

January 12, 2022

New Law Imposes Broader Whistleblower Anti-Retaliation Obligations on New York Employers

Nonprofits Should Review Their Whistleblower Policy for Compliance

A nonprofit organization incorporated in New York must have a whistleblower policy if its annual revenue is more than \$1 million and it has at least 20 employees.¹ Even smaller nonprofits may have such a policy in order to comply with licensure or contract obligations or for risk management purposes.

A new law, taking effect January 26, 2022, imposes new, broader anti-retaliation obligations on organizations with at least one employee or independent contractor in New York. To comply with this law, employers should consider:

- If the organization has a whistleblower policy written to comply with the New York Not-for-Profit Corporation Law, the policy may need to be updated to:
 - Expand the definition of protected people to include former employees and current and former independent contractors;
 - Expand protected activities to cover reports of violations of executive orders, or judicial or administrative rulings, and to include refusing to participate in certain activities or policies;
 - Provide that a person is protected not only if they make a report in good faith, but also if they have a reasonable belief that the employer is violating a law, rule, regulation, executive order or judicial or administrative order or ruling, or that the employer's activity or policy poses a substantial and specific danger to public health or safety;
 - Expand prohibited types of retaliation to include adversely affecting a former employee's current or prospective employment or reporting to a government body regarding the suspected citizenship or immigration status of an employee or employee's household or family members.
- If the organization has employees or independent contractors in New York but does not have a whistleblower policy, consider adopting a stand-alone whistleblower policy and/or updating the employee handbook.
- Train staff regarding their rights and obligations under the whistleblower policy.
- Post notice of employees' rights under the whistleblower policy and Labor Law 740 on the website and in an accessible and well-lit place frequented by employees and job applicants.

¹ NY Not-for-Profit Corporation Law ("N-PCL") sec. 715-b.

What is the new law?

As of January 26, 2022, NY Labor Law section 740 prohibits an employer with at least one employee in New York from retaliating against a whistleblower who is a current or former employee or who provides services as an independent contractor.

What whistleblowing complaints are protected by the new law?

To be covered, a complaint must concern an employer's violation of any statute, ordinance or executive order, government rule or regulation, or judicial or administrative decision, ruling or order. Protected actions include:

- disclosing or threatening to disclose to a supervisor or public body an activity, policy, or practice of the employer that the employee reasonably believes violates the law or poses a substantial and specific danger to public health or safety;
- providing information to, or testifying before, any public body conducting an investigation into any such activity, policy, or practice by the employer; or
- objecting to, or refusing to participate in any such activity, policy, or practice.

To be protected, the person making the complaint must have a reasonable belief that the employer is violating a law, rule, regulation, executive order or judicial or administrative order or ruling, or that the employer's activity or policy poses a substantial and specific danger to public health or safety.²

Which people are protected by the new law?

A person is protected if she is providing services in exchange for compensation, including current and former employees. An independent contractor is covered if that person is providing the services herself and is not employing other people to do so.

What constitutes prohibited retaliation?

The new law prohibits taking an adverse action against someone exercising their rights under the law, 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 to a government agency an employee's suspected citizenship

² Previously, Labor Law section 740 applied only if the whistleblower's complaint concerned illegal activity presenting a substantial and specific danger to the public health or constituting health care fraud. N-PCL 715-b protects a complaint if it is made in good faith.

or immigration status or the suspected citizenship or immigration status of an employee's family or household member.

What are the penalties for noncompliance?

An employee who files a successful civil lawsuit under Labor Law 740 may be entitled to:

- a civil penalty of up to \$10,000,
- an injunction against the employer,
- reinstatement in the same position or an equivalent position, and of full fringe benefits and seniority rights,
- compensation for lost wages, benefits, or other remuneration,
- reasonable attorney's fees, costs, disbursements,
- punitive damages if the violation was willful, malicious, or wanton.

On the other hand, if the court determines that the employee's lawsuit was frivolous, the court can order the employee to cover the employer's attorney's fees, costs, and disbursements.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Senior Policy Counsel Laura Abel at label@lawyersalliance.org or visit our website at www.lawyersalliance.org for further information. To become a client, visit www.lawyersalliance.org/becoming-a-client.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations and social enterprises that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, Lawyers Alliance for New York helps nonprofits to provide housing, stimulate economic opportunity, improve urban health and education, promote community arts, and operate and advocate for vital programs that benefit low-income New Yorkers of all ages.