

NEW YORK EXPANDS HEALTHCARE WORKER WHISTLEBLOWER PROTECTIONS

Hodgson Russ Healthcare Alert
June 25, 2020

On June 17, 2020, Governor Cuomo signed into law an amendment to the New York healthcare whistleblower law to create a new protected category, “improper quality of workplace safety,” and to expand protected channels to include news and social media outlets for reporting violations of improper quality of patient care or workplace safety. Under the new amendment, healthcare employers cannot take retaliatory action because an employee complains to the press or on social media about workplace conditions that significantly threaten employee health.

New York’s Healthcare Whistleblower Law

Prior to the amendment, New York law already contained broad whistleblower protections. Labor Law § 740 prohibits retaliation based upon the disclosure to a supervisor or a public body of a practice that creates and presents a substantial and specific danger to the public health or safety or that constitutes health care fraud. Labor Law § 741 prohibits an employer from taking retaliatory action against a healthcare employee because the employee either (i) discloses or threatens to disclose to a supervisor, or to a public body, or (ii) objects to, or refuses to participate in, an activity, policy or practice of the employer that may constitute improper quality of patient care. The term “improper quality of patient care,” as defined in § 741, means violations that relate to “matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient.”

New York’s Amended Healthcare Whistleblower Law

The new amendment expands the statutory protections to encompass complaints about workplace safety issues. As amended, the statute prohibits retaliatory employment action because a healthcare employee discloses or threatens to disclose, or objects to or refuses to participate in, “improper quality of workplace safety,” which means violations that relate to matters that “may present an unsafe workplace environment or risk of employee safety or a significant threat to the health of a specific employee.” Additionally, the amendment expands protection to encompass disclosures to news and social media outlets about both patient and employee health and safety issues.

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As under the current law, a health care employee may seek enforcement in a civil action for an injunction, reinstatement, with back pay and benefits, and legal costs. The employee generally must bring the matter to the employer's attention and give the employer a chance to correct the practice. This notice requirement does not apply, however, to a situation involving an imminent threat to public health or safety, to the safety or health of a specific patient – or, under the amendment, of a specific healthcare employee – in cases where the employee reasonably believes that a complaint would not result in correction.

Implications for Employers

The statutory amendment is an outgrowth of the COVID experience. According to the New York State Assembly's Memorandum in Support of the law, during the COVID pandemic, medical professionals caring for patients with coronavirus lacked adequate supplies due to an international shortage of personal protective equipment, and some healthcare workers exposed the need for PPE through interviews and protests. The purpose of the legislation is to “provide medical professionals with greater whistleblower protections,” so they can speak more freely about the conditions of the patients for whom they provide care.

In addition to New York law, federal law contains existing whistleblower protections for reporting certain activities. The National Labor Relations Act affords protection for employee statements to third parties made for the purpose of mutual aid and protection of coworkers. In addition, the NLRA protects such statements when related to an ongoing labor dispute, so long as the statements are not disloyal, reckless or maliciously untrue. The Occupational Safety and Health Act prohibits employee retaliation for exercising rights under OSHA, including filing a complaint, instituting a proceeding or providing testimony.

The newly expanded whistleblower protections offer another reason for employers to use diligence in handling and documenting employee disciplinary issues. Employers should consider incorporating the expanded protections relating to workplace safety disclosures into their existing policies and procedures.

For assistance in navigating the whistleblower laws, please contact Peter Godfrey (716.848.1246) in our Labor and Employment Practice, Jane Bello Burke (518.433.2404) in our Healthcare and Litigation Practice, Jason E. Markel (716.848.1395) in our OSHA Compliance Practice.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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