S T A T E O F N E W Y O R K

3862--A

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I N S E N A T E

February 25, 2013

Introduced by Sens. KLEIN, SAVINO -- read twice and ordered printed, and when printed to be committed to the Committee on Labor -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the labor law and the civil service law, in relation to protection of employees and former employees against retaliatory action by employers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 740 of the labor law, as added by chapter 660 of the laws of 1984, paragraph (g) of subdivision 1 as added and paragraph (a) of subdivision 2 as amended by chapter 442 of the laws of 2006, and paragraph (d) of subdivision 4 as added by chapter 24 of the laws of 2002, is amended to read as follows:

S 740. Retaliatory [personnel] action by employers; prohibition. 1. Definitions. For purposes of this section, unless the context specifically indicates otherwise:

(a) "Employee" means an individual who performs services for and under the control and direction of an employer for wages or other remuneration.

(b) "Employer" means any person, firm, partnership, institution, corporation, or association that employs one or more employees.

(c) "Law, rule or regulation" includes: (I) any duly enacted FEDERAL, STATE OR LOCAL statute or ordinance [or]; (II) any rule or regulation promulgated pursuant to [any federal, state or local] SUCH statute or ordinance; OR (III) ANY JUDICIAL OR ADMINISTRATIVE DECISION, RULING OR ORDER.

(d) "Public body" includes the following:

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(i) the United States Congress, any state legislature, or any [popularly-elected] ELECTED local governmental body, or any member or employee thereof;

(ii) any federal, state, or local [judiciary] COURT, or any member or employee thereof, or any grand or petit jury;

(iii) any federal, state, or local regulatory, administrative, or public agency or authority, or instrumentality thereof; [or]

(iv) any federal, state, or local law enforcement agency, prosecutorial office, or police or peace officer;

(V) ANY FEDERAL, STATE OR LOCAL DEPARTMENT OF AN EXECUTIVE BRANCH OF GOVERNMENT; OR

(VI) ANY DIVISION, BOARD, BUREAU, OFFICE, COMMITTEE, OR COMMISSION OF ANY OF THE PUBLIC BODIES DESCRIBED IN SUBPARAGRAPHS (I) THROUGH (V) OF THIS PARAGRAPH.

(e) "Retaliatory [personnel] action" means the discharge, suspension [or demotion of], DEMOTION, PENALIZATION OR DISCRIMINATION AGAINST an employee OR FORMER EMPLOYEE, or other adverse [employment] action taken against an employee OR FORMER EMPLOYEE [in the terms and conditions of employment].

(f) "Supervisor" means any individual within an employer's organization who has the authority to direct and control the work performance of [the affected] AN employee; or who has [managerial] authority to take corrective action regarding the [violation of the law, rule or regulation] ILLEGAL BUSINESS ACTIVITY of which the employee complains.

(g) ["Health care fraud" means health care fraud as defined by article one hundred seventy-seven of the penal law.] "AGENT" MEANS ANY INDIVIDUAL, PARTNERSHIP, ASSOCIATION, CORPORATION OR GROUP OF PERSONS ACTING ON BEHALF OF AN EMPLOYER.

(H) "ILLEGAL BUSINESS ACTIVITY" MEANS ANY PRACTICE, PROCEDURE, ACTION OR FAILURE TO ACT BY AN EMPLOYER, OR AN EMPLOYEE OR AGENT OF SUCH EMPLOYER, TAKEN IN THE COURSE OF THE EMPLOYER'S BUSINESS, WHETHER OR NOT WITHIN THE SCOPE OF EMPLOYMENT OR AGENCY, THAT IS IN VIOLATION OF ANY LAW, RULE OR REGULATION PUNISHABLE BY IMPRISONMENT OR CIVIL OR CRIMINAL PENALTY.

2. Prohibitions. An employer shall not take any retaliatory [personnel] action against an employee OR FORMER EMPLOYEE because such employee OR FORMER EMPLOYEE does any of the following WHILE EMPLOYED BY THE EMPLOYER, WHETHER OR NOT WITHIN THE SCOPE OF THE EMPLOYEE'S JOB DUTIES:

(a) discloses TO A SUPERVISOR OR A PUBLIC BODY, or threatens to [disclose] MAKE A DISCLOSURE to a [supervisor or to a] public body UNLESS THE EMPLOYER REMEDIES THE ILLEGAL BUSINESS ACTIVITY, INFORMATION ABOUT an ILLEGAL BUSINESS activity[, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud];

(b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such [violation of a law, rule or regulation by such employer] ILLEGAL BUSINESS ACTIVITY; or

(c) objects to, or refuses to participate in, any [such] ILLEGAL BUSINESS activity[, policy or practice in violation of a law, rule or regulation].

