

# New York's Whistleblower Protection Law Is Dramatically Expanded

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On October 28, 2021, New York Governor Kathy Hochul signed into law a bill dramatically expanding New York's whistleblower statute, New York Labor Law § 740, which is scheduled to take effect on January 26, 2022. [S4394A/A.5144A](#).

## The Previous Whistleblower Law

New York Labor Law § 740, which was enacted in 1984, was designed to protect employees who report a violation of the law that either “creates and presents a substantial and specific danger to the public health or safety, or...constitutes health care fraud.” N.Y.L.L. § 740(2). In 2002, a parallel whistleblower statute was enacted to provide health care employees with additional protections. N.Y.L.L. § 741.

The protection for employees who do not work in health care under the previous statute was focused on alleged harm to the public at large. The whistleblower employee had to demonstrate that there was an “actual violation” of a safety statute or regulation creating a substantial and specific danger to the public health or safety, and that the harm that resulted from the violation affected the public-at-large, as opposed to an individual plaintiff or group. The statute formerly contained a broad election of remedies provision, but it was eliminated in 2019 and replaced with new language stating that “Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract.” N.Y.L.L. § 740(7).

The statute of limitations for a § 740 claim was one year and employees who successfully proved that they were retaliated against were entitled to recover back pay, but not compensatory or punitive damages. They also were not entitled to a jury trial.

As we previously [reported](#), attempts were made in previous years to expand § 740, but, other than the 2019 amendment, none of the proposed bills were signed into law.

## **The New Expanded Whistleblower Law**

The new expanded law significantly bolsters protections for private-sector employees alleging retaliation, and exposes employers to significant additional liability.

### *Expanded Definition of "Employee"*

The amended law adds "former employees" and "independent contractors" to those "employees" permitted to bring whistleblower claims.

### *Change to Reasonable Belief Standard*

The amended law removes the previous requirement that there be an actual violation of the law. Employees are now protected if they "reasonably believe" an employer's activity or conduct is (i) in violation of a "law, rule or regulation," including executive orders and judicial or administrative decisions, rulings, and orders; or (ii) "poses a substantial and specific danger to the public health or safety."

### *Expansion of Protected Activity*

The prior law required that employees first report violations to their employers before disclosing violations to a public body, thereby providing a reasonable opportunity to correct the alleged violation. The amended law now requires employees to make a "good faith effort" to notify their employer. Employer notification is not necessary if (i) there is imminent and serious danger to public health; (ii) the employee reasonably believes reporting of the violation to the employer would result in the destruction of evidence, concealment, or harm to the employee; or (iii) the employee reasonably believe that their supervisor is already aware of the violation and will not correct it.

### *Expansion of Prohibited Retaliatory Conduct*

The amended law expands the definition of prohibited "retaliatory actions" to include (i) adverse employment actions against current employees, such as discharge, suspension, or demotion; (ii) actions or threats that would adversely impact a former employee's current or future employment; or (iii) contacting or threatening to contact immigration authorities on an employee or their family member.

### *Additional Remedies, Longer Statute of Limitations, and Right to Jury Trial*

The amended law expands the remedies potentially available to whistleblowers to include: front pay, civil penalties not to exceed \$10,000, and punitive damages (in addition to back pay). The statute of limitations is extended from one year to two years, and whistleblowers now have a right to a jury trial.

#### *Notification*

Employers must notify employees of their rights under the whistleblower law by posting a notice in a conspicuous place.

#### **Implications**

New York's expanded whistleblower law exposes New York employers to a dramatically altered regulatory environment. Internal compliance mechanisms as well as whistleblower policies and procedures are thus of even greater importance than before.

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#### **Related Professionals**

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- **Lloyd B. Chinn**  
Partner
- **Pinchos (Pinny) Goldberg**  
Senior Counsel