

BOND

EXEMPT ORGANIZATIONS INFORMATION MEMO

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Updates Required for Nonprofit Whistleblower Policies Early in the New Year

Thanks to recently adopted amendments to New York State Labor Law Section 740 (effective January 26, 2022), that greatly expand the scope of the protections provided to employees under that law, New York nonprofits will be required to start the new year in high gear when it comes to compliance.

If you haven't read Bond attorney Jane Sovern's recent overview of the law, you can find it [here](#). Here are links to the [old](#) and [new](#) laws, as well as a [redlined version](#).

While the law applies to all employers, it has an immediate impact on nonprofits that have been required to have whistleblower policies under Not-for-Profit Corporation Law Section 715-b (i.e., all nonprofits with 20 or more employees and over \$1 million in revenue). More specifically, the standards and requirements of the amendments to Labor Law Section 740 do not align neatly with those of Not-for-Profit Corporation Law Section 715-b, which was typically the main compliance focus in policy drafting in the past. You can find that statute [here](#).

The following are examples of updates that will be needed for policies to comply with both Not-for-Profit Corporation Law Section 715-b and Labor Law Section 740:

- 1. Expanded need for policies.** As noted above, the Not-for-Profit Corporation Law (NPCL) requires whistleblower policies only for organizations reaching specific employment and revenue thresholds. Labor Law Section 740, on the other hand, applies to all employers having at least one employee. Accordingly, all New York nonprofits with at least one employee should now consider adopting a policy.
- 2. Coverage expanded to former employees.** Labor Law Section 740 protects not only current employees from retaliatory action but also *former* employees, as well as independent contractors, who are not typically covered under current whistleblower policies. Policies should thus be expanded to include former employees and independent contractors and otherwise modified to ensure everyone covered by Labor Law 740 is included.
- 3. Expanded reporting protection.** Old Labor Law Section 740 protected whistleblowing with respect only to certain specified laws, while the new law has been broadened to cover all laws, regulations, local ordinances, executive orders and judicial and administrative decisions, rulings and orders. Typically, whistleblower policies were much broader than the old Labor Law, (for example, NPCL Section 715-b requires policies to include violations of "adopted policies," which were/are not covered by Labor Law Section 740, and many policies expressly included regulations, executive orders and even ethical breaches), but they may not have expressly included ordinances, executive orders or judicial or administrative decisions, and should thus be expanded as needed.

4. **Retaliation expanded.** Labor Law Section 740 has expanded prohibited retaliation to encompass certain types of adverse actions that were not commonly envisioned by existing policies, such as contacting U.S. immigration authorities regarding an employee's immigration status.
5. **Good faith vs reasonable belief.** Labor Law Section 740 now protects employees who make reports whenever they "reasonably believe" there is a violation, whereas NPCL Section 715-b requires protection where there is a "good faith" report of a violation. There is inherent tension between these standards: The NPCL standard is subjective – apparently looking only at the employee's belief and intent, which is therefore arguably easier to meet – while the Labor Law standard is objective, looking at the nature of the belief itself and whether it is "reasonable" to hold it. Policies should be updated carefully to include both terms in ways that do not result in a violation of either requirement.
6. **Form of Notice to Employees.** Labor Law Section 740 requires notification regarding the protections afforded by that law by posting information conspicuously in an easily accessible and well-lighted place customarily frequented by employees and applicants for employment. The NPCL, meanwhile, allows for a whistleblower policy to simply be posted on the employer's website. We have been updating policies with the conservative approach of including the entirety of Labor Law Section 740 as an exhibit, rather than summarizing its provisions.

In light of the foregoing, nonprofits across the state will have to put these policy updates at the top of the agenda for the new year. If you would like a review and update of your policy, or have any questions, please contact [Thomas W. Simcoe](#), [Delaney M. R. Knapp](#) or the attorney at the firm with whom you are regularly in contact.

