



2023

# BUSINESS IN 2022

WEEKLY WEBINAR SERIES

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## Introduction



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## New Year, New Whistleblower Law



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## Labor Law Section 740

- **Labor Law Section 740 “Retaliatory personnel action by employer; prohibition”** significantly expands the scope of statutorily protected whistleblower activity.
  - *Who is protected*
  - *What kinds of “laws” are covered*
  - *What is considered retaliatory conduct*
  - *Consequences*
- **Relevance?** Nonprofits (policies) AND for-profits (general applicability)
- January 26, 2022 effective date.



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## Background – Form 990

- Revised Internal Revenue Service Form 990 Information Returns (2008 Revisions) / Sarbanes-Oxley Act required public disclosure as to whether orgs had policy.
- Limited substantial requisites – a policy to protect individuals that report wrongdoing.
- Push toward good governance, no particular consequence.

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## Background – NPCL Section 715-b (2013)

- Not-for-Profit Corporation Law Section 715-b – 20 or more employees AND \$1 million plus in revenue – policy required.
- **Policy “musts”:**
  - Protects: “director, officer, key person, employee or volunteer”
  - Reports made “in good faith”

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## Background – NPCL Section 715-b

- Actions that are “illegal, fraudulent or in violation of any adopted policy of the corporation”
- Protected from: “intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence”
- **Distribution requirement:** Must be “distributed to all directors, officers, key persons, employees and to volunteers who provide substantial services to the corporation.”
- Website expressly authorized.

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## Background – NPCL Section 715-b

- Certain procedural requirements must be met:
  - Designated compliance officer.
  - Exclusion of employees from participation in certain decisions.
- Policies all drafted to meet these requirements.
- Courts have found implied cause of action, not express.
- Follow the Policy, comply with the law.

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## Old Labor Law Section 740

- Narrow statute.
- Protected employee reports of conduct of violation of law which “violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud.”
- Employee had to go to employer first.
- Defense that person was IC, or fired for other reasons.
- Injunction, reinstatement, lost wages, \$10k civil penalty.



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## Existing Whistleblower Policies

- Drafted with Form 990 and NPCL Section 715-b compliance in mind.
- Drafted broadly, consistent with the high ethical standards and expectations of transparency that is organic to the nonprofit sector.



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## Labor Law Section 740

- New “musts” that do not align perfectly with the existing – and still applicable – “musts”:
  - **Near-universal applicability:** all employers with 1 or more employees (not just 20 employees/\$1 million plus)
  - **Expands WHO is protected:** former employees, independent contractors. (two categories not included under NPCL Section 715-b).
  - **Expands reporting subject matter:** Reporting or disclosure of violation of “(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.**”



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## Labor Law Section 740

- **New capacity standard for policies:** “Reasonably believes” (sincerity not relevant) vs “good faith” (sincere intention, regardless of objective reasonableness).
- **Expansion of “retaliation”:** now includes 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 (including other members of the household!), actions that impact former or future employment.



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## Labor Law Section 740

- **Form of notification.** Labor Law Section 740 requires posting information *conspicuously in an easily accessible and well-lighted place customarily frequented by employees and applicants for employment.*
  - NPCL authorization of website no longer sufficient.
- **Punitive Damages** for willful, malicious or wanton conduct.
- No longer a need to go to employer first in all circumstances.



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## Takeaways

- Policies designed to comply with NPCL Section 715-b will not ensure compliance with the requirements of Labor Law Section 740.
- Smaller organization should adopt policies to ensure that they handle whistleblower complaints in a manner that complies with the law.
- For profit organizations should adopt policies to ensure compliance.



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## NYC Employment Law Update



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## Covid-19 Child Vaccination Time

- Went into effect December 24, 2021
- **Retroactively applied to November 2, 2021**
- 4 hours leave, per injection, per child for:
  - Taking child to vaccine or
  - Caring for child during temporary side effects
- Amends NYC Earned Safe/Sick Leave Act – *additional time*
- Covers all NYC private employers – if less than 5 employees and less than \$1 million net income, leave is unpaid



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## Child and Parent Defined

- Child
  - Under 18
  - Older child incapable of self-care due to mental or physical disability
- Parent
  - Biological
  - Foster
  - Step
  - Adoptive
  - Legal guardian
  - In Loco Parentis



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## What May An Employer Request of An Employee?

