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Introduction



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Update to Whistleblower Law Changes



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New York Labor Law 740

- Prohibits retaliation against disclosure of employer's illegal or improper actions
- Recently amended to expand employee protections
- Amendments effective January 26, 2022



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Who is Protected?

Before Amendments	After Amendments (Current Law)
Employees	<ul style="list-style-type: none"> • Employees • Former employees • Independent contractors

What is Protected Activity?

Before Amendments	After Amendments (Current Law)
Protected employees who reported employer activity that violated a law when such violation posed a danger to the public health or safety, or which constituted healthcare fraud	Protects employees who report employer activity that is <i>reasonably believed</i> to violate <i>any</i> law
	Protects employees who report employer activity that is <i>reasonably believed</i> to pose a danger to public health or safety
Employee had to prove employer's violation	Employees need only <i>reasonably believe</i> their employer is in violation of a law or posing a risk to public health or safety

What is a Considered Law, Rule, Regulation ?

Before Amendments	After Amendments (Current Law)
Statutes, ordinances, rules and regulations	Statutes, ordinances, rules and regulations PLUS: <ul style="list-style-type: none"> • Executive Orders • Judicial or administrative decisions, rulings or orders

What is Retaliatory Action?

Before Amendments	After Amendments (Current Law)
“Retaliatory personnel action” = discharge, suspension or demotion, or other adverse employment action	Need not be “personnel” action Discharge, suspension or demotion, or other adverse employment action PLUS: <ul style="list-style-type: none"> • threatening, penalizing, and discriminating against employees for exercising their rights under Section 740 • taking or threatening to take action to impact current or future employment • threatening to report the immigration status of an employee or their family member to authorities

Employer Notification

Before Amendments	After Amendments (Current Law)
<p>Employees required to notify employer of alleged violation before reporting to a public body</p>	<p>Employees need only make a good faith effort to report an alleged violation to their employer before going to authorities</p> <p>EXCEPT when:</p> <ul style="list-style-type: none"> • There is imminent danger to public health or safety • The employee reasonably believes reporting would result in concealment or destruction of evidence • The employee reasonably believes reporting would endanger welfare of a minor • The employee reasonably believes reporting would result in physical harm to employee or another person • The employee reasonably believes the employer is already aware of the violation and will not correct it

Statute of Limitations

Before Amendments	After Amendments (Current Law)
One year	Two years

Damages

Before Amendments	After Amendments (Current Law)
<ul style="list-style-type: none">• Injunctive relief• Reinstatement• Back pay for lost wages and benefits• Attorneys' fees and costs	<p>PLUS:</p> <ul style="list-style-type: none">• Front pay in lieu of reinstatement• Civil penalty up to \$10,000• Punitive damages (if violation was willful, malicious, wanton)

Additional Changes

- Availability of jury trial
- Publication requirement
 - Employers are required to inform employees of their rights under this section by posting a notice published by the NY Department of Labor
 - Notice must be posted in a conspicuous, easily accessible place regularly frequented by employees and applicants
- NOTICE: https://dol.ny.gov/system/files/documents/2022/02/ls740_1.pdf

Healthcare Vaccine Mandate Update



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Healthcare Booster Mandate -- Postponed

- In order to avoid potential staffing issues and give healthcare workers more time to get boosted, the State will no longer enforce the booster requirement that will go into effect on February 21.
- The State will reassess in three months whether additional steps need to be taken to increase booster rates among the healthcare workforce. The original vaccination requirement for healthcare workers remains in effect.
- Avoids an issue that was looming in NYS



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DOH Data

	Received Booster	Willing and Awaiting Booster	Total	As a % of Total Staff
Hospitals	278,164	154,598	432,762	84%
Nursing Homes	62,540	12,536	75,076	51%
Adult Care Facilities	14,548	4,359	18,907	63%
LHCAs (Home Care)	83,341	106,292	189,633	70%
Hospice	3,719	2,088	5,807	95%
CHHAs (Home Care)	6,680	4,646	11,326	84%
Total	448,992	284,519	733,511	75%

