19th Annual Labor & Employment Symposium

The Lodge
Skaneateles Falls, New York

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Navigating Change: Key Updates in Labor & Employment Law for 2024

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AI Monitoring & Employment Tools

- Automated Monitoring and Employment decision tools (S7623/A9315)
- Status: Under Committee Review
- Prohibits electronic monitoring of employees unless requirements are met. The requirements/limitations are extensive.
- Prohibits automated employment decision tools unless:
  - The tool has been bias audited within the last year;
  - The results of the audit have been made public;
  - Notice has been given to employment candidates.
- Provides for remedial actions for violations as well as civil penalties. Includes private right of action.
- AG has enforcement authority.

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I-9 and EEO

- New I-9 form:
  - Effective 11/1/2023.
  - List of acceptable documents has changed.
  - Accommodates remote document verification.
- New EEO category for Middle Eastern or North African individuals ("MENA"):
  - Affects reporting for employers with 100 or more employees.

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CSL 63: Provisional Appointments

- Civil Service Law Section 63 concerning provisional appointments was amended effective September 7, 2023.
- Provisional service immediately preceding permanent appointment counts toward an employee's probationary period.
- Who does this affect?
  - NYS Dept. of Civil Service opinion: impacts permanent appointments on/after September 7, 2023.

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Nondisclosure Agreements

- Settlement agreements & liquidated damages
  - General Obligations Law 5-336 has been amended to expand the prohibition of non-disclosure clauses in discrimination cases to harassment and retaliation claims.
  - Exception: If preference of complainant.
  - Also expands prohibition to agreements with independent contractors.

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Nondisclosure Agreements

- Further prohibits liquidated damages or forfeiture of consideration for violation of non-disclosure or non-disparagement clauses.
- Also prohibits any affirmative statements that complainant was not subjected to unlawful discrimination, harassment or retaliation.
- Amendments became effective 11/17/2023.

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FLSA Exempt Salary Threshold

- United States exempt salary threshold increases
  - Effective 7/1/2024, increases the exempt salary threshold requirements:
    - From $684/week ($35,568) to $844/week ($43,888);
    - Highly compensated individuals from $107,432 to $132,964 per year.
  - Effective 1/1/2025:
    - To $1,128/week ($58,656);
    - Highly compensated to $151,164/year.
  - Thresholds will automatically increase every 3 years.

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Expanded Statute of Limitations

- Previously only cases of sexual harassment were subject to three-year statute of limitations to be filed with the New York State Division of Human Rights.
- Now all cases of discrimination, harassment and/or retaliation are subject to three-year statute of limitations to be filed with the New York State Division of Human Rights.
- No retroactive effect.
- Effective February 14, 2024.

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Accommodation Retaliation Bill

- NYS Senate Bill S8888
- Status: Under Committee Review
- Would amend New York State Human Rights Law and expressly prohibit retaliation against individuals who request a reasonable accommodation
  - Note: Already covered under the ADA and this intent is already contemplated under the New York State Human Rights Law

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Whistleblower Protections Bill

- S8842
- Status: Under Committee Review
- Proposed amendment to Section 740 of the Labor Law (applicable to private sector employers)
- Would prohibit retaliation against employees who disclose, or threaten to disclose, to a public body any action or activity that is a violation, ”or an attempt to circumvent,” any of the employer’s “internal controls implemented to prevent fraud, or which the employee reasonably believes to be fraudulent.”

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PUMP Act

- The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP" Act), amendment to the Fair Labor Standards Act ("FLSA").
- Applicable to private and public sector employers.
- Took effect on April 28, 2023.
- Requires employers to provide reasonable break time and a private place, other than a bathroom, for an employee to pump breast milk for their nursing child for up to one year after the child's birth each time such employee must pump at work.
- Narrow exceptions for small employers and certain transportation employees.
- We will compare the PUMP Act with New York State Labor Law Section 206-c.

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PUMP Act

- The frequency of breaks needed to pump at work, as well as the length of each break, will probably vary based upon each employee's needs.
- The nursing employee must be completely relieved from work or the time spent pumping must be counted as hours worked for the purposes of pay and overtime requirements.
- BUT, if the employer has a paid break time policy and if an employee chooses to use that time to pump, they must be paid in the same way that other employees are paid for break time.
- PUMP Act also contains requirements for space for an employee to nurse, but employers must be mindful of New York State requirements under Labor Law Section 206-c, which are more detailed.