- May request “reasonable notice” leave will be used
  - If foreseeable – “reasonable advance notice” not to exceed 7 days
  - If not foreseeable – “as soon as practicable”
- May request “reasonable documentation”
  - Within 7 days
    - Proof that this child for whom leave was taken
    - Was vaccinated against Covid-19



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## What May An Employer Not Do?

- May not ask employee to make up missed time
- May not ask employee to find replacement worker for time
- May not count this leave against other Earned Safe/Sick Leave
- May not retaliate for taking this time



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## Retroactive Application and Penalties

- Retroactively applied to Nov. 2, 2021
  - If leave was taken between Nov. 2 until law was effective, pay period following enactment
  - Otherwise, pay in next payroll cycle following leave
- However, 60-day “phase-in” period
  - During phase-in, employers receive written notice and 15 days to cure before penalties imposed
  - Ends after Feb. 22, 2022



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## Penalties

- Leave taken, not compensated: Greater of \$250 or 3x wages
- Leave denied/charged against paid Safe/Sick Time: \$500
  - Note, both of the above are charged “for each instance”
- Additional Civil Penalties – Per Employee Basis:
  - First violation: Up to, and inclusive of, \$500
  - Second violation within 2 years of first: Up to, and inclusive of, \$750
  - Additional violations: Up to, and inclusive of, \$1000



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## Collective Bargaining Agreements

- Impact is similar to Safe/Sick Leave Act generally
- Unless same conditions in Safe/Sick Leave are met, this provision cannot be waived
- Also, if CBA offers more generous Covid-19 Child Vaccination Time, this law does not relieve employer from compliance with those terms



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## Does the Law Expire?

- Yes - December 31, 2022
- However, any Covid-19 Child Vaccination Time accrued on or before that date must still be paid



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## NYC – Salary Transparency Bill

- City Council passed on Dec. 15, 2021
  - Currently on Mayor's Desk for Signature
  - Becomes effective 120 days after becoming law
- Requires posting minimum and maximum salaries on job listings
- Amends NYC Human Rights Law
  - Applies to employers of 4/+
    - Independent contractors and family members of employer (if employed by employer) are included in this count
- Applies to: Employment Agencies, Employers, Employees (Agent)



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## To What Type of Job Listings Does This Apply?

- “Advertisement” not defined, but inclusive of:
  - Jobs
  - Promotions
  - Transfers
- The words “listings” and “posting” also both used, so likely a broad application
- Does not include “a job advertisement for temporary employment at temporary help firm”



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## What Degree of Employer Certainty is Required?

- Good faith belief
- At the time of the posting
- That this is the range the employer would pay
- For this opportunity



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## Paid Sick Leave Updates



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## Paid Sick Leave Updates

- On December 22nd, the DOL finalized the Paid Sick Leave (PSL) regulations which were initially published on December 9, 2020.
- The final regulations are identical to the proposed regulations.
- However, the DOL included 27 comments and responses, some of which are helpful.



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## Paid Sick Leave Updates

- Employers are to determine their number of employees by counting the highest total number employed concurrently, nationwide, at any point during the year.
- Employers may not cap the amount of leave carried over from year to year, even when the leave is frontloaded yearly.
- Employers may elect to give employees the option to be paid out for leave at year's end, instead of carrying it over.

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## Paid Sick Leave Updates

- Employers may not mandate that employee use PSL for a covered reason at the exclusion of other available and applicable paid leave.
- Employers may not impose a different notice requirement when leave is foreseeable than when it is not.
- The DOL will develop and make available a sample attestation form that the employers may use as documentation from employees to verify the need for PSL.

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## Paid Sick Leave Updates

- The law provides that employees must receive at least one hour of PSL for every 30 hours worked.
- The proposed regulations raised the issue of “rounding” paid sick leave accrual increments for the first time, instructing employers that when calculating accruals for time worked in increments less than 30 hours, “employers may round accrued leave to the nearest five minutes, or to the nearest one-tenth or quarter of an hour, provided that it will not result, over a period of time, in a failure to provide the proper accrual of leave to employees for all the time they have actually worked.”

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## Paid Sick Leave Updates

- This language raised many questions, not the least of which was how often employers should reconcile PSL banks to determine the amount of leave available to employees.
- The Department did little in the way of aiding employers, instead merely affirming that incremental leave is required and employers could round the time if they desire.

