Proskauer

Expansive Amendments to New York Whistleblower Protection Law Introduced

Proskauer Whistleblower Defense on **May 17, 2019**

On April 29, 2019, Assemblyman Michael Benedetto introduced Assembly Bill A7384, which would amend and significantly expand New York's whistleblower statute, N.Y.L.L. §§ 740, 741. The identical Senate version of this bill, Senate Bill S3683, was introduced by Senator Brad Hoylman on February 12, 2019. The proposed amendments aim to bolster whistleblower protections for employees who disclose information about "illegal business activities" and could expose employers to significant additional liability.

The Current Whistleblower Law

New York Labor Law § 740, which was enacted in 1984, is designed to protect employees who report a violation of the law that either "creates and presents a substantial and specific danger to the public health or safety, or…constitutes health care fraud." N.Y.L.L. § 740(2). In 2002, a parallel whistleblower statute was enacted to provide health care employees with additional protections. N.Y.L.L. § 741.

The protection for employees who do not work in health care is focused on alleged harm to the public at large. The whistleblower employee must demonstrate that there was an "actual violation" of a safety statute or regulation creating a substantial and specific danger to the public health or safety, and that the harm that results from the violation affects the public-at-large, as opposed to an individual plaintiff or group. The statute also contains a broad election of remedies provision which states that "institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law." N.Y.L.L. § 740(7).

The statute of limitations for a § 740 claim is one year and employees who successfully prove that they were retaliated against can recover back pay, but cannot recover compensatory or punitive damages. They also are not entitled to a jury trial.

The Proposed Amendments

The proposed amendments would significantly expand the protections afforded to employees under New York's whistleblower law and increase the potential liability to employers. The proposed legislation would remove the requirement that the reported wrongdoing must constitute a threat to public health or safety and extend whistleblower protection to any employee who reports information about an "illegal business activity" under federal, state or local law, regardless of whether or not that activity is within the scope of the employee's job duties. It would also get rid of the statute's election of remedies provision.

The proposed legislation also removes the requirement that there be an actual violation of the law. Employees would only have to show that they "in good faith reasonably believe[] that an illegal business activity has occurred or will occur, based on information that the employee in good faith reasonably believes to be true."

It also contains an employee-friendly standard of proof: a whistleblower would only need to show that his or her actions were a contributing factor in the adverse employment action, as opposed to the "but-for" causation standard applicable to certain federal retaliation claims.

The proposed legislation would expand the remedies potentially available to whistleblowers to include front pay, compensatory damages for economic loss and for emotional distress, and liquidated damages doubling any back pay and compensatory damages awarded where the court finds that the employer retaliated against the employee in bad faith.

And it would also extend the statute of limitations from one year to two years and add a right to a jury trial.

Finally, employers would have to inform their employees of their rights under the whistleblower law by posting a notice in a conspicuous place.

Implications for Employers

The proposed legislation, at least on its face, is extremely broad and would expose New York employers to a dramatically altered regulatory environment. Viewed in the context of the proliferation of whistleblower laws under a variety of state laws around the country and the focus in New York on expanding employee protections, it would not be surprising if the proposed legislation advances. We will closely monitor this development and keep you posted.

View Original

Related Professionals

- **Lloyd B. Chinn**
  Partner