STATE OF NEW YORK

4394--A

Cal. No. 1112

2021-2022 Regular Sessions

IN SENATE

February 4, 2021

Introduced by Sens. RAMOS, BIAGGI, GOUNARDES, JACKSON, KAMINSKY, LIU -- 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, amended on second report, ordered to a third reading, and to be reprinted as amended, retaining its place in the order of third reading

AN ACT to amend the labor law, in relation to retaliatory actions 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, paragraph (d) of subdivision 4 as added by chapter 24 of the laws of 2002, and subdivision 7 as amended by chapter 684 of the laws of 2019, is amended to read as follows:

§ 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**, including former employees, or natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers**.

(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 **executive order; (ii)** any rule or regulation promulgated pursuant to [~~any federal, state or local~~] **such** statute or ordinance **or executive order; or (iii) any judicial or administrative decision, ruling or order**.

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

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(d) "Public body" includes the following:

(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 an employee, or other adverse employment action taken against an employee in the terms and conditions of employment~~] an adverse action taken by an employer or his or her agent to discharge, threaten, penalize, or in any other manner discriminate against any employee or former employee exercising his or her rights under this section, including (i) adverse employment actions or threats to take such adverse employment actions against an employee in the terms of conditions of employment including but not limited to discharge, suspension, or demotion; (ii) actions or threats to take such actions that would adversely impact a former employee's current or future employment; or (iii) threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member, as defined in subdivision two of section four hundred fifty-nine-a of the social services law, to a federal, state, or local agency.

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

2. Prohibitions. An employer shall not take any retaliatory [~~personnel~~] action against an employee, whether or not within the scope of the employee's job duties, because such employee does any of the following:

(a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation [~~which violation creates and presents~~] or that the employee reasonably believes poses 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~~] activity, policy or practice by such employer; or

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

3. Application. The protection against retaliatory [~~personnel~~] 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 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) there is an imminent and serious danger to the public health or safety; (b) the employee reasonably believes that reporting to the supervisor would result in a destruction of evidence or other concealment of the activity, policy or practice; (c) such activity, policy or practice could reasonably be expected to lead to endangering the welfare of a minor; (d) the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or (e) the employee reasonably believes that the supervisor is already aware of the activity, policy or practice and will not correct such activity, policy or practice.

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~~] retaliatory action was predicated upon grounds other than the employee's exercise of any rights protected by this section. [~~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) the reinstatement of full fringe benefits and seniority rights;

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

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

(f) a civil penalty of an amount not to exceed ten thousand dollars; and/or

(g) the payment by the employer of punitive damages, if the violation was willful, malicious or wanton.

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.

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.

§ 2. Subdivision 4 of section 741 of the labor law, as added by chapter 24 of the laws of 2002, is amended and a new subdivision 6 is added 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.

6. 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.

§ 3. This act shall take effect on the ninetieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made by the commissioner of labor of the state of New York on or before such effective date.