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DOH Data

	Received Booster	Willing and Awaiting Booster	Total	As a % of Total Direct Care Staff
Hospitals	188,732	119,565	308,297	88%
Nursing Homes	39,621	8,574	48,195	51%
Adult Care Facilities	6,888	2,491	9,379	62%
LHCAs (Home Care)	75,583	96,695	172,278	68%
Hospice	2,627	1,419	4,046	91%
CHHAs (Home Care)	5,205	3,594	8,799	85%
Total	318,656	232,338	550,994	76%

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Vaccination Mandate – Healthcare Providers

- Emergency Regulations Issued – August 26, 2021
- Preceded by Section 16 Commissioner’s Orders
- TRO Issued by the US District Court for the NDNY – limited to religious exemption
- FAQ’s issued by the NYS DOH September 20, 2021
- TRO Extended by the US District Court on September 20 through October 12
- Second Circuit Decision – vacated the stay October 29, 2021

Emergency Regulations Basics

- Vaccine mandate
- No test out
- Medical exemption
- No religious exemption
- Covered personnel – employee and non-employee members of the medical and nursing staff, contract staff, students and volunteers – who engage in activities such that they could expose other covered personnel, patients, residents and staff to the disease

Emergency Regulations Medical Exemptions

- Generally accepted medical standards
- Severe allergic reaction to previous dose or components
- Other limited precautions are listed
- Exempt individuals may continue normal job duties
- Testing not required by the ER

Emergency Regulations Religious Exemptions

- Not included in the emergency regulations
- Sincerely held religious belief
- Undue hardship standard to grant/deny accommodation
- Accommodations other than working in person
- Documentation

Name/Image/Likeness Issues for Higher Education Institutions



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Overview – Today's Agenda

- Pre-June 1, 2021
- NCAA Interim Policy and State Law
- 4 Pillars of NCAA Interim Policy
- Institutional Involvement and Tracking
- NCAA Enforcement Update



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Pre-July 1, 2021 – Compensation to Student-Athletes

2.9 The Principle of Amateurism

“Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”

- NCAA Bylaw 12

- Interpretation prior to July 1, 2021 = Name, Image, Likeness prohibited



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NCAA Interim NIL Policy

- As of July 1, 2021, NCAA enacted an interim policy that suspends NCAA name, image and likeness rules for all incoming and current student-athletes.
- This allows student-athletes to earn compensation for their name, image or likeness.
- The temporary policy will remain in place until federal legislation or new NCAA rules are adopted.
- State law supersedes NCAA Interim Policy.

• Source: <https://www.ncaa.org/about/asking-action/policy>



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4 Pillars of NCAA Interim Policy

- Must be Quid Pro Quo
- Cannot be conditioned on the enrollment (or continued enrollment) at a specific institution – Anti-Recruiting Inducements
- Cannot be conditioned on a student-athlete’s participation or performance in a collegiate sport.
- Compensation must be “Fair Market Value”

Institutional Involvement

- Institutional NIL Policy
- NCAA NIL Q & A – Question #8:
 - A number of factors are relevant when institutions consider their possible involvement in arranging NIL transactions. During the interim NIL policy, the expectation is that schools and student-athletes will not use NIL transactions to compensate for athletic participation or achievement or as an improper inducement. In addition, institutions should not dictate how student-athletes use their compensation (e.g., should not require student-athletes to use compensation for financial aid). Beyond NCAA principles related to pay-for-play and impermissible inducements, such involvement may also raise other issues—including potential claims for contractual non-performance, Title IX issues, and employment issues—as to which campus compliance, Title IX, and general counsel staff can be consulted. Institutions should also be aware of and comply with all applicable state and federal laws, including gender equity requirements. Finally, institutions may consider how their legal counsel should be involved with the negotiation, review, and storage of NIL documents.

