

# New York State Expands Its Whistleblower Law and Creates New Digital Workplace Monitoring Law

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New York Governor Kathy Hochul recently signed two bills (the “Bills”) into law that: (1) amend New York’s whistleblower law (the “Whistleblower Law”); and (2) establish a digital workplace law (the “Digital Workplace Law”). The Bills each make significant changes that will go into effect in 2022.

## I. Whistleblower Law

On October 28, 2021, New York Senate Bill S4394A/A.5144A was signed into law, dramatically expanding New York’s whistleblower law (N.Y. LAB § 740). The Whistleblower Law was designed to protect employees who report a violation of the law in the workplace. The amendments will go into effect on January 26, 2022.

### Reasonable Belief

Under the new amendments, employers shall not take any retaliatory action against an employee because such employee 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 a law, rule or regulation, or that the employee reasonably believes poses a substantial and specific danger to the public health or safety. Prior to this amendment, New York Labor Law section 740 provided whistleblower protection only for employees who reported or threatened to report actual violations of law which presented a substantial and specific danger to the public health or safety. Expanding the statute’s protection to disclosures based on an employee’s reasonable belief regarding *any* violation of law, rule, or regulation is a significant expansion of the Whistleblower Law.

### Coverage of the Statute

The Whistleblower Law will now protect current and former employees, and independent contractors. Previously, the Whistleblower Law only protected current employees.

The definition of “law, rule or regulation” has been expanded to include: (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.

### Retaliatory Action

The Whistleblower Law now defines “retaliatory action” as an adverse action taken by an employer or its 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:

- adverse employment actions or threats to take such adverse employment actions against an employee in the terms or conditions of employment including but not limited to discharge, suspension, or demotion;
- actions or threats to take such actions that would adversely impact a former employee’s current or future employment; or

- threatening to contact or contacting the 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 to a federal, state or local agency.

### Employer Notification Requirement

Previously, employees were required to report violations to their employer before disclosing violations to a public body, providing employers a reasonable opportunity to correct the alleged violation. The amendments now require employees to make a "good faith effort" to notify their employer, but there are exceptions. The employer notification requirement is not necessary in the following situations:

- there is an imminent and serious danger to the public health or safety;
- the employee reasonably believes that reporting to the supervisor would result in destruction of evidence or other concealment of the activity, policy, or practice;
- such activity, policy, or practice could reasonably be expected to lead to endangering the welfare of a minor;
- the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or
- 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.

### Punitive Damages

The Whistleblower Law now has increased penalties including punitive damages. Employers found to have violated the Whistleblower Law may be liable for a civil penalty of an amount not to exceed \$10,000 and/or punitive damages if the violation by the employer was willful, malicious, or wanton.

### Notice Requirement

Employers are now required to inform employees of their protections, rights and obligations pursuant to the law by posting a notice in the workplace in a conspicuous, easily accessible, and well-lighted place customarily frequented by employees and applicants for employment.

## II. Digital Workplace Monitoring Law

On November 8, 2021, New York Senate Bill S2628 was signed into law, requiring employers who monitor employee electronic communications to provide written notice to employees upon hiring and post a notice in the workplace informing employees of the surveillance. The Digital Workplace Law will take effect in May 2022.

### Notice Requirement

The Digital Workplace Law will require employers to provide written notice upon hiring to all employees when the employer monitors or otherwise intercepts: (1) telephone conversations or transmissions; (2) electronic mail or transmissions; and (3) internet access or usage by any electronic device or system.

The notice must be in writing, in an electronic record or in another electronic form and must be acknowledged by the employee either in writing or electronically. Each employer also must post the notice of electronic monitoring in a conspicuous place which is readily available for viewing by its employees who are subject to electronic monitoring.

### Penalties

Employers who do not comply with the statute will be 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.

If you have any questions about either law discussed in this article, please contact **Blythe E. Lovinger** at [blovinger@vedderprice.com](mailto:blovinger@vedderprice.com), **Jonathan A. Wexler** at [jwexler@vedderprice.com](mailto:jwexler@vedderprice.com), **Victoria L. Jaus** at [vjaus@vedderprice.com](mailto:vjaus@vedderprice.com), **Taylor A. McCann** at [tmccann@vedderprice.com](mailto:tmccann@vedderprice.com), or any other Vedder Price attorney with whom you have worked.