

STATE OF NEW YORK

3683

2019-2020 Regular Sessions

IN SENATE

February 12, 2019

Introduced by Sen. HOYLMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

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:

1 Section 1. Section 740 of the labor law, as added by chapter 660 of
2 the laws of 1984, paragraph (g) of subdivision 1 as added and paragraph
3 (a) of subdivision 2 as amended by chapter 442 of the laws of 2006, and
4 paragraph (d) of subdivision 4 as added by chapter 24 of the laws of
5 2002, is amended to read as follows:

6 § 740. Retaliatory ~~personnel~~ action by employers; prohibition. 1.
7 Definitions. For purposes of this section, unless the context specif-
8 ically indicates otherwise:

9 (a) "Employee" means an individual who performs services for and under
10 the control and direction of an employer for wages or other remunera-
11 tion.

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

14 (c) "Law, rule or regulation" includes: (i) any duly enacted federal,
15 state or local statute or ordinance ~~[or]; (ii) any rule or regulation~~
16 ~~promulgated pursuant to [any federal, state or local] such statute or~~
17 ~~ordinance; or (iii) any judicial or administrative decision, ruling or~~
18 ~~order.~~

19 (d) "Public body" includes the following:

20 (i) the United States Congress, any state legislature, or any ~~[popu-~~
21 ~~larly-elected] elected~~ local governmental body, or any member or employ-
22 ee thereof;

23 (ii) any federal, state, or local ~~[judiciary] court~~, or any member or
24 employee thereof, or any grand or petit jury;

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

LBD01535-02-9

(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

1 ~~[brought]~~ made a good faith effort to notify his or her employer by
2 bringing the illegal business activity~~[, policy or practice in violation~~
3 ~~of law, rule or regulation]~~ to the attention of a supervisor ~~[of the~~
4 ~~employer]~~ and has afforded such employer a reasonable opportunity to
5 correct such activity~~[, policy or practice]~~. Such employer notification
6 shall not be required where: (a) the employer has not posted any notice
7 required by subdivision eight of this section; (b) there is an imminent
8 and serious danger to the public health or safety; (c) the employee
9 reasonably believes that reporting to the supervisor would result in a
10 destruction of evidence or other concealment of the illegal business
11 activity; (d) such activity could reasonably be expected to lead to
12 endangering the welfare of a minor; (e) the employee reasonably believes
13 that reporting to the supervisor would result in physical harm to the
14 employee or any other person; or (f) the employee reasonably believes
15 that the supervisor is already aware of the illegal business activity
16 and will not correct such activity.

17 4. Violation; remedy. (a) An employee who has been the subject of a
18 retaliatory ~~[personnel]~~ action in violation of this section may insti-
19 tute a civil action in a court of competent jurisdiction for relief as
20 set forth in subdivision five of this section within ~~[one year]~~ two
21 years after the alleged retaliatory ~~[personnel]~~ action was taken.

22 (b) Any action authorized by this section may be brought in the county
23 in which the alleged retaliatory ~~[personnel]~~ action occurred, in the
24 county in which the complainant resides, or in the county in which the
25 employer has its principal place of business. In any such action, the
26 parties shall be entitled to a jury trial.

27 (c) ~~[It shall be a defense to any action brought pursuant to this~~
28 ~~section that the personnel action was predicated upon grounds other than~~
29 ~~the employee's exercise of any rights protected by this section.]~~ Except
30 as otherwise provided in this section, a violation of this section is
31 established when the complainant demonstrates that a motivating factor
32 for the retaliatory action violates subdivision two of this section.
33 Remedies for violation of subdivision two of this section shall be
34 limited solely to those provided in paragraphs (e), (f) and (g) of
35 subdivision five of this section if the employer demonstrates that it
36 would have taken the same action in the absence of the impermissible
37 motivating factor. It shall ~~[also]~~ be a defense that the individual was
38 an independent contractor.

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

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

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

1 ~~(b)~~ the reinstatement of the employee to the same position held
 2 before the retaliatory ~~personnel~~ action~~[7]~~ or to an equivalent posi-
 3 tion, or front pay in lieu thereof;

4 ~~(c)~~ (b) the reinstatement of full fringe benefits and seniority
 5 rights;

6 ~~(d)~~ (c) the compensation for lost wages, benefits and other remuner-
 7 ation; ~~and~~

8 ~~(e)~~ (d) compensatory damages for economic loss and for emotional
 9 distress;

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

12 (f) an injunction to restrain the employer's continued violation of
 13 this section; and

14 (g) a civil penalty of an amount not to exceed ten thousand dollars
 15 and/or a liquidated damages award equal to amounts of damages pursuant
 16 to paragraphs (c) and (d) of this subdivision, if the court, in its
 17 discretion, finds that the employer acted in bad faith in the retaliato-
 18 ry action.