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PUMP Act

- Anti-retaliation protections.
- It is unlawful under the FLSA for an employer to discharge or otherwise discriminate against an employee because, for instance, they exercised their right to pump at work or filed a complaint with regards to an alleged violation of the PUMP Act.
- Remedies for violations of the PUMP Act include legal and equitable remedies.
- Examples: Reinstatement, promotion and the payment of lost wages and an equal amount as liquidated damages, compensatory damages, damages for economic losses and also punitive damages.

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Differences between New York State Versus Federal Requirements

- PUMP Act provides employees the right to reasonable break time to pump for one year after the child's birth, but New York State Labor Law Section 206-c provides that employees may take break time to pump breast milk at work for three years following the birth of a child.
- Room requirements:
  - PUMP Act: "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."
  - Labor Law Section 206-c:
    - In close proximity to work area, well lit, shielded from view and free from intrusion by other persons.
    - Location must also include: A chair, a small table, nearby access to running water and an electrical outlet, if the workplace is supplied with electricity.

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Paid Lactation Breaks

- Amendment to Labor Law Section 206-c
  - Employers will recall recent requirements concerning the space employers must make available to employees to express breast milk
- Effective June 19, 2024
- Applicable to all private and public sector employers
- Old requirement: Unpaid breaks for each time an employee had the need to express breast milk
- New requirement: Employees are entitled to paid 30 minute lactation breaks "when the employee has a need to express breast milk."
- Discrimination and retaliation protections

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Paid Lactation Breaks

- NYSDOL issued guidance on paid lactation breaks:
  - Paid breaks are "in addition to any regularly paid break or meal time."
  - "Employers must allow employees to take breaks as often as they reasonably need to express breast milk. Each employee is different, and employers must accommodate employees based on each individual's needs."
  - Employers "cannot deduct paid break time for breast milk expression from the employee's regular break or meal time."
  - An employer cannot require an employee "to make up the time spent expressing breast milk."
  - Employers "cannot require an employee to stay beyond their regularly scheduled work hours because they used paid break time to pump at work."

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Paid Lactation Breaks

- Notice requirements for both employers and employees
- Employers:
  - Employers are required to inform all employees about the right to take paid leave for pumping
  - Must provide notice to employees upon hire, annually thereafter and to employees following return to work due to the birth of a child
  - Providing copy of NYSDOL model policy is sufficient
- Employees:
  - Employees are required to provide advance notice in writing (preferably before returning from maternity leave) if the employee intends to pump at work
  - Can be via email, text "any chat-based app regularly used by the organization"
    - **Employers must respond to request within five days**

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Pregnant Workers Fairness Act

- Pregnant Workers Fairness Act ("PWFA") took effect on June 27, 2023.
- Applicable to employers with at least 15 employees.
- Requires covered employers to provide reasonable accommodations to employee's limitations due to pregnancy, childbirth or a related medical condition, unless the accommodation poses an undue hardship.
- Undue hardship is generally defined as an accommodation which poses either a significant difficulty or expense for the employer.
- Remember, the process of exploring accommodations is known as the "interactive process" which is certainly contemplated under the PWFA.
- If employee requests accommodation, do not delay!

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Pregnant Workers Fairness Act

- Examples of reasonable accommodations contemplated by the PWFA:
  - Temporarily suspending requirement of job function;
  - The ability to sit or drink water;
  - Flexible hours;
  - Modifying work environment or making existing facilities accessible;
  - Light duty;
  - Closer parking;
  - More appropriately sized uniforms and/or safety apparel;
  - Additional break time to use the bathroom, eat and rest;
  - Job restructuring;
  - Leave or time off to recover from childbirth; and
  - Being excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

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Pregnant Workers Fairness Act

- Prohibitions of the PWFA:
  - "Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
  - Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
  - Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
  - Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
  - Interfere with any individual's rights under the PWFA."

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Pregnant Workers Fairness Act

- EEOC eventually issued final regulations implementing the PWFA.
  - The Notice of Proposed Rulemaking issued in early August and comment period closed October 10, 2023.
  - Interim Final Rule comment period closed on April 14, 2024.
  - Regulations went into effect June 18, 2024
    - ➢ Pending legal challenges
- Same remedies available under the PWFA as with Title VII.
- Do not overlook obligations under the Americans with Disabilities Act ("ADA"), Title VII, the federal Family and Medical Leave Act ("FMLA") or New York State law.

