

YOUR COUNSEL: NY expands employee whistleblower protections

SPECIAL TO THE DAILY RECORD By Steven V. Modica and Anne Modica Eich

Lawyers tend to limit their practice to a few areas. Nonetheless, people come to us with myriad problems – many of which fall outside our expertise.

Through this column, we provide practical information to help assist those who have employment, disability benefit, workers' compensation, and related issues. This information also helps lawyers understand their rights and responsibilities as employers.

Whistleblowing is defined as “disclosing information to the public or to appropriate authorities concerning the illegal or socially harmful actions of a person or group, especially a corporation or government agency.” It is illegal for an employer to retaliate against an employee who “blows the whistle” on certain types of illegal conduct.

This article addresses amendments to New York Labor Law § 740 which expand whistleblower protections in New York state. Before addressing the amendments, it is important to remember two facts:

- **The law does not protect EVERY disclosure of illegal conduct.** The first question is whether the information the employee disclosed is protected by a statute, regulation, or common law.
- **Every adverse employment action taken against a whistleblower is NOT illegal.** Even if the information disclosed was protected, an employee who is fired or disciplined must show that his/her disclosure was an important reason he or she was fired or disciplined.

For many years, New York Labor Law § 740 provided limited protection for employees who disclosed their employer's illegal conduct. To win a whistleblower case, an employee had to prove that their employer's illegal conduct created or presented “a substantial and specific danger to the public health and safety.”

It was not enough that the employer's conduct created a danger to the health and safety of its workers; the employee had to prove that the employer's conduct



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adversely affected the health and safety of the general public. Few employees won whistleblower cases brought under New York Labor Law § 740.

More Employee Disclosures are Protected

Effective Jan. 26, whistleblowers are protected if they report or threaten to report an employer's action, policy, or practice that the employee reasonably believes: (i) violates any federal, state, or local law, rule, or regulation; or (ii) poses a substantial and specific danger to the public health or safety.

The employee can make (or threaten to make) such reports to any federal, state, or local court, agency, law enforcement officer, or executive branch. The amendments make clear that the employee is protected even if such reporting is outside of the scope of his or her employment duties. Moreover, the employee is protected even if he or she incorrectly believed the employer's actions to violate the law, so long as his or her belief in that regard was reasonable.

More Employer Retaliation is Illegal

New York Labor Law § 740 has long prohibited an employer from discharging, suspending, demoting, or taking other ad-

verse action against an employee for engaging in protected activity. The amendments provide that a mere "threat" to take adverse action is, in and of itself, unlawful if done because of the employee's protected activity.

The amendments also prohibit retaliation for protected activities in the form of "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 [that of] an employee's family or household member."

Current & Former Employees & Independent Contractors are Protected

The amendments expressly state that, in addition to current employees, former employees and independent contractors are protected under New York Labor Law § 740.

Employers Must Notify Employees of their Rights

Employers are required to affirmatively notify employees of their rights and protections under New York Labor Law § 740 by publishing a notice "conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment."

Deadline to Sue is Lengthened

Employees used to have one year from the date of the adverse employment action to sue; now, employees have two years to sue.

More Damages are Available to Employees who Sue and Win

The amendments expand the categories of damages available to a whistleblower who prevails. Previously, New York Labor Law § 740 provided that a court could order the employer to reinstate the employee. The amendments make clear that the court may order money damages (specifically, front pay) as an alternative to reinstatement. In addition, the amendments allow civil penalties up to \$10,000 and, if the employer's violation is found to be willful, malicious, or wanton, uncapped punitive damages.

Steven V. Modica, Esq. is the principal attorney and owner of the Modica Law Firm, a small firm that has served the Rochester community since 1995. His daughter and associate, Anne Modica Eich, Esq., joined the firm in January 2020. If you enjoyed this article, please "like" Modica Law Firm on Facebook to stay current on all that we are sharing. If you have questions about this article or want to suggest a future topic, call 585-368-1111 or send an email to Firm@ModicaLawFirm.com.