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New York State Strengthens Whistleblower Protection

New York recently amended sections of the Labor Law that prohibit an employer from taking retaliatory action against an employee. Previously, the law protected “whistleblowers” who brought to light a policy or practice of an employer that presents a substantial or specific danger to the public health. The new section, § 740(2)(a), protects an employee who discloses a policy or practice of an employer that constitutes health care fraud.

What employers/employees are covered?

The law covers practically all employers and employees. The term “employer” is defined as including any person, firm, partnership, institution, corporation or association that employs one or more employees. The act defines an “employee” as any person who performs services “under the control and direction of an employer for wages or other remuneration.” As with other labor and employment laws, independent contractors are excluded.

How has the law changed?

Under the original New York whistleblower statute, employees reporting fraud, waste, and theft by their employer were granted legal protections only if the alleged improper conduct was done in relation to the employer’s fulfilling a government contract, or if the employer was a company publicly selling stock shares, or if the company was putting the health and safety of the public at risk. The new amendment expands the scope of protection, adding shelter when a whistleblower identifies an employer’s health care fraud.

What is health care fraud?

An employer commits health care fraud when it intentionally defrauds a health plan by either providing materially false information or omitting material information when requesting payment from a health plan and, consequently, the employer receives money from the health care plan to which it is not entitled. Any information is considered “material” if it leads to the improper payment of money by the health care plan.

What is a health care plan?

The statute broadly defines “health care plan” to include any publicly or privately funded health insurance or managed care plan.

How does the new law work?

If an employee discloses an employer’s health care fraud to a supervisor, the statute prohibits the employer from taking or threatening any retaliatory action against the employee, including discharge, suspension, demotion or other adverse action in terms of a condition of employment.

What types of allegations are protected from retaliation?

To be protected under the statute, the employee must have alleged an actual violation of the law, not merely a reasonable or good faith belief that there was a violation. If the employer did not actually carry out the plan that the employee complained about, or if the contention that there was a legal violation was merely speculative, the employee is not protected under this section.



What happens if an employer does retaliate?

Under the law, any employee retaliated against may bring a civil action against the employer. The employee may be entitled to injunctive relief preventing further retaliation, reinstatement to the same or equivalent position held prior to the retaliation, reinstatement of benefits, compensation for lost wages and payment of all attorneys' fees associated with the civil action.

What is the scope of protection under the law?

The whistleblower statute offers private employees only limited protection in terms of their ability to bring an action against their employer. If an employee sues under the statute simply to harass the employer, or if the allegations of retaliation are determined to be without merit, the employee may have to pay the employer's defense costs.

What if the employer was unaware of any health care fraud?

Upon uncovering alleged health care fraud, an employee must first bring the violation or questionable policy to the attention of a supervisor. The employer must then be given a "reasonable opportunity to correct such activity" before the employee discloses the violation or policy to a public body. If the employee discloses the violation or policy to a public body before bringing it to the attention of a supervisor, the employee will not be protected under this particular statute.

Does the law have any posting requirements?

No.

Practical Pointers

- Remind employees that anyone who believes a violation of a law may have occurred should first communicate concerns to the employer.

- Alert employees that the employer will not retaliate or discriminate in any manner against anyone who discloses possible violations.
- Make sure managers and supervisors are acquainted with the new law, so that they properly address any allegations and do not retaliate against employees for exercising their statutory rights.

New Minimum Wage Poster

On July 24, 2007 the federal minimum wage for covered non-exempt employees increased to \$5.85 per hour. On July 24, 2008 the federal minimum wage will again increase to \$6.55 per hour and on July 24, 2009, it will rise to \$7.25 per hour. To reflect these changes, the United States Department of Labor has issued a new Federal Minimum Wage Poster, which can be downloaded at <http://www.hancocklaw.com/news/posters.cfm>.

Please remember that New York State employers must also comply with the New York State Labor Law, which imposes a higher minimum wage than federal law. The current New York State minimum wage is \$7.15. Even though the New York State minimum wage is higher than the federal minimum wage, all employers covered by the Fair Labor Standards Act must post the Federal Minimum Wage Poster.

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