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

23 7. Existing rights. Nothing in this section shall be deemed to dimin-
 24 ish the rights, privileges, or remedies of any employee under any other
 25 law or regulation or under any collective bargaining agreement or
 26 employment contract~~;~~ ~~except that the institution of an action in~~
 27 ~~accordance with this section shall be deemed a waiver of the rights and~~
 28 ~~remedies available under any other contract, collective bargaining~~
 29 ~~agreement, law, rule or regulation or under the common law].~~

30 8. Publication. Every employer shall inform employees of their
 31 protections, rights and obligations under this section, by posting a
 32 notice thereof. Such notices shall be posted conspicuously in easily
 33 accessible and well-lighted places customarily frequented by employees
 34 and applicants for employment.

35 § 2. Subdivision 4 of section 741 of the labor law, as added by chap-
 36 ter 24 of the laws of 2002, is amended to read as follows:

37 4. Enforcement. A health care employee may seek enforcement of this
 38 section pursuant to ~~paragraph (d) of subdivision~~ subdivisions four and
 39 five of section seven hundred forty of this article.

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

43 2. (a) A public employer shall not dismiss, suspend, demote, penalize,
 44 threaten or discriminate against, or take other disciplinary or other
 45 ~~[adverse personnel action]~~ act of reprisal against a public employee
 46 regarding the employee's employment because the employee: (i) discloses
 47 to a public body or threatens to make a disclosure to a public body or
 48 supervisor if the employer does not remedy the improper conduct, to a
 49 governmental body information~~;~~ ~~(i)~~ regarding a violation of a law,
 50 rule or regulation which violation creates ~~and~~ or presents a substan-
 51 tial and specific danger to the public health or safety~~;~~ ~~or (ii) which~~
 52 ~~the employee reasonably believes to be true and reasonably believes], or~~
 53 which constitutes an improper governmental action~~;~~ ~~"Improper govern-~~
 54 ~~mental action" shall mean any action by a public employer or employee,~~
 55 ~~or an agent of such employer or employee, which is undertaken in the~~
 56 ~~performance of such agent's official duties, whether or not such action~~

1 ~~is within the scope of his employment, and which is in violation of any~~
2 ~~federal, state or local law, rule or regulation~~, or which could reason-
3 ably be expected to lead to endangering the welfare of a minor; (ii)
4 provides information to, or testifies before, any public body conducting
5 an investigation, hearing or inquiry into any violation or improper
6 governmental action; or (iii) objects to, or refuses to participate in,
7 any such violation or improper governmental action.

8 (b) The protection against retaliatory action provided in subpara-
9 graphs (i) and (ii) of paragraph (a) of this subdivision shall apply to
10 any employee who in good faith reasonably believes that a violation or
11 improper governmental action has occurred or will occur, based on infor-
12 mation that the employee in good faith reasonably believes to be true.

13 (c) "Improper governmental action" shall mean any practice, procedure,
14 action or failure to act by a public employer or employee, or an agent
15 of such employer or employee, which is undertaken in the performance of
16 such agent's official duties, whether or not such action is within the
17 scope of such person's employment, and which is in violation of any law,
18 rule or regulation regarding governmental action punishable by imprison-
19 ment or civil or criminal penalty. "Law, rule or regulation" includes:
20 (i) any duly enacted federal, state or local statute or ordinance; (ii)
21 any rule or regulation promulgated pursuant to any such statute or ordi-
22 nance; or (iii) any judicial or administrative decision, ruling or
23 order.

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

26 3. (a) Where an employee is subject to dismissal or other disciplinary
27 action under a final and binding arbitration provision, or other disci-
28 plinary procedure contained in a collectively negotiated agreement, or
29 under section seventy-five of this title or any other provision of state
30 or local law, or to the elimination of job title or classification that
31 uniquely fits and singles out such employee and the employee reasonably
32 believes that such dismissal [✗], other disciplinary action or other
33 adverse action would not have been taken but for the conduct protected
34 under subdivision two of this section, he or she may assert such as a
35 defense before the designated arbitrator or hearing officer. The merits
36 of such defense shall be considered and determined as part of the arbi-
37 tration award or hearing officer decision of the matter. If there is a
38 finding that the dismissal or other disciplinary action is based solely
39 on a violation by the employer of such subdivision, the arbitrator or
40 hearing officer shall dismiss or recommend dismissal of the disciplinary
41 proceeding, as appropriate, and, if appropriate, reinstate the employee
42 with back pay, and, in the case of an arbitration procedure, may take
43 other appropriate action as is permitted in the collectively negotiated
44 agreement.

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

1 (c) [~~where~~] In addition to or in lieu of the procedures set forth in
2 paragraphs (a) and (b) of this subdivision, or where an employee is not
3 subject to any of the provisions of [~~paragraph (a) or (b) of this subdivi-~~
4 ~~vision~~] such paragraphs, the employee may commence an action in a court
5 of competent jurisdiction under the same terms and conditions and for
6 the same relief as set forth in article twenty-C of the labor law.

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

9 5. Every public employer shall inform employees of their protections,
10 rights and obligations under this section, by posting a notice thereof.
11 Such notices shall be posted conspicuously in easily accessible and
12 well-lighted places customarily frequented by employees and applicants
13 for employment.

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