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

8237--D

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I N A S S E M B L Y

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Introduced by M. of A. JOHN, MILLMAN, BENEDETTO, LANCMAN, COLTON, DenDEKKER, REILLY, STIRPE, MAGNARELLI, McENENY, CAHILL, SCHIMEL, TITONE -- Multi-Sponsored by -- M. of A. BRODSKY, CALHOUN, CHRISTENSEN, KOON, LATIMER, LIFTON, McDONOUGH, PERRY, RUSSELL, SKARTADOS, SPANO, TOWNSEND -- read once and referred to the Committee on Labor -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Labor in accordance with Assembly Rule 3, sec. 2 -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported and referred to the Committee on Rules -- Rules Committee discharged, bill amended, ordered reprinted as amended and recommitted to the Committee on Rules -- reported and referred to the Committee on Rules -- Rules Committee discharged, bill amended, ordered reprinted as amended and recommitted to the Committee on Rules

AN ACT to amend the labor law, in relation to enacting the "New York state construction industry fair play act"; and to amend the workers' compensation law, in relation to the definition of employee

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

Section 1. The labor law is amended by adding a new article 25-B to read as follows:

ARTICLE 25-B

THE NEW YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT

SECTION 861. SHORT TITLE.
861-A. LEGISLATIVE FINDINGS AND INTENT.
861-B. DEFINITIONS.
861-C. PRESUMPTION OF EMPLOYMENT IN THE CONSTRUCTION INDUSTRY.
861-D. NOTICE TO PERSONS RECEIVING REMUNERATION FROM CONTRACTORS AND SUBCONTRACTORS.
861-E. VIOLATIONS AND PENALTIES.

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

LBD11756-23-0

861-F. RETALIATION.

S 861. SHORT TITLE. THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS "THE NEW YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT".

S 861-A. LEGISLATIVE FINDINGS AND INTENT. THE LEGISLATURE HEREBY FINDS AND DECLARES THAT NEW YORK STATE'S CONSTRUCTION INDUSTRY IS EXPERIENCING DANGEROUS LEVELS OF EMPLOYEE MISCLASSIFICATION FRAUD. UNSCRUPULOUS EMPLOYERS ARE INTENTIONALLY REPORTING EMPLOYEES AS INDEPENDENT CONTRACTORS TO STATE AND FEDERAL AUTHORITIES OR WORKERS' COMPENSATION CARRIERS IN RECORD NUMBERS. IN ADDITION, THERE HAS BEEN AN EXPLOSION OF EMPLOYERS WHO OPERATE IN THE UNDERGROUND ECONOMY AND FAIL TO REPORT ALL OR A SIZABLE PORTION OF THEIR WORKERS.

THE LEGISLATURE HEREBY FINDS AND DECLARES THAT RECENT STUDIES OF NEW YORK CITY'S CONSTRUCTION INDUSTRY ALONE SUGGESTS THAT AS MANY AS FIFTY THOUSAND NEW YORK CITY CONSTRUCTION WORKERS -- NEARLY ONE IN FOUR -- ARE EITHER MISCLASSIFIED AS INDEPENDENT CONTRACTORS OR ARE EMPLOYED BY CONSTRUCTION CONTRACTORS COMPLETELY OFF THE BOOKS. CONSTRUCTION INDUSTRY FRAUD REDUCES GOVERNMENT REVENUE, SHIFTS TAX AND WORKERS' COMPENSATION INSURANCE COSTS TO LAW-ABIDING EMPLOYEES, LOWERS WORKING CONDITIONS AND STEALS JOBS FROM LEGITIMATE EMPLOYERS AND THEIR EMPLOYEES.

THEREFORE, THE LEGISLATURE HEREBY FINDS AND DECLARES THAT GOVERNMENT HAS AN OBLIGATION TO CURB THIS UNDERGROUND ECONOMY, ENFORCE LONG-STANDING EMPLOYMENT LAWS, ENSURE COMPLIANCE WITH ESSENTIAL SOCIAL INSURANCE PROTECTIONS AND ELIMINATE THE UNFAIR COMPETITIVE ADVANTAGE FROM CONTRACTORS IN THE UNDERGROUND ECONOMY BY AND THROUGH THE ENACTMENT OF THE NEW YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT.

