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LEGAL ALERT

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Expansion of New York State's Whistleblower Law Becomes Effective on January 26, 2022

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Background

In October 2021, Governor Kathy Hochul signed Senate Bill S4394A into law and enacted significant changes (Amendments) to one of New York's whistleblower protection statutes, Labor Law § 740. Although Senate Bill S4394A was signed on October 28, 2021, it does not become effective until January 26, 2022.

Labor Law § 740 has historically provided whistleblower protection to private sector employees claiming to have been retaliated against by their employer after reporting or threatening to report an activity, policy or practice that was an actual violation of a law, rule or regulation and that posed a substantial and specific danger to the public health and safety. N.Y. Lab. Law § 740 (McKinney). Due to these dual requirements, § 740's protection had greater limitations than its companion statute, § 741, which provides whistleblower protection to health care employees. Unlike § 740, Labor Law § 741 utilizes a "good faith" and "reasonable belief" standard for employees seeking its whistleblower protection. Under § 741, health care employees are entitled to protection so long as they act in good faith and with the reasonable belief that their employer's activities, policies or practices constitute improper quality of patient care or improper quality of workplace safety. N.Y. Lab. Law § 740 (McKinney).

The amendments to § 740 broaden the whistleblower protection available to private sector employees by adopting a "reasonable belief" standard in place of the dual requirements that the whistleblower reported an actual violation that poses a substantial and specific danger to the public health and safety. Now, an actual violation of the law, rule or regulation and a substantial risk to the public health and safety are not required for an employee seeking whistleblower protection under § 741. Whistleblowers need only demonstrate that they reasonably believed that their employer's practices violated a law, rule or regulation or that these practice posed a substantial and specific danger to the public health or safety requirement. By employing the good faith and reasonable belief standard, the scope of protection afforded to all employees working in the private sector has been expanded significantly.

Changes to Definitions Expand Whistleblower Protection

The amendments to § 741 include changes to key definitions in the statute that expand the statute's protection to a larger swath of whistleblowers and afford broader protection. The definition of "employee" has been broadened to include former employees, and independent contractors, which

means that substantially larger categories of whistleblowers can seek protection under § 740 for retaliatory actions.

The definition of "law, rule or regulation" has also been changed to include: (i) any duly enacted federal, state or local executive order; (ii) any rule or regulation promulgated pursuant to any such executive order; or (iii) any judicial or administrative decision, ruling or order. Obviously these changes mean that an employer may not take retaliatory action against employees who report violations of executive orders, presumably including those that were enacted in response to the pandemic.

The definition a "retaliatory action" has been expanded beyond "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." A retaliatory action now includes:

An adverse action taken by an employer or his or her agent to discharge, threaten, penalize, or in any other manner discriminate against any employee or former employee exercising his or her rights under [§ 740], including:

- (i) 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;
- (ii) actions or threats to take such actions that would adversely impact a former employee's current or future employment; or
- (iii) 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, as defined in subdivision two of section four hundred fifty- nine-a of the social services law, to a federal, state, or local agency.

Due to the foregoing changes, threats to take actions that would adversely impact the employee's current or future employment are considered retaliatory, along with an employee's demotion or termination or suspensions.

Expanded Statute of Limitations and Additional Rights and Relief for the Employee

The statute of limitations for claims brought under § 740 has been expanded from one year to two years. With this expansion, the statute of limitations periods for §§ 740 & 741 are now identical.

With the amendments to § 740, employees are now expressly entitled to a trial by jury.The relief afforded under the revised statute also includes a civil penalty not to exceed ten thousand dollars and/or an award of punitive damages if the employers' violation of §741 was willful, malicious or wanton. These changes are in addition to the right to attorney fees and costs for the prevailing party.

Notification Requirements

Every employer will now be required to post a notice informing employees of the protections, rights and obligations afforded to them under § 741. The required notices must be posted "conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment."

While the employers' obligation to provide notice has been expanded, the employees' obligations have been reduced. Employees must still make a good faith effort to notify their employer about the violation of law, rule or regulation by bringing it to the attention of a supervisor and affording such employer a reasonable opportunity to correct such activity, policy or practice. However, such notification is not required where:

- (i) there is an imminent and serious danger to the public health or safety;
- (ii) where 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;
- (iii) such activity, policy or practice could reasonably be expected to lead to endangering the welfare of a minor;
- (iv) the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or
- (v) 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 now?

Since the amended statute becomes effective **on January 26, 2022**, employers must post the required notice immediately. Employers should also review and possibly update their internal whistleblower policies and employee handbooks for compliance with the amended statute. Employers should also consider additional training for front line managers and for employees. Complaint procedures should also be reviewed to ensure proper investigations and responses generated to internal whistleblower complaints.

Employees should review and understand all internal policies, and the employee handbook, regarding reporting employer practices that employees believe in good faith violate the law.

Should you like more information regarding the amendments to §740 of the New York Labor Law, or if we can provide counsel, please feel free to contact **L. Micha Ordway, Jr. Esq., at lordway@blawpllc.com or 315.701.6441** or any of the attorneys in the Bousquet Holstein Labor and Employment Practice Group.

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Labor & Employment Practice

In recent years, there has been an explosion of employment-related lawsuits. This trend is the result of several factors including the growing awareness by both employers and employees of their rights and responsibilities in the workplace and the continual development of new case law and statutes on discrimination. Our employment and discrimination lawyers monitor this dynamic area of law including changes and developments regarding state and federal regulations and legislation.

Our attorneys and paralegals possess diverse talents and interdisciplinary skills whose areas of concentration include employer representation, executive compensation and employment contracts, employee advocacy, and litigation.

We have provided representation before various federal and state agencies including the New York State Division of Human Rights, the Department of Labor, the National Labor Relations Board, the Unemployment Insurance Appeal Board, and the Equal Employment Opportunity Commission. In every stage of these proceedings, from investigation and settlement conferences to hearings and appeals, our involvement has been highly effective. Contact us to learn more about how our services can protect your business.

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