3. Application. The protection against retaliatory [personnel] action provided by PARAGRAPHS (A), (B) AND (C) OF SUBDIVISION TWO OF THIS SECTION SHALL APPLY TO ANY EMPLOYEE WHO IN GOOD FAITH REASONABLY BELIEVES THAT AN ILLEGAL BUSINESS ACTIVITY HAS OCCURRED OR WILL OCCUR,

BASED ON INFORMATION THAT THE EMPLOYEE IN GOOD FAITH REASONABLY BELIEVES TO BE TRUE; PROVIDED HOWEVER THAT THE PROTECTION AGAINST RETALIATORY ACTION PROVIDED BY paragraph (a) of subdivision two of this section pertaining to disclosure to a public body shall not apply to an employee who makes such disclosure to a public body unless the employee has [brought] MADE A GOOD FAITH EFFORT TO NOTIFY HIS OR HER EMPLOYER BY BRINGING the ILLEGAL BUSINESS activity[, policy or practice in violation of law, rule or regulation] to the attention of a supervisor [of the employer] and has afforded such employer a reasonable opportunity to correct such activity[, policy or practice]. SUCH EMPLOYER NOTIFICATION SHALL NOT BE REQUIRED WHERE: (A) THE EMPLOYER HAS NOT POSTED ANY NOTICE REQUIRED BY SUBDIVISION EIGHT OF THIS SECTION; (B) THERE IS AN IMMINENT AND SERIOUS DANGER TO THE PUBLIC HEALTH OR SAFETY; (C) THE EMPLOYEE REASONABLY BELIEVES THAT REPORTING TO THE SUPERVISOR WOULD RESULT IN A DESTRUCTION OF EVIDENCE OR OTHER CONCEALMENT OF THE ILLEGAL BUSINESS ACTIVITY; (D) SUCH ACTIVITY COULD REASONABLY BE EXPECTED TO LEAD TO ENDANGERING THE WELFARE OF A MINOR; (E) THE EMPLOYEE REASONABLY BELIEVES THAT REPORTING TO THE SUPERVISOR WOULD RESULT IN PHYSICAL HARM TO THE EMPLOYEE OR ANY OTHER PERSON; OR (F) THE EMPLOYEE REASONABLY BELIEVES THAT THE SUPERVISOR IS ALREADY AWARE OF THE ILLEGAL BUSINESS ACTIVITY AND WILL NOT CORRECT SUCH ACTIVITY.

4. Violation; remedy. (a) An employee who has been the subject of a retaliatory [personnel] action in violation of this section may institute a civil action in a court of competent jurisdiction for relief as set forth in subdivision five of this section within [one year] TWO YEARS after the alleged retaliatory [personnel] action was taken.

(b) Any action authorized by this section may be brought in the county in which the alleged retaliatory [personnel] action occurred, in the county in which the complainant resides, or in the county in which the employer has its principal place of business. IN ANY SUCH ACTION, THE PARTIES SHALL BE ENTITLED TO A JURY TRIAL.

(c) [It shall be a defense to any action brought pursuant to this section that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section.] EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, A VIOLATION OF THIS SECTION IS ESTABLISHED WHEN THE COMPLAINANT DEMONSTRATES THAT A MOTIVATING FACTOR FOR THE RETALIATORY ACTION VIOLATES SUBDIVISION TWO OF THIS SECTION. REMEDIES FOR VIOLATION OF SUBDIVISION TWO OF THIS SECTION SHALL BE LIMITED SOLELY TO THOSE PROVIDED IN PARAGRAPHS (E), (F) AND (G) OF SUBDIVISION FIVE OF THIS SECTION IF THE EMPLOYER DEMONSTRATES THAT IT WOULD HAVE TAKEN THE SAME ACTION IN THE ABSENCE OF THE IMPERMISSIBLE MOTIVATING FACTOR. It shall [also] be a defense that the individual was an independent contractor.

[(d) Notwithstanding the provisions of paragraphs (a) and (c) of this subdivision, a health care employee who has been the subject of a retaliatory action by a health care employer in violation of section seven hundred forty-one of this article may institute a civil action in a court of competent jurisdiction for relief as set forth in subdivision five of this section within two years after the alleged retaliatory personnel action was taken. In addition to the relief set forth in that subdivision, the court, in its discretion, based upon a finding that the employer acted in bad faith in the retaliatory action, may assess the employer a civil penalty of an amount not to exceed ten thousand dollars, to be paid to the improving quality of patient care fund, established pursuant to section ninety-seven-aaaa of the state finance law.]