S 861-B. DEFINITIONS. AS USED IN THIS ARTICLE:

1. "CONSTRUCTION" MEANS CONSTRUCTING, RECONSTRUCTING, ALTERING, MAINTAINING, MOVING, REHABILITATING, REPAIRING, RENOVATING OR DEMOLITION OF ANY BUILDING, STRUCTURE, OR IMPROVEMENT, OR RELATING TO THE EXCAVATION OF OR OTHER DEVELOPMENT OR IMPROVEMENT TO LAND.

2. "CONTRACTOR" MEANS ANY SOLE PROPRIETOR, PARTNERSHIP, FIRM, CORPORATION, LIMITED LIABILITY COMPANY, ASSOCIATION OR OTHER LEGAL ENTITY PERMITTED BY LAW TO DO BUSINESS WITHIN THE STATE WHO ENGAGES IN CONSTRUCTION AS DEFINED IN THIS ARTICLE.

3. "CONTRACTOR" INCLUDES A GENERAL CONTRACTOR AND A SUBCONTRACTOR.

4. "DEPARTMENT" MEANS THE DEPARTMENT OF LABOR.

5. "COMMISSIONER" MEANS THE COMMISSIONER OF LABOR.

6. "EMPLOYER" MEANS ANY CONTRACTOR THAT EMPLOYS INDIVIDUALS DEEMED EMPLOYEES UNDER THIS ARTICLE.

S 861-C. PRESUMPTION OF EMPLOYMENT IN THE CONSTRUCTION INDUSTRY. 1. ANY PERSON PERFORMING SERVICES FOR A CONTRACTOR SHALL BE CLASSIFIED AS AN EMPLOYEE UNLESS THE PERSON IS A SEPARATE BUSINESS ENTITY UNDER SUBDIVISION TWO OF THIS SECTION OR ALL OF THE FOLLOWING CRITERIA ARE MET, IN WHICH CASE THE PERSON SHALL BE AN INDEPENDENT CONTRACTOR:

(A) THE INDIVIDUAL IS FREE FROM CONTROL AND DIRECTION IN PERFORMING THE JOB, BOTH UNDER HIS OR HER CONTRACT AND IN FACT;

(B) THE SERVICE MUST BE PERFORMED OUTSIDE THE USUAL COURSE OF BUSINESS FOR WHICH THE SERVICE IS PERFORMED; AND

(C) THE INDIVIDUAL IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION, PROFESSION, OR BUSINESS THAT IS SIMILAR TO THE SERVICE AT ISSUE.

2. A BUSINESS ENTITY, INCLUDING ANY SOLE PROPRIETOR, PARTNERSHIP, CORPORATION OR ENTITY THAT MAY BE A CONTRACTOR UNDER THIS SECTION SHALL BE CONSIDERED A SEPARATE BUSINESS ENTITY FROM THE CONTRACTOR WHERE ALL THE FOLLOWING CRITERIA ARE MET:

(A) THE BUSINESS ENTITY IS PERFORMING THE SERVICE FREE FROM THE DIRECTION OR CONTROL OVER THE MEANS AND MANNER OF PROVIDING THE SERVICE, SUBJECT ONLY TO THE RIGHT OF THE CONTRACTOR FOR WHOM THE SERVICE IS PROVIDED TO SPECIFY THE DESIRED RESULT;

(B) THE BUSINESS ENTITY IS NOT SUBJECT TO CANCELLATION OR DESTRUCTION UPON SEVERANCE OF THE RELATIONSHIP WITH THE CONTRACTOR;

(C) THE BUSINESS ENTITY HAS A SUBSTANTIAL INVESTMENT OF CAPITAL IN THE BUSINESS ENTITY BEYOND ORDINARY TOOLS AND EQUIPMENT AND A PERSONAL VEHICLE;

(D) THE BUSINESS ENTITY OWNS THE CAPITAL GOODS AND GAINS THE PROFITS AND BEARS THE LOSSES OF THE BUSINESS ENTITY;

(E) THE BUSINESS ENTITY MAKES ITS SERVICES AVAILABLE TO THE GENERAL PUBLIC OR THE BUSINESS COMMUNITY ON A CONTINUING BASIS;