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Religious Accommodation

- In the 2023 *Groff v. DeJoy* decision, the US Supreme Court changed an employer's obligation to accommodate an employee's sincere religious observances/practices.
- Previously, did not have to accommodate if more than a *de minimis* cost.
- Now, must accommodate unless the burden of accommodation is substantial.

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Caregiver Accommodation Bill

- NYS Assembly Bill 3188-A to amend the Executive Law.
- Require employers to provide reasonable accommodations to employees who are caregivers.
- Also, lists types of possible accommodations available to pregnant, disabled and caregiver employees.
- Must provide accommodations unless doing so imposes an undue hardship on the employer.
- May not discriminate against a caregiver.

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Standing is Tiring Bill

- NYS Assembly Bill 1997-A to add a new section to the Labor Law.
- Status: Under Committee Review
- Must provide seats to employees where nature of work reasonably permits. Otherwise, must provide anti-fatigue mats or other ergonomic controls.
- DOL to promulgate rules and regulations and notices to advise employees of rights.
- DOL also to create on-line form for employee complaints.
- Private right of action.

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COVID Vaccination Leave

- REMINDER . . .
  - This leave expired on December 31, 2023

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COVID Sick Leave

- New York State COVID-19 sick leave requirements will sunset on July 31, 2025 (note: this is different than original proposal in Governor Hochul's initial proposed budget).
- CDC Guidance now removes requirement to isolate for five days following COVID-19 test (outside healthcare settings).
  - Requires individuals with symptoms of respiratory illness to stay home and not return until symptoms subside for 24 hours (such as no fever for 24 hours) versus a specific isolation period.
- Unclear if NYS will interpret the above 24 hour period above as isolation period.
- Most conservative course of action: Continue to provide NYS COVID-19 sick leave subject to NYS Health Department guidelines.

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Prenatal Leave

- Applicable to private sector employers
- Although not applicable to public sector employers, important to know for potential bargaining impacts and also to correct misperceptions. . .
- Amendment to Labor Law Section 196-b (paid sick leave legislation) which requires employers to provide up to 20 hours of prenatal personal leave "during any 52 week period."
  - Benefit available in hourly increments.
  - Benefit is in addition to current sick leave requirements, PFL leave entitlements and short-term disability benefits.
  - Leave available at employee's regular rate of pay, or minimum wage, whichever is greater.
- Be on the lookout for additional guidance issued by New York State.
- Effective January 1, 2025

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Medicaid for Strikers Bill

- Senate Bill S8839.
- Status: Under Committee Review
- Amend Social Services Law 366 to provide Medicaid eligibility to striking workers.
- Limited to the period of the strike or industrial controversy.
- When determining eligibility, striker's resources shall not be considered. Striker not required to use such resources for the payment of medical costs.
- If enacted, it takes effect immediately.

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Police, Fire & Corrections Personnel Records Bill

- Senate Bill S8910
- Status: Under Committee Review
- To amend Civil Rights Law by adding a new section.
- Would exempt from disclosure ”all personnel records used to evaluate performance toward continued employment or promotion” of police officers, firefighters, corrections officers and other peace officers private and exempt from disclosure with limited exceptions.
- May obtain records through court order if Judge determines clear showing of need and that records are relevant.
- Does not affect disclosure to District Attorneys, the Attorney General, County Attorneys, Town and Village Attorneys.

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Freelance Isn’t Free Act

- Amendment to General Business Law to create protections for freelance independent contractors

- Took effect August 28, 2024

- Primary requirements: (1) requirements for contract; (2) timely payment and (3) retaliation protections

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Freelance Isn't Free Act

- Hiring party must retain the services of a freelance contractor through a written contract
- The contract must include:
  - Name and address of both parties
  - An itemization of services to be provided by the freelance worker
  - Value of services provided
  - Rate and method of compensation to freelance worker
  - The date on which payment is due and how due date for payment will be determined by the parties
  - The date by which the freelance worker must provide a list of services to ensure payment is made in a timely manner
- Hiring party must retain copy of contract for six years.

