Financial Services Roundtable: Whistleblower Laws

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New York Labor Law Section 740

New York State General Whistleblowing Protections

- Under the statute, an employer shall not take any retaliatory action against an employee, whether or not within the scope of the employee's job duties, because such employee does any of the following:
  - (a) 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* or that the **employee reasonably believes** poses a substantial and specific *danger to the public health or safety*;
  - (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such activity, policy or practice by such employer; or
  - (c) objects to, or refuses to participate in any such activity, policy or practice.

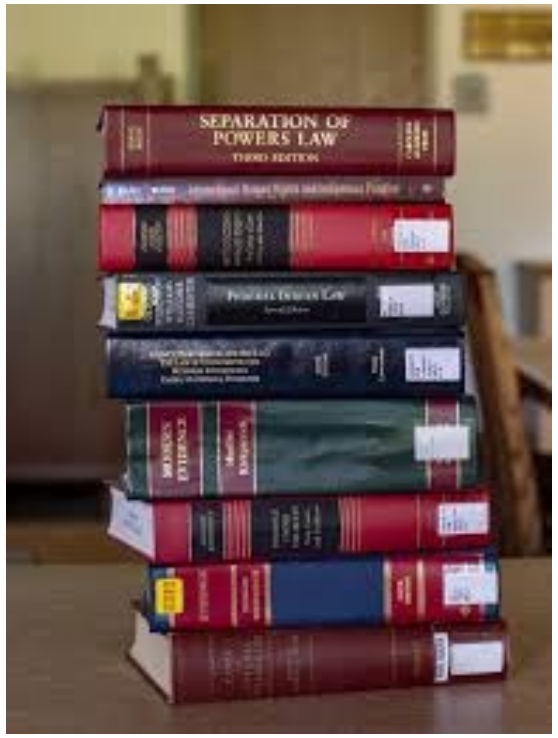
N.Y. Lab. Law Section 740

Good Faith Reasonable Belief

- Did the employee "reasonably believe" that the employer activity, policy or practice violated a law, rule or regulation or posed a danger to public health and safety?
- Was the employee’s belief subjectively reasonable?

Law, Rule or Regulation Defined

1. Any duly enacted federal, state or local statute or ordinance or executive order;
2. Any rule or regulation promulgated pursuant to such statute or ordinance or executive order; or
3. Any judicial or administrative decision, ruling or order.



New York State General Whistleblowing Protections

- The law defines prohibited “retaliatory actions” to include:
  1. adverse employment actions or threats to take such adverse employment actions against an employee in the terms of conditions of employment including but not limited to discharge, suspension, or demotion;
  2. actions or threats to take such actions that would adversely impact a former employee’s current or future employment; or
  3. 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 the suspected citizenship or immigration status of an employee's family or household member.

Retroactivity

- Does the expanded definition of "law, rule or regulation" apply retroactively to conduct occurring before the amendment took effect on Jan. 26, 2022?
- Courts are currently divided.
  - One district court allowed retroactive application due to the "remedial" nature of the amendment, finding a legislative intent to correct the "restrictive nature of the prior statutory requirements." *Callahan v. HSBC Sec.,* 2024 U.S. Dist. LEXIS 47106, at *17-18 (S.D.N.Y. Mar. 18, 2024).
  - Other courts find that the amendment's broadened protections provide a new basis upon which to find relief and therefore cannot be applied retroactively. *See Pisano v. Reynolds*, 2023 N.Y. Misc. LEXIS 2573, at *6 (N.Y. Sup. Ct. May 23, 2023).

Whistleblowers Claims in New York

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Section 740 Landscape

- Almost 150 Section 740 claims have been filed in New York state and federal courts on or after January 26, 2022.

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Murray v. UBS Securities, LLC, 601 U.S. 23 (2024)

- On February 8, 2024, the Supreme Court unanimously held that an employee **need not prove an employer's "retaliatory intent"** in order to establish that the employer violated the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 ("SOX"), which prohibits employers from taking adverse employment action against employees in retaliation for engaging in activity protected by the legislation.
- Plaintiff filed a whistleblower action in the district court, alleging that UBS terminated his employment in retaliation for reporting that individuals on the UBS trading desk were engaging in unethical and illegal conduct. The jury found in favor of Plaintiff, Defendant appealed, and the Second Circuit held that to be successful, a claim for retaliation must provide evidence of the employer's intent to retaliate.
- The Supreme Court disagreed, noting that the plain language of SOX includes no such requirement. Instead, if a plaintiff establishes that protected activity was a contributing factor in the adverse employment action, the plaintiff has established a prima facie case. A plaintiff need not prove why an adverse action was taken against him, only that it happened, and that his protected activity was a contributing factor in the employer's decision to take that action.
- Once an employee establishes a *prima facie* case, the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected behavior.

La Belle v. Barclays Capital Inc., No. 23-448, 2024 WL 878909 (2d Cir. Mar. 1, 2024)

- Plaintiff, a former executive, was terminated after he reported that Defendant violated its own Mandatory Block Leave Program ("MBL") Program. The MBL required that certain individuals "take ten consecutive business days per year out of the office and without access to Barclays' systems."
- The district court granted Defendant's motion for summary judgment on Plaintiff's SOX claim, holding that Plaintiff failed to establish a retaliation claim under SOX because Defendant's **alleged violation of its own MBL did not amount to a violation** of an SEC rule or regulation.
- In Plaintiff's appeal, he argued that the lower court's judgment should be reversed because his retaliation claims constitute protected activity, which led to Defendant taking an adverse employment action against him.
- The Second Circuit **affirmed** the district court's judgment, holding that although Plaintiff "subjectively believed that MBL was a regulatory requirement and that he was reporting violations of an SEC rule or regulation, such a belief was **not objectively reasonable insofar as MBL is not a legal requirement** and is therefore 'wholly untethered' from the enumerated provisions in section 1514A."

Pierce v. Better Holdco, Inc., No. 22 CIV. 4748 (AT), 2023 WL 6386920 (S.D.N.Y. Sept. 29, 2023)

- Plaintiff, the vice president of sales, operations, and customer service, was placed on administrative leave and terminated after raising complaints related to violations of the California and federal WARN Acts, misrepresentations regarding website traffic in a SEC filing, and misrepresentations of profitability to investors.
- The district court held that Plaintiff sufficiently alleged protected activity and emphasized that Plaintiff did not allege that Defendant did or even intended to violate the WARN Act and that **Section 740 no longer requires such allegations**.
- The court held that Plaintiff needed to demonstrate only a reasonable belief that the WARN Act had been violated.
- Although Plaintiff did not explain how the SEC filing misrepresentation violated the law, the statute still protected the employee for disclosing "a reasonable belief of a violation of law" to her supervisors.

Collison v. WANDRD, LLC, No. 24-CV-2221 (LJL), 2024 WL 3106326 (S.D.N.Y. June 20, 2024)

- The district court denied Defendants' motion to dismiss Plaintiff's retaliation claim and held that Plaintiff stated a claim for retaliation after raising concerns regarding **certain legal requirements** relating to a sales and consumption tax.
- Plaintiff, a customer service 1099 employee later promoted to a financial management W-2 position, alleged that he raised concerns that Defendant violated requirements related to sales and consumption tax filings on multiple occasions.
- Following expression of these concerns, Plaintiff faced adverse employment actions, including eventual termination of employment.

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