The New York State Dental Journal

Volume 88 | Number 2 Article 3

3-1-2022

New York Continues Employment Law Rampage

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Newly enacted laws continue trend favoring employee rights. Dental practices on notice.

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In 2022, the trend in New York State to enact laws favoring employees over employers has continued unabated. Two new laws have taken effect or will take effect this year statewide. Those two major laws are discussed below. Note that New York City has also adopted new employment laws applicable only within New York City; those will be addressed in a future article.

The New York State Whistleblower Law (Section 740 of the New York State Labor Law) took effect on Jan. 26. The law applies to all employers in New York State. It prohibits an employer from taking retaliatory action against an employee because the employee does any of the following:

- 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.
- 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.
- Objects to or refuses to participate in any such activity, policy or practice.

The law does not define what constitutes a reasonable belief by an employee, but courts are likely to interpret this as they have for government employees—some good faith, reasonably factual basis for believing a violation has occurred. Because the New York State Legislature has broadened the law, it is likely that the benefit of any doubt will be construed in the employee's favor.

The new whistleblower law requires that employers post a notice for employees of their rights under the new law. The notice must be posted conspicuously, in easily accessible and well-lighted places customarily frequented by employees and applicants for employment. The New York State Department of Labor has issued the required notice (Figure 1) that dental offices should post immediately (and it is largely a restatement of the major provisions of the law, so it also serves as a very good explanation of the new law).

It should be noted that Section 741 of the Labor Law expressly deals with added whistleblowing protections for healthcare employees working in facility settings, but private dental practices are covered only by Section 740.

Putting an End to Electronic Snooping

The other new statewide law is Section 52-c of the New York State Civil Rights Law, which will take effect on May 7. The law will require that all

employers give notice of electronic monitoring of employees. Any employer who monitors or otherwise intercepts telephone conversations or transmissions, electronic mail or transmissions, or Internet access or usage of or by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio, or electromagnetic, photoelectronic or photo-optical systems, must give prior written notice upon hiring to all employees who are subject to electronic monitoring. The notice required must be in writing, in an electronic record, or in another electronic form and acknowledged by the employee either in writing or electronically. Each employer must also post the notice of electronic monitoring in a conspicuous place that is readily available for viewing by employees who are subject to electronic monitoring.

Unlike the new whistleblower law that creates a private right for employees to sue to enforce the law, only the New York State Attorney General can enforce the provisions of the employee electronic monitoring law. Any employer found to be in violation of Section 52-c of the Civil Rights Law is subject to a maximum civil penalty of $500 for the first offense, $1,000 for the second offense and $3,000 for the third and each subsequent offense.

It should be noted that the provisions of the new employee electronic monitoring law do not apply to processes that are designed to manage the type or volume of incoming or outgoing electronic mail or telephone voice mail or Internet usage that are not targeted to monitor or intercept the electronic mail or telephone voice mail or Internet usage of a particular individual, and that are performed solely for the purpose of computer system maintenance and/or protection.

There are some dental practices that engage in electronic monitoring of employees (NYSDA has gotten questions about this over the years), but of the two new statewide laws that apply to all employers, the whistleblower law is more likely to affect more dental practices. With all of the infection-control issues surrounding the novel coronavirus (COVID-19) pandemic and the already existing protections of the Occupational Safety and Health Administration (OSHA), employees may now be encouraged to file complaints and feel empowered to threaten lawsuits. And it will not be so easy to know if the employee has called OSHA or the Office of Professional Discipline (OPD) anymore, thanks to the new employee electronic monitoring law.

New York State may well continue the trend of employee-friendly legislation in this 2022 legislative session if it decides to follow the rapid pace New York City has been setting in this area. More on that in my next column.

The material contained in this column is informational only and does not constitute legal advice. For specific questions, dentists should contact their own attorney.

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FIGURE 1

Notice of Employee Rights, Protections, and Obligations Under Labor Law Section 740 Prohibited Retaliatory Personnel Action by Employers Effective January 26, 2022 § 740. Retaliatory action by employers; prohibition.

1. Definitions. For purposes of this section, unless the context specifically indicates otherwise:

(a) "Employee" means an individual who performs services for and under the control and direction of an employer for wages or other remuneration, including former employees, or natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers.

(b) "Employer" means any person, firm, partnership, institution, corporation, or association that employs one or more employees.

(c) "Law, rule or regulation" includes: (i) any duly enacted federal, state or local statute or ordinance or executive order; (ii) any rule or regulation promulgated pursuant to such statute or ordinance or executive order; or (iii) any judicial or administrative decision, ruling or order.

(d) "Public body" includes the following:

(i) the United States Congress, any state legislature, or any elected local governmental body, or any member or employee thereof;

(ii) any federal, state, or local court, or any member or employee thereof, or any grand or petit jury;

(iii) any federal, state, or local regulatory, administrative, or public agency or authority, or instrumentality thereof;

(iv) any federal, state, or local law enforcement agency, prosecutorial office, or police or peace officer;

(v) any federal, state or local department of an executive branch of government; or

(vi) any division, board, bureau, office, committee, or commission of any of the public bodies described in subparagraphs (i) through (v) of this paragraph.

(e) "Retaliatory action" means an adverse action taken by an employer or his or her agent to discharge, threaten, penalize, or in any other manner discriminate against any employee or former employee exercising his or her rights under this section, including (i) 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; (ii) actions or threats to take such actions that would adversely impact a former employee's current or future employment; or (iii) 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, as defined in subdivision two of section four hundred fifty-nine-a of the social services law, to a federal, state, or local agency.

(f) "Supervisor" means any individual within an employer's organization who has the authority to direct and control the work performance of the affected employee; or who has managerial authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains.

2. Prohibitions. 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.

3. Application. The protection against retaliatory action provided by paragraph (a) of subdivision two of this section pertaining to disclosure to a public body shall not apply to an employee who makes such disclosure to a public body unless the employee has made a good faith effort to notify his or her employer by bringing the activity, policy or practice to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct such activity, policy or practice. Such employer notification shall not be required 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 such activity, policy or practice.

4. Violation; remedy.

(a) An employee who has been the subject of a retaliatory action in violation of this section may institute a civil action in a court of competent jurisdiction for relief as set forth in subdivision five of this section within two years after the alleged retaliatory action was taken.

(b) Any action authorized by this section may be brought in the county in which the alleged retaliatory action occurred, in the county in which the complainant resides, or in the county in which the employer has its principal place of business. In any such action, the parties shall be entitled to a jury trial.

(c) It shall be a defense to any action brought pursuant to this section that the retaliatory action was predicated upon grounds other than the employee's exercise of any rights protected by this section.

5. Relief. In any action brought pursuant to subdivision four of this section, the court may order relief as follows:

(a) an injunction to restrain continued violation of this section;

(b) the reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position, or front pay in lieu thereof;

(c) the reinstatement of full fringe benefits and seniority rights;

(d) the compensation for lost wages, benefits and other remuneration;

(e) the payment by the employer of reasonable costs, disbursements, and attorney's fees;

(f) a civil penalty of an amount not to exceed ten thousand dollars; and/or

(g) the payment by the employer of punitive damages, if the violation was willful, malicious or wanton.

6. Employer relief. A court, in its discretion, may also order that reasonable attorneys' fees and court costs and disbursements be awarded to an employer if the court determines that an action brought by an employee under this section was without basis in law or in fact.

7. Existing rights. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract.

8. Publication. Every employer shall inform employees of their protections, rights and obligations under this section, by posting a notice thereof. Such notices shall be posted conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment.