Testimony of Miriam F. Clark for National Employment Lawyers Association/New York

Good morning. Thank you for the opportunity to testify at this morning's hearing.

I am Miriam Clark, Chair of the Legislative Committee of the National Employment Lawyers Association, New York affiliate. NELA/NY is an organization of about 350 lawyers who primarily represent employees.

I have been representing employees, for more than thirty years. I am here to speak about an urgent issue facing employees in New York that has been ignored by the Legislature for decades: the need to protect whistleblowers who complain about unsafe or illegal workplace conditions and face retaliation as a result. Labor Law 740, New York's current whistleblower law, was passed in 1984 and has been criticized by commentators ever since for inadequately protecting employees.

Last year, a bill that would have better protected whistleblowers passed the Senate, but not the Assembly, and as a result, during the ravaging effects of the COVID pandemic, employees who complained about unsafe working conditions could be fired for doing so without impunity. This legislative gap has undermined efforts to assure safety at every job site.

Thus, under New York law, it is legal to fire hospital janitors who raise concerns about lack of gloves and masks. It is legal to fire retail workers who complain that they are at risk because they lack plastic barricades. It is legal to fire factory workers who complain that they are working side by side in what they believe to be inadequately sanitized facilities. It is legal to fire workers who uncover unlawful activities by their employer and report them to the government.

This is because New York's principal whistleblower law, Labor Law 740, only protects employers who complain about conduct that is both an actual, proven violation of a specific law, rule or regulation AND a substantial and specific threat to public health and safety. [1]

HISTORY OF LABOR LAW 740

Labor Law 740 was enacted in 1984, and almost from the time of its passage has been criticized as being so narrow as to offer almost no protection for

[1] Labor Law 741, which contains a "reasonable belief" standard, applies to persons performing health care services, was amended last year to provide some minimal additional protection for those employees. Notably, it does not protect those who work in health care settings but do not provide medical care, such as janitors, cafeteria workers, and housekeepers -- or administrators and executives. Civil Service Law 75-b, which applies to public employees, also contains the "reasonable belief" standard.

whistleblowers. As far back as 1989, courts were noting, "Since passage of the statute in 1984, the Legislature has considered but failed to pass other changes which would have extended the protection offered by the statute" Leibowitz v. Bank Leumi Trust Co., 152 A.D.2d 169, 548 N.Y.S.2d 513 (2d Dept, 1989). . The Leibowitz court pointed out back in 1989 that the statute had been criticized by a number of commentators "because it provides protection only when the whistleblowing concerns the violation of a law, rule, or regulation that 'creates and presents a substantial and specific danger to the public health or safety'" (Dworkin and Near, Whistleblowing Statutes: Are They Working?, 25 Amer. Bus. L.J. 241, 253 (1987); see also, Minda and Raab, Time for an Unjust Dismissal Statute in New York, 54 Brooklyn L. Rev. 1137, 1138, 1182-1187 (1989); Minda, The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine, 36 Syracuse L. Rev. 939, 942 (1985).

More than 30 years later, employees are no better protected.

LIMITATIONS OF LABOR LAW 740

Even before the current pandemic, the limitations of Labor Law 740 were readily apparent to those attempting to protect employees who raised serious issues concerning their employer's potentially unsafe or illegal conduct. The two most restrictive elements of the law are the (1) the requirement that the conduct complained of be both a violation of law, rule, or regulation and a substantial threat to public health or safety and (2) the requirement that employee prove that the

complained of conduct be an actual violation of law or substantial threat to public health.

REQUIREMENT THAT CONDUCT BE BOTH UNLAWFUL AND A THREAT TO PUBLIC HEALTH OR SAFETY

This double requirement means, and courts have repeatedly ruled, that employees may freely fire whistleblowers who complain of serious conduct that fits only one of the two categories. For example, in Leibowitz v. Bank Leumi Trust Co., 152 A.D.2d 169, 548 N.Y.S.2d 513 (2d Dept. 1989), the court held that it was permissible to fire an employee who complained of unlawful financial practices, because the practices did not impact public health or safety. Similarly, in Littman v. Firestone Tire & Rubber Co., 709 F. Supp. 461 (S.D.N.Y. 1989), the court held that fraudulent conduct was not covered by Labor Law 740 because the allegations did not include matters of public health or safety.

This serious limitation could be easily remedied by changing the standard from "and" to "or" -- so that complaining of conduct that met either prong would protect an employee from termination.

REQUIREMENT THAT THE EMPLOYEE PROVE THE COMPLAINED OF CONDUCT WAS ACTUALLY UNLAWFUL

Importantly, a whistleblower claim can only succeed under Labor Law 740 if the employee can "plead and prove that the employer engaged in an activity, policy, or practice that constituted an actual violation of law, rule, or regulation. In short, a

"reasonable belief of a possible violation will not suffice." Barker v. Peconic Landing at Southold, Inc., 885 F. Supp. 2d 564, 570 (E.D.N.Y. 2012).

Thus, in Bordell v. GE, 88 N.Y.2d 869, 644 N.Y.S.2d 912, 667 N.E.2d 922 (N.Y. 1996), the New York Court of Appeals held that it was lawful for an employer to terminate a physicist who worked at Knolls Atomic Power Company, The employee reported, based on his preliminary calculations, that as many as seven employees might have been exposed to radiation at levels sufficient to trigger the mandatory reporting requirements of DOE Order 5484.1 if further factual investigation (which the employer prevented him from conducting) corroborated the scientific assumptions underlying the calculations. The employee was terminated for making a report to the government. The court held that termination was lawful because the employee was not able not prove that the radiation levels were in fact excessive.

Labor Law 740 should be amended to track Labor Law 741, Civil Service Law 75-b, and multiple other statutes that protect employees from retaliation, by requiring only that employees have a "reasonable belief" that they are reporting an unlawful or unsafe condition, rather than requiring that the employee be absolutely able to prove that this is the case -- proof which is typically almost impossible for the employee to obtain, as in Bordell.

LABOR LAW 740 AND THE COVID-19 PANDEMIC

The country's chaotic response to the pandemic has meant that there are very few actual regulations concerning workplace safety, widespread ignorance of those

regulations that do exist, and general confusion and constantly changing information about what kind of workplace is safe. If a worker raises a concern about a public health or safety issue that is not actually a provable violation of law, rule or regulation, she is subject to termination. And of course, there are virtually no such laws, rules or regulations. Therefore, workers who speak up about safety issues get fired. Workers who are afraid to speak up are left to work in potentially life-threatening situations. Given the public spread of the virus, the inability to keep workplaces safe will further impact households and entire communities.

CONCLUSION

The failures of New York's antiquated statute were readily apparent before the pandemic, and as a result the statute was virtually dormant for decades. But now, during a pandemic that has taken the lives of tens of thousands of New Yorkers, our state's deliberate and abject failure to protect those who raise what they reasonably believe to be health and safety issues in their workplaces, is unconscionable. Labor Law 740 must be amended to protect workers who have a reasonable belief that they are reporting either unlawful conduct OR unsafe, unhealthful or dangerous conditions. Amending Labor Law 740 will not only save jobs, it will save lives.