"WHISTLEBLOWER PROTECTIONS" SIGNIFICANTLY EXPANDED UNDER SECTION 740 OF NEW YORK LABOR LAW

Hodgson Russ Labor & Employment Alert
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Governor Kathy Hochul recently signed legislation that amends Section 740 of the New York Labor Law ("Section 740") to dramatically expand whistleblower protections in New York. In particular, the amendment makes the following changes to Section 740:

- **Expansion of protections to include former employees and independent contractors.** Prior to the amendment, Section 740 only protected "employees," defined to mean "an individual who performs services for and under the direction and control of an employer for wages or other remuneration." The amendments expressly state that former employees or "natural persons employed as independent contractors" are included within the definition of a covered employee.
- **Expansion of protected activities**. Previously, Section 740 only protected covered employees who reported or threatened to report violations of law that presented a "substantial and specific danger to the public health and safety." Under the amendments, protected activity now includes a report or threat to report an action, policy, or practice by the employer 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 constitute a violation of the law, so long as his or her belief in that regard was reasonable.
- **Expansion of prohibited adverse actions**. Section 740 has long prohibited an employer from discharging, suspending, demoting, or taking other adverse 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

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[that of] an employee's family or household member."

- **Limits on employee's obligation to notify employer before making an external report**. Prior to the amendments, an employee could only bring a Section 740 claim if he or she brought the allegedly problematic action, policy, or practice to the attention of a supervisor and gave the employer the opportunity to correct the issue before making an external report. Now, the employee must only demonstrate a "good faith effort" to bring the matter to the supervisor's attention before making the external report. Further, employees are not required to make any internal report "where: (a) there is an imminent and serious danger to the public health or safety; (b) the employee reasonably believes that reporting to the supervisor would result in a destruction of evidence or other concealment of the activity, policy, or practice; (c) such activity, policy, or practice could reasonably be expected to lead to endangering the welfare of a minor; (d) the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or (e) the employee reasonably believes that the supervisor is already aware of the activity, policy, or practice" and will not correct it.
- **New employer notice obligation.** Employers will now be required to affirmatively notify employees of their Section 740 rights and protections by publishing a notice "conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment."
- **Longer statute of limitations**. Employees will now have two years from the time of the alleged adverse action to bring a Section 740 claim. Previously, the statute of limitations for such a claim was one year.
- **Availability of front pay, civil penalties, and punitive damages**. The amendments also expand the categories of damages available to the employee if he or she succeeds on a Section 740 claim. Previously, Section 740 indicated 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 not to exceed $10,000 and, if the employer's violation is found to be willful, malicious, or wanton, uncapped punitive damages.

These amendments to New York Labor Law Section 740 take effect 90 days after the legislation became law, or on January 26, 2022. We expect that these significant changes will encourage a greater volume of Section 740 claims, make it easier for employees (and now former employees and independent contractors) to prevail on those claims, and result in higher cost settlements and judgments on such claims. The revisions to Section 740 add New York to the small number of states with expansive employee whistleblower protections. These states include our neighbor New Jersey, whose whistleblower statute, the New Jersey Conscientious Employee Protection Act ("CEPA"), gives employees a wide range of protections and remedies. In New Jersey, the enactment of CEPA resulted in a substantial increase in whistleblower litigation. We expect that New York employers will similarly face a serious rise in whistleblower claims as a result of the dramatic expansion of Section 740.

If you have any questions regarding the amendments to Section 740 or its impact on your business, contact John Godwin (716.848.1357), Kinsey O'Brien (716.848.1287), or any other member of the Hodgson Russ Labor & Employment practice.