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Freelance Isn't Free Act

- Timing of payment
  - Freelance workers must be paid on or before the date specified in contract; or
  - If no date is specified for when payment is due: Within 30 days of completion of services
- Once the freelance worker starts services, the hiring party cannot require the freelance worker to accept a fee less than agreed upon as a condition of timely payment
- Discrimination and retaliation protections

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Unemployment Eligibility Notice

- Notice of eligibility for unemployment (S4878)
  - Amendment to the Labor Law which requires an employer to provide written notice to every employee upon termination, interruption or reduction of employment of their right to file for unemployment benefits.
  - NYS DOL form for notice is now available. ("Record of Employment" form.)

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Dispatcher Retirement Plan Bill

- Bill S9062 to add a new section to the RSSL
- Status: Under Committee Review
- Optional 25-year plan for 911 operators/supervisors
- Benefit of ½ of FAS after 25 years of service
- May add 1/60th
- Creditable service =
  - Service as 911 operator
  - Service as paid firefighter or police officer
  - Service as DA criminal investigator
  - Service as probation assistant in County probation department

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Non-Compete Agreements

- Federal Trade Commission (”FTC”) issued a proposed ban on non-competes
  - Very closely watched once the FTC issued the proposed ban
- A federal court in Texas stuck down the ban on non-competes holding that the FTC exceeded its rulemaking authority in issuing the ban
- Now what?

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Thank You! Questions?

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Whistleblower Protections in New York

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Labor Law Section 740

- Changes to New York's Labor Law Section 740 effective January 2022 increase protections for supposed whistleblowers on the state level. See Act of Oct. 28, 2021, ch. 522, 2021 N.Y. Laws 4394-A
- Generally, a whistleblower under § 740 must show:
  1. They opposed or threatened to oppose what they reasonably believed to be a violation of law, rule, or regulation by their employer.
  2. The employer took an adverse action against that employee.
  3. There is a causal connection between the opposition to reasonably believe illegal practices and the adverse action inflicted on the complaining employee.

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Labor Law Section 740

- Specific Language: "tak[ing] any retaliatory action against an employee ... because such employee ... discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation," whether or not the violation relates to public health or safety. N.Y. Lab. Law § 740(2)(a)

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Labor Law Section 740

- No longer must a whistleblowing event relate to "a substantial and specific danger to the public health or safety" or an "actual violation" of law, rule, or regulation. This is true even at the initial pleading stage, greatly increasing the access to discovery by whistleblower litigants.
  - Note this new standard has been applied retroactively in United States District Court.

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What is opposition activity?

- Must be specific to the employee in question, cannot claim the whistleblower rights of others.
- Opposition to violation of a law, rule, or regulation includes, but is not limited to, any complaint that the employer is violating health and safety regulations, discrimination laws, financial regulations, mandatory reporting statutes, and complaints regarding constitutional rights.

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Opposition Activity (cont.)

- Recent changes to § 740 allow protection for employees who "reasonably believe" they are complaining regarding such a violation of law, rule, or regulation, whether or not that violation is actually occurring.
- Under previous versions of the statute, the violation must have been found to have actually occurred, but no longer is there any such requirement.
- A complaining whistleblower only needs to have an articulable good faith basis for their complaint.

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Opposition Activity (cont.)

- Opposition activity also includes refusal to participate in what an employee reasonably believes to be a violation of a law, rule, or regulation.
- Employees do not need to specify the law, rule, or regulation they reasonably believe is being opposed by their actions.
- Providing information by an investigating agency, or even during a third-party investigation, can constitute protected activity if the investigation pertains to a violation of law, rule, or regulation.

Opposition Activity (cont.)

- This now includes employees who give information during an investigation which they reasonably believe pertains to a violation of law, even if that investigation is not actually pursuing an underlying legal violation.
- Protection applies to employees who give testimony during a proceeding, give witness information, or give documents to investigators.
  - The provision of materials to an investigating agency is protected when done in good faith, pursuant to that investigation, even where the materials should have otherwise been protected.

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What is an adverse action in the whistleblowing context?

- Defined as "actions or threats to take such actions that would adversely impact a former employee's current or future employment." N.Y. Lab. Law § 740(1)(e)
- Not a limiting definition, and Courts are sure to find retaliation for any action traditionally considered adverse, such as demotion, removal of material duties, creation of a hostile work environment, and more under a theory that they "sully" that employee's reputation for future employment.
- Employee does not have to show a specific employment objective to claim an action is adverse in any given circumstance.