(F) THE BUSINESS ENTITY INCLUDES SERVICES RENDERED ON A FEDERAL INCOME TAX SCHEDULE AS AN INDEPENDENT BUSINESS OR PROFESSION;

(G) THE BUSINESS ENTITY PERFORMS SERVICES FOR THE CONTRACTOR UNDER THE BUSINESS ENTITY'S NAME;

(H) WHEN THE SERVICES BEING PROVIDED REQUIRE A LICENSE OR PERMIT, THE BUSINESS ENTITY OBTAINS AND PAYS FOR THE LICENSE OR PERMIT IN THE BUSINESS ENTITY'S NAME;

(I) THE BUSINESS ENTITY FURNISHES THE TOOLS AND EQUIPMENT NECESSARY TO PROVIDE THE SERVICE;

(J) IF NECESSARY, THE BUSINESS ENTITY HIRES ITS OWN EMPLOYEES WITHOUT CONTRACTOR APPROVAL, PAYS THE EMPLOYEES WITHOUT REIMBURSEMENT FROM THE CONTRACTOR AND REPORTS THE EMPLOYEES' INCOME TO THE INTERNAL REVENUE SERVICE;

(K) THE CONTRACTOR DOES NOT REPRESENT THE BUSINESS ENTITY AS AN EMPLOYEE OF THE CONTRACTOR TO ITS CUSTOMERS; AND

(L) THE BUSINESS ENTITY HAS THE RIGHT TO PERFORM SIMILAR SERVICES FOR OTHERS ON WHATEVER BASIS AND WHENEVER IT CHOOSES.

3. THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES OR TO PAY UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMIUMS WITH RESPECT TO AN INDIVIDUAL'S WAGES SHALL NOT BE CONSIDERED IN MAKING A DETERMINATION UNDER THIS SECTION, EXCEPT AS SET FORTH IN PARAGRAPH (F) OF SUBDIVISION TWO OF THIS SECTION.

4. AN INDIVIDUAL'S ACT OF SECURING WORKERS' COMPENSATION INSURANCE WITH A CARRIER AS A SOLE PROPRIETOR, PARTNERSHIP OR OTHERWISE SHALL NOT BE BINDING ON ANY DETERMINATION UNDER THIS SECTION.

5. WHEN A BUSINESS ENTITY MEETS THE DEFINITION OF A SEPARATE BUSINESS ENTITY PURSUANT TO SUBDIVISION TWO OF THIS SECTION, THE SEPARATE BUSINESS ENTITY WILL BE CONSIDERED A CONTRACTOR SUBJECT TO ALL THE PROVISIONS OF THIS ARTICLE IN REGARD TO THE CLASSIFICATION OF INDIVIDUALS PERFORMING SERVICES FOR IT.

S 861-D. NOTICE TO PERSONS RECEIVING REMUNERATION FROM CONTRACTORS AND SUBCONTRACTORS. 1. EVERY CONTRACTOR SHALL POST IN A PROMINENT AND ACCESSIBLE PLACE ON THE SITE WHERE THE CONSTRUCTION IS PERFORMED A LEGIBLE STATEMENT, PROVIDED BY THE COMMISSIONER, THAT DESCRIBES THE RESPONSIBILITY OF INDEPENDENT CONTRACTORS TO PAY TAXES REQUIRED BY STATE AND FEDERAL LAW, THE RIGHTS OF EMPLOYEES TO WORKERS' COMPENSATION, UNEMPLOYMENT BENEFITS, MINIMUM WAGE, OVERTIME AND OTHER FEDERAL AND STATE WORKPLACE PROTECTIONS, AND THE PROTECTIONS AGAINST RETALIATION AND THE PENALTIES IN THIS ARTICLE IF THE CONTRACTOR FAILS TO PROPERLY CLASSIFY AN INDIVIDUAL AS AN EMPLOYEE. THIS NOTICE SHALL ALSO CONTAIN CONTACT INFORMATION FOR INDIVIDUALS TO FILE COMPLAINTS OR INQUIRE WITH THE COMMISSIONER ABOUT EMPLOYMENT CLASSIFICATION STATUS. THIS INFORMATION SHALL BE PROVIDED IN ENGLISH, SPANISH OR OTHER LANGUAGES REQUIRED BY THE COMMIS-

SIONER. THE POSTED STATEMENT SHALL BE CONSTRUCTED OF MATERIALS CAPABLE OF WITHSTANDING ADVERSE WEATHER CONDITIONS.

2. WITHIN THIRTY DAYS OF THE EFFECTIVE DATE OF THIS ARTICLE, THE COMMISSIONER SHALL CREATE THE NOTICE DESCRIBED IN SUBDIVISION ONE OF THIS SECTION AND POST THE NOTICE ON THE DEPARTMENT'S WEBSITE FOR DOWNLOADING BY CONTRACTORS.

3. CONTRACTORS WHO VIOLATE THIS SECTION SHALL BE SUBJECT TO A CIVIL PENALTY OF UP TO ONE THOUSAND FIVE HUNDRED DOLLARS FOR A FIRST VIOLATION, AND UP TO FIVE THOUSAND DOLLARS FOR A SUBSEQUENT VIOLATION WITHIN A FIVE YEAR PERIOD.

S 861-E. VIOLATIONS AND PENALTIES. 1. ANY CONTRACTOR WHO WILFULLY FAILS TO PROPERLY CLASSIFY AN INDIVIDUAL AS AN EMPLOYEE AS PROVIDED UNDER SECTION EIGHT HUNDRED SIXTY-ONE-C OF THIS ARTICLE SHALL BE SUBJECT TO THE CIVIL AND CRIMINAL PENALTIES PROVIDED UNDER THIS SECTION. THE CIVIL PENALTIES SET FORTH IN THIS SECTION SHALL BE IMPOSED AS FOLLOWS: BY THE COMMISSIONER WHERE SUCH PENALTY IS BASED ON A VIOLATION OF THIS CHAPTER; BY THE CHAIR OF THE WORKERS' COMPENSATION BOARD WHERE SUCH PENALTY IS BASED ON A VIOLATION OF THE WORKERS' COMPENSATION LAW; AND BY THE COMMISSIONER OF TAX AND FINANCE WHEN SUCH PENALTY IS BASED ON A VIOLATION OF THE TAX LAW, PROVIDED THAT NO MORE THAN ONE CIVIL PENALTY UNDER THIS SECTION MAY BE IMPOSED PER EMPLOYEE PER INCIDENT OF MISCLASSIFICATION.

(A) THE WORKERS' COMPENSATION BOARD SHALL PROVIDE A COPY OF ANY ORDER RELATING TO THE MISCLASSIFICATION OF AN EMPLOYEE, THE INTENTIONAL AND MATERIAL UNDERPAYMENT OR CONCEALMENT OF PAYROLL, OR THE FAILURE TO SECURE WORKERS' COMPENSATION IN THE CONSTRUCTION INDUSTRY TO THE COMMISSIONER AND COMMISSIONER OF TAXATION AND FINANCE NO LATER THAN SEVEN DAYS AFTER THE ISSUANCE OF THE ORDER.

(B) NOTWITHSTANDING THE SECRECY PROVISIONS CONTAINED IN ARTICLES NINE-A AND TWENTY-TWO OF THE TAX LAW, THE DEPARTMENT OF TAXATION AND FINANCE SHALL PROVIDE A COPY OF ANY ASSESSMENT FOR FAILURE TO PAY BUSINESS, CORPORATE OR PERSONAL INCOME TAX BY AN EMPLOYER IN THE CONSTRUCTION INDUSTRY ARISING OUT OF THE MISCLASSIFICATION OF AN EMPLOYEE TO THE COMMISSIONER AND CHAIR OF THE WORKERS' COMPENSATION BOARD NO LATER THAN SEVEN DAYS AFTER THE ISSUANCE OF THE ASSESSMENT.

(C) UPON THE ISSUANCE OF AN ORDER OR DETERMINATION BY THE COMMISSIONER FOR A VIOLATION AND PENALTIES UNDER THIS ARTICLE, THE COMMISSIONER SHALL PROVIDE A COPY OF THE ORDER TO THE CHAIR OF THE WORKERS' COMPENSATION BOARD AND THE COMMISSIONER OF TAXATION AND FINANCE NO LATER THAN SEVEN DAYS AFTER THE ISSUANCE OF THE ORDER.

2. FOR THE PURPOSES OF THIS SECTION, THE TERM "WILLFULLY VIOLATES" MEANS A CONTRACTOR KNEW OR SHOULD HAVE KNOWN THAT HIS OR HER CONDUCT WAS PROHIBITED BY THIS SECTION.

3. ANY CONTRACTOR WHO WILLFULLY VIOLATES SECTION EIGHT HUNDRED SIXTY-ONE-C OF THIS ARTICLE SHALL BE SUBJECT TO A CIVIL PENALTY OF UP TO TWENTY-FIVE HUNDRED DOLLARS FOR THE FIRST VIOLATION PER MISCLASSIFIED EMPLOYEE AND TO A CIVIL PENALTY OF UP TO FIVE THOUSAND DOLLARS FOR EACH SUBSEQUENT VIOLATION PER MISCLASSIFIED EMPLOYEE WITHIN A FIVE YEAR PERIOD.

4. IN ADDITION TO CIVIL PENALTIES, THE CRIMINAL PENALTIES IMPOSED ON A CONTRACTOR WHO WILLFULLY VIOLATES THE PROVISIONS OF THIS ARTICLE SHALL BE A MISDEMEANOR AND UPON CONVICTION SHALL BE PUNISHED FOR A FIRST OFFENSE BY IMPRISONMENT FOR NOT MORE THAN THIRTY DAYS OR A FINE NOT TO EXCEED TWENTY-FIVE THOUSAND DOLLARS AND FOR A SUBSEQUENT OFFENSE BY IMPRISONMENT FOR NOT MORE THAN SIXTY DAYS OR A FINE NOT TO EXCEED FIFTY THOUSAND DOLLARS.

5. IF THE CONTRACTOR IS A CORPORATION, ANY OFFICER OF SUCH CORPORATION OR SHAREHOLDER WHO OWNS OR CONTROLS AT LEAST TEN PERCENT OF THE OUTSTANDING STOCK OF SUCH CORPORATION WHO KNOWINGLY PERMITS THE CORPORATION TO WILLFULLY VIOLATE THE PROVISIONS OF THIS ARTICLE SHALL ALSO BE IN VIOLATION OF THIS ARTICLE AND THE CIVIL AND CRIMINAL PENALTIES HEREIN SHALL ATTACH TO SUCH OFFICER UPON CONVICTION.

6. ANY CONTRACTOR SUBJECT TO CIVIL PENALTIES UNDER THIS ARTICLE SHALL ALSO BE SUBJECT TO ANY OTHER APPLICABLE PENALTIES OR REMEDIES PROVIDED BY LAW FOR FAILURE TO PAY ANY OTHER STATUTORY PAYMENT OR COVERAGE OBLIGATIONS, INCLUDING BUT NOT LIMITED TO, UNEMPLOYMENT INSURANCE, WORKERS' COMPENSATION INSURANCE, OR BUSINESS, CORPORATE OR PERSONAL INCOME TAX, AS FOLLOWS:

(A) FOR FAILURE TO PAY UNEMPLOYMENT INSURANCE TAX, THE PENALTIES IMPOSED BY SECTION FIVE HUNDRED SEVENTY OF THIS CHAPTER.

(B) FOR INTENTIONAL AND MATERIAL UNDERSTATEMENT OR CONCEALMENT OF PAYROLL OR FAILURE TO SECURE WORKERS' COMPENSATION INSURANCE, THE PENALTIES IMPOSED BY PARAGRAPH (D) OF SUBDIVISION ONE OF SECTION FIFTY-TWO OF THE WORKERS' COMPENSATION LAW, AND FOR FAILURE TO KEEP A TRUE AND ACCURATE RECORD PURSUANT TO SECTION ONE HUNDRED THIRTY-ONE OF THE WORKERS' COMPENSATION LAW, THE PENALTIES OF SECTION ONE HUNDRED THIRTY-ONE OF THE WORKERS' COMPENSATION LAW.

(C) FOR FAILURE TO PAY BUSINESS, CORPORATE OR PERSONAL INCOME TAX, THE PENALTIES IMPOSED BY SECTION SIX HUNDRED EIGHTY-FIVE AND ONE THOUSAND EIGHTY-FIVE OF THE TAX LAW.