5. Relief. In any action brought pursuant to subdivision four of this section, the court may order relief as follows:

(a) [an injunction to restrain continued violation of this section;

(b)] the reinstatement of the employee to the same position held before the retaliatory [personnel] action[,] or to an equivalent position, OR FRONT PAY IN LIEU THEREOF;

[(c)] (B) the reinstatement of full fringe benefits and seniority rights;

[(d)] (C) the compensation for lost wages, benefits and other remuneration; [and

(e)] (D) COMPENSATORY DAMAGES FOR ECONOMIC LOSS AND FOR EMOTIONAL DISTRESS;

(E) the payment by the employer of reasonable costs, disbursements, and attorney's fees;

(F) AN INJUNCTION TO RESTRAIN THE EMPLOYER'S CONTINUED VIOLATION OF THIS SECTION; AND

(G) A CIVIL PENALTY OF AN AMOUNT NOT TO EXCEED TEN THOUSAND DOLLARS AND/OR A LIQUIDATED DAMAGES AWARD EQUAL TO AMOUNTS OF DAMAGES PURSUANT TO PARAGRAPHS (C) AND (D) OF THIS SUBDIVISION, IF THE COURT, IN ITS DISCRETION, FINDS THAT THE EMPLOYER ACTED IN BAD FAITH IN THE RETALIATORY ACTION.

6. Employer relief. A court, in its discretion, may also order that reasonable attorneys' fees and court costs and disbursements be awarded to an employer if the court determines that an action brought by an employee under this section was without basis in law or in fact.

7. Existing rights. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract[; except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law].

8. PUBLICATION. EVERY EMPLOYER SHALL INFORM EMPLOYEES OF THEIR PROTECTIONS, RIGHTS AND OBLIGATIONS UNDER THIS SECTION, BY POSTING A NOTICE THEREOF. SUCH NOTICES SHALL BE POSTED CONSPICUOUSLY IN EASILY ACCESSIBLE AND WELL-LIGHTED PLACES CUSTOMARILY FREQUENTED BY EMPLOYEES AND APPLICANTS FOR EMPLOYMENT.

S 2. Subdivision 4 of section 741 of the labor law, as added by chapter 24 of the laws of 2002, is amended to read as follows:

4. Enforcement. A health care employee may seek enforcement of this section pursuant to [paragraph (d) of subdivision] SUBDIVISIONS four AND FIVE of section seven hundred forty of this article.

S 3. Subdivision 2 of section 75-b of the civil service law, as added by chapter 660 of the laws of 1984 and paragraph (a) as amended by chapter 899 of the laws of 1986, is amended to read as follows:

2. (a) A public employer shall not dismiss, SUSPEND, DEMOTE, PENALIZE, THREATEN OR DISCRIMINATE AGAINST, or take other disciplinary or other [adverse personnel action] ACT OF REPRISAL against a public employee regarding the employee's employment because the employee: (I) discloses TO A PUBLIC BODY OR THREATENS TO MAKE A DISCLOSURE TO A PUBLIC BODY OR SUPERVISOR IF THE EMPLOYER DOES NOT REMEDY THE IMPROPER CONDUCT, to a governmental body information[: (i)] regarding a violation of a law, rule or regulation which violation creates [and] OR presents a substantial and specific danger to the public health or safety[; or (ii) which the employee reasonably believes to be true and reasonably believes], OR WHICH constitutes an improper governmental action[. "Improper govern-

mental action" shall mean any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation], OR WHICH COULD REASONABLY BE EXPECTED TO LEAD TO ENDANGERING THE WELFARE OF A MINOR; (II) PROVIDES INFORMATION TO, OR TESTIFIES BEFORE, ANY PUBLIC BODY CONDUCTING AN INVESTIGATION, HEARING OR INQUIRY INTO ANY VIOLATION OR IMPROPER GOVERNMENTAL ACTION; OR (III) OBJECTS TO, OR REFUSES TO PARTICIPATE IN, ANY SUCH VIOLATION OR IMPROPER GOVERNMENTAL ACTION.

(b) THE PROTECTION AGAINST RETALIATORY ACTION PROVIDED IN SUBPARAGRAPHS (I) AND (II) OF PARAGRAPH (A) OF THIS SUBDIVISION SHALL APPLY TO ANY EMPLOYEE WHO IN GOOD FAITH REASONABLY BELIEVES THAT A VIOLATION OR IMPROPER GOVERNMENTAL ACTION HAS OCCURRED OR WILL OCCUR, BASED ON INFORMATION THAT THE EMPLOYEE IN GOOD FAITH REASONABLY BELIEVES TO BE TRUE.