Institutional Involvement

- Our Guidance to Institutions
 - Updates on NCAA Enforcement
 - Risk Management in determining an institution's involvement
- Where is the line?
 - Amateurism/NCAA Issues
 - Potential Legal Exposure for Institution
 - Athlete Performance, Health Care, Opportunities
 - Potential Sovereign Immunity Waiver
 - Tracking Requirements?

NCAA Enforcement Update

- Letters of Inquiry (“LOI”) being sent out to member institutions.
- LOIs are not simply “educational” – intent to investigate
- Requests in LOI
- Useful in determining an institution’s “risk tolerance” in NIL policy

HERO Act Refresher



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Recap – NY HERO Act

- Airborne Infectious Disease Exposure Prevention Plans (NYLL § 218-b)
 - Effective July 4, 2021
 - All private employers (no numerosity threshold)
 - **Focus of today's discussion**
- Workplace Safety Committees (NYLL § 27-D)
 - Effective November 1, 2021
 - Private employers with at least 10 employees

Who is covered?

- Who does this apply to?
 - Only applies to **private** employers with worksites in NYS
 - Covers a broad range of workers (not just employees)
 - Only applies to an “airborne infectious agent or disease” designated by the Commissioner of Health as highly contagious communicable disease that presents serious risk of harm to public health
- Standard is clear that this **does not apply to** any seasonal or endemic infectious agent or disease (like the seasonal flu)
- The standard **does not apply to** “[a]ny employee within coverage of a temporary or permanent standard adopted by [OSHA] setting forth applicable standards regarding COVID-19 and/or airborne infectious disease agents and diseases”



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NYSDOL Published Model Plans & Standard

- [Airborne Infectious Disease Exposure Prevention Standard](#)
 - Minimum standard/requirements
- [Model Airborne Infectious Disease Exposure Prevention Plan](#)
- HERO Act Industry Specific Plans:
 - (available on NYDOL HERO Act website)
 - Agriculture, Construction, Delivery Services, Domestic Workers, Emergency Response, Food Services, Manufacturing and Industry, Personal Services, Private Education, Private Transportation, Retail



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Specific Topics To Be Included

Requirements on procedures and methods for:

- a) Employee health screenings
- b) Face coverings
- c) Required PPE
- d) Accessible workplace hand hygiene stations (including adequate break times for handwashing)
- e) Regular cleaning and disinfecting of equipment, frequently touched surfaces, restrooms, breakrooms/dining areas, etc. ("high-risk areas"/"frequently touched surfaces")
- f) Social distancing
- g) Compliance with mandatory/precautionary orders of quarantine/isolation
- h) Compliance with applicable engineering controls (proper air flow, exhaust ventilation)
- i) Designation of one or more supervisory employee(s) to enforce compliance with prevention plan
- j) Compliance with any applicable rules, laws, regulations, standards, guidance regarding notification to employees and relevant state/local agencies regarding potential exposure at worksite
- k) Verbal review ("training") of standard, employer policies, and employee rights under this section of the HERO Act (not required for individuals working for staffing agencies, contractors, subcontractors)

NY HERO Act - Update

- Model Plan Updated on February 9, 2022
 - *Employees will wear appropriate face coverings in accordance with guidance from State Department of Health or the Centers for Disease Control and Prevention, as applicable. Consistent with the guidance from the State Department of Health, if indoor areas do not have a mask or vaccine requirement as a condition of entry, appropriate face coverings are recommended, but not required. It is also recommended that face coverings be worn by unvaccinated individuals, including those with medical exemptions, in accordance with federal CDC guidance. Further, the State's masking requirements continue to be in effect for pre-K to grade 12 schools, public transit, homeless shelters, domestic violence shelters, correctional facilities, nursing homes, health care, child care, group homes, and other sensitive settings in accordance with CDC guidelines. New York State and the State Department of Health continue to strongly recommend face coverings in all public indoor settings as an added layer of protection, even when not required.*