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How is an adverse action considered causally connected to whistleblowing activity?

- Like many standards of law, where there is a temporal proximity between reasonably believed protected activity and a claimed adverse action, causation will be found.
- Circumstances specifically will dictate causation in most circumstances.
  - A high performing employee who engages in protected activity against a supervisor will be able to show causation between her complaint and a demotion, even if that demotion took place a year after the employee's complaint, if the employer cannot show performance or organizational reasons for the demotion.

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Connection to Whistleblowing Activity (cont.)

- An employee who commits misconduct after engaging in protected activity will still be able to show causation if the penalty imposed on them for that misconduct is disproportional to the penalties imposed on similarly situated employees.
- An employee, who engages in protected activity and has the material duties of their written position description removed slowly over the course of a year will likely establish causation between their protected activity and an adverse action, even without diminution of pay.
- An employee who is suspended with pay and subject to investigations after engaging in protected activity may well establish causation if a good faith basis for the investigation of that employee cannot be shown during discovery. *Senal v. Lynch*, 2023, 217 A.D.3d 466, 190 N.Y.S.3d 352.

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Notice Requirements for Potential Whistleblowers

- A whistleblower's suit will fail if they did not give notice to their employer that they believe a law, rule, or regulation was being violated by a particular practice. See Labor Law § 740[2][a]; *Webb–Weber v. Community Action for Human Servs., Inc.*, 23 N.Y.3d 448, 453, 992 N.Y.S.2d 163, 15 N.E.3d 1172 [2014].
- Thereafter, a whistleblower's suit will not be ripe unless the employer is afforded "a reasonable opportunity to correct such activity, policy or practice," making it important for employers to take investigatory action in the wake of any whistleblower complaint.

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Defenses to Labor Law § 740

- Importantly, N.Y. Lab. Law § 740(4)(c) provides a defense to employers who take an adverse action for legitimate reasons unrelated to protected activity, even where protected activity is undisputed.
- Torts of a specific, personal nature to the employee are not to be litigated as whistleblower actions under Labor Law § 740 or similar statute. E.g. *Sakthivel v. Industrious Staffing Company, LLC*, 2023, 212 A.D.3d 419, 183 N.Y.S.3d 1, appeal dismissed 41 N.Y.3d 1000, 213 N.Y.S.3d 220, 236 N.E.3d 1239 (assault by one coworker on another coworker and employee's reporting of the same did not constitute a whistleblower claim).

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Defenses to Labor Law § 740 (cont.)

- A genuine belief that a violation of law, rule or regulation has occurred is not enough; there must be a report or cooperation of some sort of communication of that belief to the employer or a third party, and the employer must also have knowledge of that report or cooperation.
- Statute of limitations is two years from accrual of the claim.
- Does not apply to public employers, though some suits have been brought under § 740 against individuals in their official capacity for Labor Law § 740 violations and not dismissed.

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Consequences of Violations

- Subject to suit under a private right of action by Labor Law § 740.
- Relief by statute now allows for back pay with benefits, fees, reinstatement, injunctive relief, a civil penalty, and punitive damages.
- Civil Penalty is currently limited to $1,000, but statutory inclusion of fees and punitive damages opens the door for large awards.

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Related Concerns

- Whistleblower litigation has a high potential for the need of protective discovery practices. Often at issue are information related to sensitive business practices, and the new Labor Law § 740 standard allows discovery on such issues even where no real violation of law, rule, or regulation has taken place, so long as the Plaintiff reasonable suspects the same.
- Employers must now publish the updated whistleblower rights to employees - poster format is acceptable.
- Frequently coupled with claims of constructive discharge, complicating issues further.

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Civil Service § 75-b

Retaliatory Action by Public Employees

- Civil Service Law § 75-b is far more limiting than Labor Law § 740, still requiring the opposition activity by a public employee to relate to a violation of law, rule, or regulation "(i) which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action."

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Civil Service § 75-b (cont.)

- However, "improper governmental action" can encompass many routine activities, as it is defined as any action "which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation."
  - Note as to the first basis for a claim under § 75-b, no "reasonable belief" that a violation which could imperil public safety will suffice, there must be an actual violation being opposed. *Barker v. Peconic Landing* at Southold, Inc., 2012, 885 F.Supp.2d 564.

