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# A Look Back on the Retroactivity of New York's Amended Whistleblower Protection Law

**By Jonathan Trafimow and Jacob Nemon**
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In an excellent column in these pages, Nicholas J. Pappas and Elena Mondi discussed recent developments, including statutory amendment in 2021 (effective January 26, 2022) (2021 Amendment), to New York Labor Law Section 740, New York's Whistleblower Law, and noted that courts were divided on the issue of whether the statute applied retroactively.

Recent Developments Under New York's Amended Whistleblower Protection Law, New York Law Journal, Aug. 7, 2024. Since that column, New York state and federal courts have engaged in a spirited debate of this issue, with still no consensus having emerged. We write today to discuss these recent decisions.

**Retroactive Effect of the 2022 Amendment**

As Pappas and Mondi detailed, the 2021 Amendment significantly broadened the statute to permit causes of action for alleged retaliation for employee complaints where the employee "reasonably believes" there is a violation of a "law, rule or regulation", and provides a right to a jury trial, the possibility of punitive damages for willful violations, civil penalties, a longer (two-year) statute of limitations and other relief.

Whistleblower

These changes highlight the importance of whether the 2021 Amendment operates retroactively.

While courts remain divided on the issue, the First Department has weighed in with its view, in a case called *Spiegel v. 226 Realty, LLC*, that the amendments are retroactive while acknowledging that issue is one of first impression. 231 A.D.3d 562, 563 (1st Dep't 2024) ("We have

not previously determined whether this amendment applies retroactively.").

The court acknowledged that the amendments "did not take effect immediately" but held that this fact "does not preclude us from holding that they are retroactive."

The court characterized the amendment as "remedial in nature", "intended to correct a discrepancy created by the courts between Labor Law §740 and its public employee counterpart, New York Civil Service Law §75-b, and to ameliorate the restrictive language of the earlier version of Labor Law §740."

The court also observed that "the amendment does not create a new cause of action but "merely lessens the burden for plaintiffs to bring a claim" as supporting application of the amendment retroactively.

Recent federal court decisions have reached the same conclusion as the First Department. Recognizing that "the few courts that have considered the issue [of retroactivity] have been divided", two federal courts have cited the "remedial purpose" of the amendment to support its view that the amendment applies retroactively. *Gilmore v. Saratoga Ctr. for Care, LLC*, No. 1:19-CV-888 (LEK/CFH), 2025 WL 48620, at *10 (N.D.N.Y. Jan. 8, 2025); *Rackley v. Constellis, LLC*, No. 22-CV-4066 (GHW) (RWL), 2024 WL 3498718, at *26 (S.D.N.Y. June 17, 2024), *report and recommendation adopted as modified*, No. 1:22-CV-4066-GHW, 2024 WL 3824108 (S.D.N.Y. Aug. 14, 2024). *See also Callahan v. HSBC Sec. (USA) Inc.*, 723 F. Supp. 3d 315, 326 (S.D.N.Y. 2024).

Other courts have disagreed, finding that the 2021 Amendment does not apply retroactively. In the most recent and detailed analysis taking this view, Judge Liman opined:

But an amendment may not be classed as remedial and given retroactive application simply because it expands a legal cause of action. Classifying a statute as 'remedial' does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to 'supply some defect or abridge some superfluity in the former law.

Nearly any amendment can be described as remedial because for the Legislature to determine that a law needs amending, it must have deemed some aspect of the previous version deficient.

*Accettola v. He*, No. 23-CV-1983 (LJL), 2025 WL 843412, at *8 (S.D.N.Y. Mar. 18, 2025) (cleaned up). Judge Liman agreed that while the 2021 amendment "may encourage a broader swath of future whistleblowers to come forward, retroactive application does not aid that goal."

This is because the "whistleblowers who would be protected by retroactive application already came forward with no reasonable expectation of legal cover; retroactively applying Section 740 provides no further incentive once they have made the subject disclosures."

Judge Liman also noted that the 2021 Amendment stated that it was intended to take effect ninety days after it became law, and concluded: "absent a specific pronouncement of retroactivity, a sense of urgency, a clarification of an unintended judicial interpretation, or any other indication that the legislature intended

the 2021 Amendment to apply retroactively, the court will not part from the presumption that the 2021 Amendment applies only prospectively." See also *Zennamo v. Cnty. of Oneida,* No. 6:21-CV-840 (TJM/TWD), 2022 WL 4328346, at *9-19 (N.D.N.Y. Sept. 19, 2022).

Because the 2021 Amendment's changes to Section 740 are substantial, whether it applies retroactively can be a critical issue where the conduct at issue occurred prior to the amendment's effective date.

Indeed, in both *Spiegel* and *Accettola*, the courts noted the impact of the retroactivity ruling on the viability of plaintiffs' claims. *Spiegel,* 231 A.D.3d 564 ("Therefore, we find that this amendment to Labor Law §740 should be applied retroactively, and Supreme Court should not have granted summary judgment based solely on the lack of proof of an actual violation."); *Accettola*, 2025 WL 843412, at *10

("Because the 2021 Amendment does not apply to plaintiff's termination, to succeed on her Section 740 claim, plaintiff must prove that she disclosed that defendants actually violated a law, rule, or regulation, in a manner that poses a substantial and specific danger to public health or safety.

Because she has not shown that her disclosures regarding defendants' PPP loans related to any public health or safety risk, plaintiff's whistleblower retaliation claim fails.") (cleaned up).

**A Distinction Over Retroactivity That May Matter Only Retroactively**

The debate over whether the 2021 Amendment has retroactive effect may itself only matter retroactively, *i.e.*, to the group of litigants whose claims accrued prior to Jan. 26, 2022, the effective date of the amendment, and are still pending in trial courts or on appeal.

The 2021 Amendment expanded the statute of limitation for whistleblower claims to two years, but all claims to which the question of retroactivity apply are now time-barred from new filings.

Clarification from the New York Court of Appeals or Second Circuit may impact the rights of litigants in previous timely filed cases, but will not change or diminish the expanded protections presently available to whistleblowers whose claims have accrued since the 2021 Amendment or will arise in the future.

However, at least for the moment the cases discussed above suggest that the retroactivity issue remains relevant for the class of Section 740 claims noted above. And even when this is no longer true, the analyses from these decisions may not be entirely academic when it comes to future litigations.

They provide a framework for analyzing the legislative intent of other employee protection legislation that may come down.

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