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## COVID19 – Where Are We Now?



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## NY – Current Numbers

- As of January 3, 2022
  - 66,164 new cases (291% 14-day change)
    - 39,132 in NYC (388% 14-day change)
    - 842 in Onondaga County (181% 14-day change)
  - 7,774 hospitalized (73% 14-day change)
    - Peak – April 16, 2020 – 13,671 daily average
  - 91 deaths (50% 14-day change)



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## Quarantine Requirements/Recommendations

- NY Guidance
  - Close Contact
    - Fully vaccinated or recovered from previously diagnosed with laboratory confirmed COVID-19
      - Do not need to quarantine following exposure
      - Should be tested between day 3 – 5 after exposure
      - Wear mask in public indoor setting for 14 days
    - NOT fully vaccinated or NOT recovered from COVID in previous 3 months
      - 10-day quarantine
      - Testing not required to end quarantine if no symptoms
    - [COVID-19 Exposure Flow Chart](#)

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## Quarantine Requirements/Recommendations

- NY Guidance (Cont'd)
  - Positive Test
    - Generally, 10 days of isolation from symptom onset or positive test if asymptomatic
    - [December 24, 2021, Guidance](#)
      - Shortens return to work timeline to 5 days from symptom onset or positive test if asymptomatic, but ONLY IF:
        - Healthcare worker or other “critical workforce member”
        - Fully vaccinated
        - Asymptomatic, or if mild symptoms, certain recovery conditions are met
        - Individual must consistently wear a “well-fitting face mask, a higher-level mask such as a KN95, or a fit-tested N95 respirator while at work”
        - DOES NOT apply to individuals who are moderately to severely immunocompromised
        - Continue to stay home and observe other elements of isolation for full 10-day period

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## Quarantine Requirements/Recommendations

- NY Guidance (Cont'd)
  - December 24, 2021, Guidance (Cont'd)
    - Workers participating in program should be instructed that:
      - They should practice social distancing from coworkers at all times except when job duties do not permit such distancing.
      - If they must remove their mask they should separate themselves from others

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## Quarantine Requirements/Recommendations

- Potential Issues with 12/24 Guidance
  - Do you qualify as “critical workforce”?
  - Validating symptoms
  - Ensure correct mask
    - \*Cloth masks do not qualify
  - Conflict with local DOH
  - Potential liability?

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## Quarantine Requirements/Recommendations

- CDC Guidance (General Population)
  - Positive Test
    - Stay home for 5 days
    - If you have no symptoms or symptoms resolving, you can leave your house
    - Wear a mask around others for additional 5 days
  - Exposure
    - If you have been boosted, or completed Pfizer or Moderna series within 6 months or J&J within 2 months
      - Wear a mask around others for 10 days, test on day 5, if possible
    - If you do not fit criteria
      - Stay home for 5 days. After that continue to wear a mask for 5 additional days
      - Test on day 5 if possible

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## Paid Leave

- FFCRA Leave No Longer Available
- NY Paid COVID Leave
  - Public and private employers
  - Employers must provide up to 14 days of paid leave, depending on size
  - Employees subject to a mandatory or precautionary order of quarantine issued by the State of NY, Department of Health, or any governmental entity authorized to issue a quarantine order
  - Job protection
  - Cannot be charged against other leave, including sick leave
  - Amount the worker would have otherwise received during period (5 or 14 days)

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## Paid Leave

- NY Paid COVID Leave (Cont'd)
  - [January 20, 2021, Guidance](#)
    - Leave available up to 3 times
    - Second and Third must be due to positive test
    - \*If employer mandates an employee who is not otherwise subject to a mandatory or precautionary order of quarantine to remain out of work due to exposure or potential exposure, employer must continue to pay regular rate of pay UNTIL the employer permits the employee to return to work or the employee becomes subject to a quarantine order. Employer must then pay for the full amount required during the order

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## Paid Leave

- Current Issues
  - Overwhelmed Local Departments of Health
    - Onondaga County Self Attestation Forms
      - <http://www.ongov.net/health/documents/IsolationAffirmation.pdf>
      - <http://www.ongov.net/health/documents/QuarantineAffirmation.pdf>
    - Is this a quarantine order?

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## Paid Leave

- NY PFL
  - Available where employee must care for dependent under quarantine order
  - Other qualifying rules
  - [Request for COVID-19 Quarantine PFL](#)

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