Whistleblower Protection in New York State

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Civil Service Law Section 75-b

• Protects Public Employees

• Prohibits termination, discipline or “adverse personnel action” by a public employer when a public employee reports what they reasonably believe is a violation of law, rule, or regulation by the employer to a governmental body
To Be Protected

- The Employee must first
  - Provide the information about the alleged violation to the “appointing authority” or its designee, or have made a “good faith effort” to do so
  - Provide a “reasonable time to take appropriate action”
  - Unless there is an imminent and serious danger to the public health or safety

- Then, the employee must
  - Disclose the alleged violation to a “governmental body”
To Raise the Claim

• As a defense in a disciplinary case
  – Civil Service Law
  – Other contractual disciplinary charges

• As a contract grievance
  – Where there are no disciplinary charges
  – Where there is language in the collective bargaining agreement

• As a suit in court
  – If there is no discipline or grievance (or no right)
Proof Required to Make the Case

• In any forum, the employee must show that the adverse personnel action would not have been taken “but for” the protected activity of reporting the alleged violation of law, rule, or regulation to a governmental body
Labor Law Section 740

- Protects Private Sector Employees

- Prohibits private employers from taking any “retaliatory personnel action” against an employee who discloses, threatens to disclose, provides information about, objects to, or refuses to participate in a violation of law, rule, or regulation that presents a substantial and specific danger to the public health or safety, or constitutes health care fraud
To Be Protected

• There must be an actual violation of a law, rule, or regulation; no “good faith” belief

• Employee must first
  – Reveal the alleged violation to a “supervisor” of the employer
  – Provide a “reasonable opportunity to correct”

• Then, the employee must
  – Disclose the violation to a “supervisor” of the employer or a “public body”
To Raise the Claim

• The remedy for retaliatory adverse personnel action is to file a suit in court

• The statute does not address whether a Labor Law § 740 retaliation claims must be raised as a disciplinary defense or grievance
Proof Required to Make the Case

• The employee must specify the exact law, rule or regulation violated
• prove there was an actual violation of that law, rule, or regulation
• show how that actual violation created a substantial danger to the public health and safety
• show that the retaliatory personnel action would not have been taken for any other reason
Labor Law Section 741

• Protects public or private sector health care employees

• Prohibits “retaliatory action” by an employer when an employee objects to or discloses to a “supervisor” or “public body” an employer policy or practice based on the “good faith” belief that it results in “improper quality of patient care”
To Be Protected

• The Employee must first
  – Bring the improper quality of patient care to the attention of a “supervisor”
  – Afford a “reasonable opportunity to correct”
  – Unless there is an imminent threat to public health or safety or to the health of a specific patient and the employee reasonably believes in good faith that reporting would not result in corrective action

• Then, the employee may
  – Disclose the alleged violation to a “public body”
To Raise the Claim

• The remedy for retaliatory action is to file a suit in court

• Again, the statute references only that enforcement is through the procedure outlined in Labor Law § 740(4)(d) (court) and does not address whether a Labor Law § 741 retaliation claims must be raised as a disciplinary defense or grievance
Proof Required to Make the Case

• That the employee is an employee of a health care employer and provides health care services as part of his or her duties

• Specify the exaction law, rule, or regulation allegedly violated

• Show that the violation alleged relates to “improper quality of patient care”

• That the “retaliatory personnel action” would not have been taken “but for” the protected activity under the statute
PESHA Labor Law Section 27-a(10)

• Protects public employees in New York

• Prohibits retaliation by a public employer against a public employee for filing or participating in a health and safety complaint to the NYS Department of Labor, or exercising other rights under PESHA
To Be Protected

- Employees who believe a violation of safety and health standards exists, or that imminent danger exists, may request an inspection.

- There is no separate pre-disclosure requirement; NYS Department of Labor will notify the employer.
To Raise the Claim

• The employee files a Complaint with the NYS Department of Labor

• If the Department of Labor finds retaliation on the part of the employer, the NYS Attorney General will be asked to file suit

• There is no private right of action
Proof Required to Make the Case

• The employee must show
  – That the employee engaged in activity protected under the statute
  – That the employer was aware of that activity
  – That the employer took adverse action against the employee
  – That “the only reasonable conclusion” is that the employee was discriminated against due to his or her protected activity
OSHA Section 11(c)

- Protects private sector employees

- Prohibits retaliation against private sector employees for filing a complaint, participating in a proceeding, or exercising rights under OSHA
To Be Protected

• An employee who believes an unsafe or unhealthful working condition exists, or that there are environmental problems in the workplace, may complain to the employer, OSHA, or another governmental agency.

• There is no “pre-disclosure” required; the Secretary of the US Department of Labor will notify the employer.
To Raise the Claim

• The employee who believes he or she has been retaliated or discriminated against files a complaint with the OSHA

• If discrimination is found, the US Secretary of Labor will file suit

• There is no private right of action
Proof Required to Make the Case

• The employee must show
  – That the employee engaged in activity protected under the statute
  – That the employer was aware of or suspected that activity
  – That the employer took adverse action or otherwise discriminated against the employee
  – That the employee’s protected activity was a “contributing or motivating factor” for that action
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