(C) Prior to disclosing information pursuant to SUBPARAGRAPH (I) OF paragraph (a) of this subdivision, an employee shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety. For the purposes of this subdivision, an employee who acts pursuant to this paragraph shall be deemed to have disclosed information to a governmental body under paragraph (a) of this subdivision. NOTIFICATION TO THE APPOINTING AUTHORITY OR DESIGNEE SHALL NOT BE REQUIRED WHERE: (I) THE EMPLOYER HAS NOT POSTED ANY NOTICE REQUIRED BY SUBDIVISION FIVE OF THIS SECTION; (II) THERE IS AN IMMINENT AND SERIOUS DANGER TO THE PUBLIC HEALTH OR SAFETY; (III) THE EMPLOYEE REASONABLY BELIEVES THAT REPORTING TO THE APPOINTING AUTHORITY OR DESIGNEE WOULD RESULT IN A DESTRUCTION OF EVIDENCE OR OTHER CONCEALMENT OF THE IMPROPER GOVERNMENTAL ACTION; OR (IV) SUCH ACTIVITY COULD REASONABLY BE EXPECTED TO LEAD TO ENDANGERING THE WELFARE OF A MINOR.

(D) "IMPROPER GOVERNMENTAL ACTION" SHALL MEAN ANY PRACTICE, PROCEDURE, ACTION OR FAILURE TO ACT BY A PUBLIC EMPLOYER OR EMPLOYEE, OR AN AGENT OF SUCH EMPLOYER OR EMPLOYEE, WHICH IS UNDERTAKEN IN THE PERFORMANCE OF SUCH AGENT'S OFFICIAL DUTIES, WHETHER OR NOT SUCH ACTION IS WITHIN THE SCOPE OF SUCH PERSON'S EMPLOYMENT, AND WHICH IS IN VIOLATION OF ANY LAW, RULE OR REGULATION REGARDING GOVERNMENTAL ACTION PUNISHABLE BY IMPRISONMENT OR CIVIL OR CRIMINAL PENALTY. "LAW, RULE OR REGULATION" INCLUDES: (I) ANY DULY ENACTED FEDERAL, STATE OR LOCAL STATUTE OR ORDINANCE; (II) ANY RULE OR REGULATION PROMULGATED PURSUANT TO ANY SUCH STATUTE OR ORDINANCE; OR (III) ANY JUDICIAL OR ADMINISTRATIVE DECISION, RULING OR ORDER.

S 4. Subdivision 3 of section 75-b of the civil service law, as added by chapter 660 of the laws of 1984, is amended to read as follows:

3. (a) Where an employee is subject to dismissal or other disciplinary action under a final and binding arbitration provision, or other disciplinary procedure contained in a collectively negotiated agreement, or under section seventy-five of this title or any other provision of state or local law, OR TO THE ELIMINATION OF JOB TITLE OR CLASSIFICATION THAT UNIQUELY FITS AND SINGLES OUT SUCH EMPLOYEE and the employee reasonably believes THAT SUCH dismissal [or], other disciplinary action OR OTHER ADVERSE ACTION would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a defense before the designated arbitrator or hearing officer. The merits of such defense shall be considered and determined as part of the arbi-

tration award or hearing officer decision of the matter. If there is a finding that the dismissal or other disciplinary action is based solely on a violation by the employer of such subdivision, the arbitrator or hearing officer shall dismiss or recommend dismissal of the disciplinary proceeding, as appropriate, and, if appropriate, reinstate the employee with back pay, and, in the case of an arbitration procedure, may take other appropriate action as is permitted in the collectively negotiated agreement.

(b) Where an employee is subject to a collectively negotiated agreement which contains provisions preventing an employer from taking adverse [personnel] actions and which contains a final and binding arbitration provision to resolve alleged violations of such provisions of the agreement and the employee reasonably believes that such [personnel] action would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a claim before the arbitrator. The arbitrator shall consider such claim and determine its merits and shall, if a determination is made that such adverse [personnel] ion is based on a violation by the employer of such subdivision, take such action to remedy the violation as is permitted by the collectively negotiated agreement.

(c) [Where] IN ADDITION TO OR IN LIEU OF THE PROCEDURES SET FORTH IN PARAGRAPHS (A) AND (B) OF THIS SUBDIVISION, OR WHERE an employee is not subject to any of the provisions of [paragraph (a) or (b) of this subdivision] SUCH PARAGRAPHS, the employee may commence an action in a court of competent jurisdiction under the same terms and conditions AND FOR THE SAME RELIEF as set forth in article twenty-C of the labor law.

S 5. Section 75-b of the civil service law is amended by adding a new subdivision 5 to read as follows:

5. EVERY PUBLIC EMPLOYER SHALL INFORM EMPLOYEES OF THEIR PROTECTIONS, RIGHTS AND OBLIGATIONS UNDER THIS SECTION, BY POSTING A NOTICE THEREOF. SUCH NOTICES SHALL BE POSTED CONSPICUOUSLY IN EASILY ACCESSIBLE AND WELL-LIGHTED PLACES CUSTOMARILY FREQUENTED BY EMPLOYEES AND APPLICANTS FOR EMPLOYMENT.

S 6. This act shall take effect on the ninetieth day after it shall have become a law.