7. ANY CONTRACTOR OR ANY OFFICER OR SHAREHOLDER WHO OWNS OR CONTROLS AT LEAST TEN PERCENT OF THE OUTSTANDING STOCK OF SUCH CORPORATION THAT HAS BEEN CONVICTED OF A MISDEMEANOR SHALL BE SUBJECT TO DEBARMENT AND BE INELIGIBLE TO SUBMIT A BID ON OR BE AWARDED ANY PUBLIC WORKS CONTRACT WITH THE STATE, ANY MUNICIPAL CORPORATION, PUBLIC BENEFIT CORPORATION, PUBLIC AUTHORITY OR PUBLIC BODY FOR A PERIOD OF UP TO ONE YEAR FROM THE DATE OF SUCH CONVICTION OR FINAL DETERMINATION, OR UP TO FIVE YEARS IN THE EVENT OF ANY SUBSEQUENT VIOLATION.

8. ANY SUBSTANTIALLY OWNED AFFILIATED ENTITY OF A CONTRACTOR, AS DEFINED BY PARAGRAPH G OF SUBDIVISION FIVE OF SECTION TWO HUNDRED TWENTY OF THIS CHAPTER, SHALL BE SUBJECT TO THE SAME CIVIL PENALTY PROVIDED UNDER THIS ARTICLE FOR A VIOLATION OF SUCH PROVISION.

9. ANY PENALTIES IMPOSED UNDER THIS SECTION BY THE COMMISSIONER SHALL BE APPEALED TO THE INDUSTRIAL BOARD OF APPEALS IN ACCORDANCE WITH ARTICLE THREE OF THIS CHAPTER. ANY PENALTIES IMPOSED UNDER THIS SECTION BY THE WORKERS' COMPENSATION BOARD OR COMMISSIONER OF TAXATION AND FINANCE SHALL BE APPEALED IN THE SAME MANNER AS THE UNDERLYING VIOLATION.

10. NOTHING IN THIS SECTION SHALL LIMIT THE AVAILABILITY OF OTHER REMEDIES AT LAW OR IN EQUITY FOR A VIOLATION OF THIS ARTICLE.

11. ANY FEE OR PENALTY ASSESSED FOR A VIOLATION OF THIS ARTICLE SHALL BE DEPOSITED INTO THE DEPARTMENT'S FEE AND PENALTY ACCOUNT.

S 861-F. RETALIATION. 1. IT IS A VIOLATION OF THIS ARTICLE FOR AN EMPLOYER OR ANY AGENT OF ANY EMPLOYER, TO RETALIATE THROUGH DISCHARGE OR IN ANY OTHER MANNER AGAINST ANY PERSON IN THE TERMS OF CONDITIONS OF HIS OR HER EMPLOYMENT FOR EXERCISING ANY RIGHTS GRANTED UNDER THIS ARTICLE FOR:

(A) MAKING, OR THREATENING TO MAKE, A COMPLAINT TO AN EMPLOYER, CO-WORKER OR TO A PUBLIC BODY THAT RIGHTS GUARANTEED UNDER THIS ARTICLE HAVE BEEN VIOLATED;

(B) CAUSING TO BE INSTITUTED ANY PROCEEDING UNDER OR RELATED TO THIS ARTICLE; OR

(C) PROVIDING INFORMATION TO, OR TESTIFYING BEFORE, ANY PUBLIC BODY CONDUCTING AN INVESTIGATION, HEARING OR INQUIRY INTO ANY SUCH VIOLATION OF A LAW, RULE OR REGULATION BY SUCH EMPLOYER. NOTHING IN THIS SECTION SHALL LIMIT THE COMMISSIONER'S AUTHORITY UNDER SECTION TWO HUNDRED FIFTEEN OF THE LABOR LAW, OR ANY OTHER STATUTE.

2. ANY ACT OF RETALIATION UNDER THIS SECTION SHALL SUBJECT AN EMPLOYER TO THE CIVIL PENALTIES UNDER SECTION EIGHT HUNDRED SIXTY-ONE-E OF THIS ARTICLE, OR TO A PRIVATE CAUSE OF ACTION, OR BOTH.

