

NY Expands Whistleblower Law. Employers: Tread Carefully; New York Law Journal, authors Rashmee Sinha, Esq., Saranicole Duaban, Esq., Solomon Abramov, Esq., March 23, 2022

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The amendments to New York State's Whistleblower Protection Law, which went into effect on Jan. 26, 2022, have brought about several significant changes to the Law by broadening the types of claims that employees may pursue against their employers.

Prior to the amendments, which went into effect Jan. 26, 2022, the New York State Whistleblower Protection Law protected employees if their employer was violating a law that either created a danger to public health or safety or constituted health care fraud. Indeed, many whistleblower cases were dismissed because it was difficult for employees to prove that an actual law was violated. For example, during the early days of the COVID-19 pandemic (prior to the amendments) non-healthcare employees such as grocery store workers who complained about not receiving enough masks were not afforded any whistleblower protections because there was no law specifying the number of masks that they should have received. This is no longer the case.

The New Frontier: The Expanded Law

The amendments brought about several significant changes to the Whistleblower Protection Law, including the following:

- The definition of an “employee” has been expanded to include “former employees” and “independent contractors,” thus adding two new categories of potential claimants that employers should consider.
- Employees no longer need to complain about a violation of a specific law related to public health and safety; they may complain about a wider range of claims, including a violation of any law, rule, regulation or judicial opinion.
- Employees no longer need to prove a violation of a law; they only need to have a *reasonable belief that the employer's practices may somehow violate a law, rule or regulation.*
- *Protections under the whistleblower statute are afforded to employees whether or not they are acting within the scope of their job duties.*

The revamped Whistleblower Protection Law is so broad that all employers, including mom-and-pop shops and the struggling restaurant industry, are now at risk for a deluge of potential claims from employees.

Definition of ‘Reasonable Belief’

The “reasonable belief” clause might provide more questions than answers. What is a “reasonable belief”? Reasonable to whom? And how do you affirm it? The amendments do not define what constitutes a reasonable belief, but analyzing similar language under New York's Whistleblower Law for public employees, at least one court has examined whether an employee has shown a “good faith,

reasonable basis” for their belief that a violation has occurred.

Guidance on the definition of a “reasonable belief” may also be gleaned by looking at the whistleblower protection laws in sister-states. For example, courts in New Jersey have interpreted the “reasonable belief” standard in the Conscientious Employee Protection Act (CEPA)—New Jersey’s whistleblower protection law—to mean that the belief must be *objectively reasonable and that the employee’s subjective belief is irrelevant*.

In evaluating whether a belief is “objectively reasonable,” New Jersey courts look to the existence of a substantial nexus or close relationship between the complained of conduct and a specific law. See Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003). It remains to be determined if New York courts will follow suit.

Limitless Scope of Retaliatory Actions

Importantly, the amendments also broadened the scope of retaliatory conduct: *Whereas the statute previously prohibited retaliatory personnel actions, meaning adverse employment actions such as termination, demotion or suspension, the amendments now prohibit retaliatory actions generally, including: (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; or (4) threatening to contact or contacting the U.S. immigration authorities or otherwise threatening or reporting a worker or the worker’s family or household member’s suspected citizenship or immigration status. The prohibition of reporting or threatening to report an employee or their family member to immigration appears to have been specifically enacted to protect undocumented workers.*

Extended Statute of Limitations

The amendments also expanded the statute of limitations for whistleblower claims, providing employees with two years instead of one year to file suit. The amended law also provides that the parties will be entitled to a jury trial, however, there is nothing in the law that expressly prohibits employers from entering into arbitration agreements with employees waiving an employee’s right to a jury trial.

An employee who prevails in court may secure an injunction against the employer from continuing the unlawful practice; reinstatement to their prior position, including all benefits and seniority rights; front pay damages; lost wages or other benefits if the employee does not seek reinstatement; costs, disbursements and attorney’s fees; a monetary penalty of up to \$10,000; and/or punitive damages.

Compliance and Posting Requirements

All employers must display a poster provided by the New York State Department of Labor that aims to educate employees about their rights under the newly expanded Whistleblower Protection Law. The New York Department of Labor issued a model whistleblower notice Feb. 14, 2022. Employers should post the notice in a conspicuous and well-lit place within the employer’s place of business.

The amendments do require employees to 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 before going to court. Not surprisingly, this requirement has several generous exceptions. Specifically, employees may complain to a public body without first notifying their employer if:*

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

Navigating the New Employment Law Landscape

It is anticipated that, with the numerous COVID-19-related regulations implemented since the start of the pandemic, employees may raise complaints about what they perceive to be a violation and—even if they are wrong—they can try to use those complaints as a shield against an adverse employment action. And with the copious laws, rules and regulations related to masks, vaccinations, sick leave, quarantine requirements and even air filtration systems, employees have plenty to work with.

In addition, employees may complain about violations of rights that do not actually exist. For example, an employee may complain that they were not provided with paid holidays, vacation time, or that they were not offered severance pay when leaving a place of work. While employers are free to offer these benefits to their employees, there are currently no laws that entitle employees to them. Employees complaining about violations of these non-existent rights may nevertheless pursue their whistleblower claims provided that they have a *reasonable belief that such rights do exist*.

It is therefore imperative that business owners and employers throughout New York educate themselves and their staff about the newly expanded Whistleblower Protection Law, including what constitutes protected activity, how to respond to complaints and reducing the risk of retaliation.

In light of the good faith reporting requirement, employers should also update their employee handbooks and policies and ensure that a clear complaint procedure advising employees about how to internally report suspected violations of laws, rules and regulations is articulated. Managers and supervisors should also be reminded to take all employee complaints seriously. Employers should consider adopting policies and procedures for investigating and responding to complaints.

The expansive nature of these amendments also means that poor performing employees may utilize the expanded Whistleblower Law as a safe haven to protect themselves from any adverse action. It is therefore imperative that employers thoroughly document employee performance and disciplinary actions taken against employees. Employers should also prepare a strong “Rules of Conduct” policy and enforce it.

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