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Civil Service § 75-b (cont.)

- Conversely, it has been held expressly that no actual improper governmental action is required where opposition activity occurs based on a reasonable belief. *Cucchi v. New York City Off-Track Betting Corp.*, 1993, 818 F.Supp. 647.

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Claims Under Civil Service § 75-b

- Opposition activity must be made to a governmental body, though a good faith belief that disclosure is being made to such a governmental body, even where that body is the retaliating employer in question, will suffice. *Castro v. City of New York*, 2016, 141 A.D.3d 456, 36 N.Y.S.3d 113.
- Plaintiffs must follow the same general paradigm in making out a claim for whistleblower retaliation: there must be opposition activity; and adverse action against the employee who engaged in opposition activity, and there must be a causal connection between the adverse action and the opposition activity.

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Claims Under Civil Service § 75-b (cont.)

- The major limitation is in the public sector is that the allegation in the pleadings must be framed in terms of a threat to public safety, or improper governmental action.

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Common Defenses (cont.)

- Like Labor Law § 740, notice to the employing agency that the employee believes they are violating a law that imperils public safety or committing improper governmental action is required, and must be adequately pled, for a claim to survive. *Carter v. Incorporated Village of Ocean Beach* (3 Dept. 2019) 172 A.D.3d 1608, 100 N.Y.S.3d 128.
- A plaintiff who cannot affirmatively allege or show a good faith attempt to engage in opposition activity or reasonable belief that they did engage in such activity cannot succeed on a claim under § 75-b.

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Common Defenses to Claims Under Section 75-b

- Qualified and absolute immunity for individuals is often relevant in suits based on Civil Service Section 75-b.
- Adverse actions may be viewed more narrowly in this context, and normally must relate to a specifically pled and shown affected compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement, or evaluation of performance. *Verdi v. City of New York*, 2018, 306 F.Supp.3d 532 (counseling memoranda insufficient to show adverse action).

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Further Defenses to § 75-b and related considerations

- As with Labor Law § 740, it is a defense that the municipal entity would have taken the same adverse action against the whistleblower anyway because of independent misconduct.
- Note that Section 75-b claims are often coupled with claims for constitutional violations, and therefore brought in District Court.

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Recent Court Decisions Impacting Employers

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USERRA

- Courts continue to allow claims where employers pay for similar absences but do not pay for military leave.
- Class actions are being pursued under this theory.
  - *Scanlan v. American Airlines*, 102 F.4th (3d Cir. 2024).
    - A jury could conclude that short-term military leave is comparable to jury-duty leave or bereavement leave.
  - Nothing from the Second Circuit yet.
    - *Won v. Amazon, Inc.*, 2022 WL 3576738 (E.D.N.Y. Aug. 19, 2022).
      - First case to address the issue in NY federal court. Amazon provided differential pay for short military leave and full pay for sick leave, jury duty and bereavement leave.

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Title VII of the 1964 Civil Rights Act

- Adverse Actions Under Title VII.
  - *Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346 (2024): A police officer alleged she was transferred to a lesser position because of her sex. There was no change in pay, benefits, etc.
  - Employee needs only show some harm with respect to an identifiable term or condition of employment, but that harm need not be significant.
  - Previously was a split among Circuit Courts. 2d Cir. standard was a "materially adverse change in the terms, privileges, duration and conditions of employment" that "is more disruptive than a mere inconvenience or an alteration of job responsibilities."
- Impact in NY?
  - In 2021 we obtained dismissal of a correctional officer's claim. Court found removal from transport team was an adverse action because the transport team had more amenities and was an easier job.
  - Courts held that issuing counseling memos, negative reviews and PIPs is not an adverse action.
    - NY District Courts are now holding a PIP/counseling is an adverse action. *Stinson v. Morningstar Credit Ratings, LLC*, 2024 WL 3848515, at *8 n. 5 (S.D.N.Y. Aug. 16, 2024).

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Title VII of the 1964 Civil Rights Act

- Off Duty Harassment Online
- *Lindsay Okonowsky v. Merrick B. Garland*, 109 F.4th 1166 (9th Cir. 2024).
  - A Lt. at a correctional facility had an anonymous Instagram account that was followed by more than 100 co-workers.
  - Plaintiff as a staff psychologist. The Lt. did not supervise her, but they occasionally worked together on issues. Plaintiff learned from co-workers that the Lt. posted sexually offensive content about work, and some of it was directed at the prison psychologist.