S 2. Paragraph (b) of subdivision 1 of section 511 of the labor law is amended by adding a new subparagraph 1-b to read as follows:

(1-B) AS AN EMPLOYEE IN THE CONSTRUCTION INDUSTRY UNLESS THE PRESUMPTION OF EMPLOYMENT CAN BE OVERCOME, AS PROVIDED UNDER SECTION EIGHT HUNDRED SIXTY-ONE-C OF THIS CHAPTER; OR

S 3. The opening paragraph of subdivision 4 of section 2 of the workers' compensation law, as amended by chapter 205 of the laws of 1993, is amended to read as follows:

"Employee" means a person engaged in one of the occupations enumerated in section three OF THIS ARTICLE or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his OR HER employment away from the plant of his OR HER employer; "EMPLOYEE" SHALL ALSO MEAN FOR THE PURPOSES OF THIS CHAPTER ANY INDIVIDUAL PERFORMING SERVICES IN CONSTRUCTION FOR A CONTRACTOR WHO DOES NOT OVERCOME THE PRESUMPTION OF EMPLOYMENT AS PROVIDED UNDER SECTION EIGHT HUNDRED SIXTY-ONE-C OF THE LABOR LAW; "employee" shall also mean for the purposes of this chapter civil defense volunteers who are personnel of volunteer agencies sponsored or authorized by a local office under regulations of the civil defense commission, to the extent of the provisions of groups seventeen and nineteen; "employee" shall at the election of a municipal corporation made pursuant to local law duly enacted also mean a member of an auxiliary police organization authorized by local law; and for the purposes of this chapter only a newspaper carrier under the age of eighteen years as defined in section thirty-two hundred twenty-eight of the education law, and shall not include domestic servants except as provided in section three of this chapter, and except where the employer has elected to bring such employees under the law by securing compensation in accordance with the terms of section fifty of this chapter. The term "employee" shall not include persons who are members of a supervised amateur athletic activity operated on a non-profit basis, provided that said members are not also otherwise engaged or employed by any person, firm or corporation participating in said athletic activity, nor shall it include the spouse or minor child of an employer who is a farmer unless the services of such spouse or minor child shall be engaged by said employer under an express contract of hire nor shall it include an executive officer of a corporation who at all times during the period involved owns all of the issued and outstanding stock of the corporation and holds all of the offices pursuant to paragraph (e) of section seven hundred fifteen of the business corporation law or two executive officers of a corporation who at all times during the period involved between them own all of the issued and outstanding stock of such corporation and hold all such offices except as provided in subdivision six of section fifty-four of this chapter provided, however, that where there are two executive officers of a corporation each officer must own at least one share of stock, nor shall it include a self-employed person or a partner of a partnership as defined in section ten of the partnership law who is not covered under a

compensation insurance contract or a certificate of self-insurance as provided in subdivision eight of section fifty-four of this chapter, nor shall it include farm laborers except as provided in group fourteen-b of section three of this chapter. If a farm labor contractor recruits or supplies farm laborers for work on a farm, such farm laborers shall for the purposes of this chapter be deemed to be employees of the owner or lessee of such farm. The term "employee" shall not include baby sitters as defined in subdivision three of section one hundred thirty-one and subdivision three of section one hundred thirty-two of the labor law or minors fourteen years of age or over engaged in casual employment consisting of yard work and household chores in and about a one family owner-occupied residence or the premises of a non-profit, non-commercial organization, not involving the use of power-driven machinery. The term "employee" shall not include persons engaged by the owner in casual employment consisting of yard work, household chores and making repairs to or painting in and about a one-family owner-occupied residence. The term "employee" shall not include the services of a licensed real estate broker or sales associate if it be proven that (a) substantially all of the remuneration (whether or not paid in cash) for the services performed by such broker or sales associate is directly related to sales or other output (including the performance of services) rather than to the number of hours worked; (b) the services performed by the broker or sales associate are performed pursuant to a written contract executed between such broker or sales associate and the person for whom the services are performed within the past twelve to fifteen months; and (c) the written contract provided for in paragraph (b) [herein] OF THIS SUBDIVISION was not executed under duress and contains the following provisions:

S 4. Notwithstanding any other provision of the law to the contrary, the provisions of section 861-c of the labor law, as added by section one of this act, shall apply to and be utilized for all determinations of a construction industry individual's employment status under the labor law and the workers' compensation law, but not the tax law.

S 5. This act shall take effect on the sixtieth day after it shall have become a law.