NY HERO Act - Update

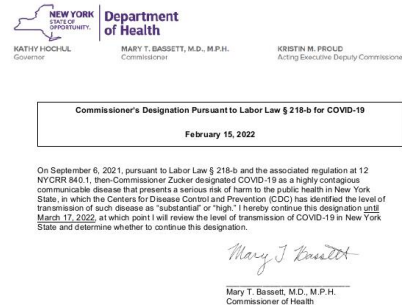
- Model Plan Updated on February 9, 2022
 - Indicates State is NOT requiring employers to mandate employees to wear masks, unless the setting is specifically referenced in the model plan language
 - Pre-K to grade 12 schools, public transit, homeless shelters, domestic violence shelters, correctional facilities, nursing homes, health care, child care, group homes, or other sensitive settings
 - Recommended, but not required for unvaccinated individuals

Additional Requirements

- **Written Notice / Posting**
 - Statute: Employers must provide copy of the adopted plan to all employees in primary language within 30 days of adoption, or by September 4, 2021 (within 60 days from NYSDOL published models/standard)
 - Post plan in visible and prominent location in each worksite
 - Other additional scenarios, including (per Guidance) if there is a designated outbreak
 - Employee Handbook
- **Training**
 - Guidance: Required once plan is “activated” during a designated outbreak

Designation by Commissioner of Health

- September 6, 2021 – Commissioner of Health designated COVID-19 as a “highly contagious communicable disease that presents a serious risk of harm to the public health.”
- Extended through **March 17, 2022**



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Implementation of Exposure Prevention Plans

Standard:

- When designation is made by the Commissioner of Health each employer shall:
 - Immediately review the worksite's exposure prevention plan and update the plan, if necessary, to ensure that it incorporates current information, guidance, and mandatory requirements issued by federal, state, or local governments related to the infectious agent of concern
 - Finalize and promptly activate the worksite exposure prevention plan;
 - Provide the verbal review;
 - Provide each employee with a copy of the exposure prevention plan in English or in the language identified as the primary language of such employees, if available, and
 - Post a copy of the exposure prevention plan in a visible and prominent location at the worksite (except when the worksite is a vehicle); and
 - Ensure that a copy of the exposure prevention plan is accessible to employees during all work shifts.



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Implementation of Exposure Prevention Plans

Standard:

- While the designation is in effect:
 - Assign enforcement responsibilities and ensure that enforcement takes place;
 - Monitor and maintain exposure controls;
 - Follow updates to guidance;
 - Designate one or more supervisory employees to enforce compliance with the plan. *Must be a supervisory employee

Required Actions

- Review Your Plan – Update as Necessary
 - Familiarize yourself with the exposure controls you need to have in place and consider what exposure controls you can/should have in place
 - Familiarize yourself with the Standard itself– this lays out the requirements and is currently an “Emergency Regulation” itself
 - Process has already started to become full regulation
 - Be prepared to change or update plan to reflect current guidance from NYSDOH and/or CDC
- Provide verbal review/training to all employees
- Updated copies/plans to employees, posted, etc.

Verbal Review/Training

Model Plan(s): “When this plan is activated, all personnel will receive training which will cover all elements of this plan and the following topics:

1. The infectious agent and the disease(s) it can cause;
2. The signs and symptoms of the disease;
3. How the disease can be spread;
4. An explanation of this Exposure Prevention Plan;
5. The activities and locations at our worksite that may involve exposure to the infectious agent;
6. The use and limitations of exposure controls
7. A review of the standard, including employee rights provided under Labor Law, Section 218-B.”

“The training will be:

1. Provided at no cost to employees and take place during working hours. If training during normal work hours is not possible, employees will be compensated for the training time (with pay or time off);
2. Appropriate in content and vocabulary to your educational level, literacy, and preferred language; and
3. Verbally provided in person or through telephonic, electronic, or other means.”



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Update to Whistleblower Law Changes

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Health Care Vaccine Mandate Update

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