Title VII of the 1964 Civil Rights Act

- EEOC Workplace Guidance to Prevent Harassment – Published 4/29/24
  - **Social Media**: If "the employee learns about the post directly or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a hostile work environment based on national origin. However, postings on a social media account generally will not, standing alone, contribute to a hostile work environment if they do not target the employer or its employees."
    - Harassing conduct that is not directed at the employee like the use of sex-based epithets.
    - Conduct outside the employee's presence if they become aware of it during their employment and it relates to their work environment.
  - **Harassment of a third party**: Sophie works with Eitan who is Jewish. Supervisor Jordan makes disparaging remarks about Jews and asks Eitan when he was going to "go home and start fighting." Jordan intimidates Sophie into participating in acts that make it hard for Eitan to do his job.
    - Who can assert a claim?

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FTC Non-Compete Ban

- The Federal Trade Commission's Rule effective as of 9/4/24.
  - Prohibits NCs for all workers, including senior executives.
  - Excludes owners when selling a business and pre-existing NCs for senior executives who are in policymaking positions and earn more than $151,164 annually.
  - Requires written notice to workers that NCs will not be and cannot be enforced.
- On 8/20/24 the U.S. District Court for the Northern District of Texas granted plaintiff summary judgment and issued a nationwide injunction prohibiting the FTC from enforcing its rule.
  - District Courts in Maryland and Florida also issued decisions concluding the FTC Rule exceeds its authority.
  - One court in PA sided with the FTC in a limited preliminary injunction context and still must decide the issue on the merits.

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Severance Agreements - NLRB

- The NLRB's current General Counsel takes the position that severance agreements with confidentiality/NDA and non-disparagement provisions violate Section 7 of the National Labor Relations Act (NLRA) if not properly worded.
  - NDA cannot prohibit discussing the severance agreement with current/former employees or NLRB.
- The NLRB held in *McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023) that simply presenting a proposed agreement with these terms violates the NLRA.
- Consider removing or limiting language.
- Non-defamation v. non-disparagement.
- Supervisor v. non-supervisor.

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Current Litigation Trends in CNY

- Wage & Hour claims including class and collective actions under the FLSA and NYLL.
- Allegations of unpaid off-the-clock work, missed meal periods and timecard rounding.
  - Ensure policy and practices that require employees to verify hours each payroll period and make corrections.
  - Employee verification they received an "uninterrupted meal period" of at least 30 minutes and method to report interruptions.
  - Keep good records.

Current Litigation Trends in CNY

- Tipped Workers
  - When pooling tips ensure an employee helps count cash tips, keep a log and have the people counting sign/date. Distribute tips proportionally based on hours worked, not days worked.
- Ensure payroll journal job titles are accurate!
  - Example…Kitchen Manager still titled as Cook.
- Job Descriptions for exempt workers.
  - Be thorough and have the employee sign receipt.
  - Track exemption language from FLSA (i.e., The position supervises all kitchen staff and is responsible for setting their schedules, performance reviews, discipline, hiring and firing).

Employer Wins

- DHR No Probable Cause Determinations
  - Continue to be very challenging for sexual harassment claims due to the law standard under the NYSHRL.
  - Much higher success rate for age, pregnancy, disability discrimination/failure to accommodate & retaliation claims.
  - The decision-makers lack of knowledge is key. HR is wise to insulate them whenever possible.
- Examples:
  - LPN fired day after applying for FMLA & PFL.
  - Patient/customer service rep who abused break time for pregnancy. DHR held that "receiving unfair criticism, unfavorable schedules or work assignments…criticism" is not adverse action.

Employer Wins

- February 2024 obtained summary judgment dismissing age discrimination claims.
  - Recruiter sent an email stating "need help finding a reason we don't want to consider a 66yo."
  - Applicant withdrew because he received a better job offer and filed a lawsuit.
- September 2024 summary judgment dismissing claims of race discrimination and retaliation.
  - PL complained that he was called a racial epithet by a co-worker about six weeks before he was fired.
  - Fired for threatening to physically harm a co-worker. The employer previously issued a written warning about the issue.

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Questions/Discussion?

Thank you!!

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