

5194

2009-2010 Regular Sessions

I N   S E N A T E

April 27, 2009

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Introduced by Sen. SAVINO -- 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 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     S 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.

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(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 other adverse employment action taken against an 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.

(H) "AGENT" MEANS ANY INDIVIDUAL, PARTNERSHIP, ASSOCIATION, CORPORATION OR GROUP OF PERSONS ACTING ON BEHALF OF AN EMPLOYER.

(I) "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, WHICH IS IN VIOLATION OF ANY LAW, RULE OR REGULATION.

2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:

(a) discloses, or threatens to disclose to a supervisor or to a public body 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 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 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 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]. EMPLOYER NOTIFICATION SHALL NOT BE REQUIRED WHERE: (A) THE

1 EMPLOYER HAS NOT COMPLIED WITH THE PUBLICATION REQUIREMENTS OF SUBDIVI-  
2 SION EIGHT OF THIS SECTION; (B) THERE IS AN IMMINENT AND SERIOUS DANGER  
3 TO THE PUBLIC HEALTH OR SAFETY; OR (C) THE EMPLOYEE REASONABLY BELIEVES  
4 THAT REPORTING TO THE SUPERVISOR WOULD RESULT IN A DESTRUCTION OF  
5 EVIDENCE OR OTHER CONCEALMENT OF THE ILLEGAL BUSINESS ACTIVITY.

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

11 (b) Any action authorized by this section may be brought in the county  
12 in which the alleged retaliatory personnel action occurred, in the coun-  
13 ty in which the complainant resides, or in the county in which the  
14 employer has its principal place of business.

15 (c) It shall be a defense to any action brought pursuant to this  
16 section that the personnel action was predicated upon grounds other than  
17 the employee's exercise of any rights protected by this section. It  
18 shall also be a defense that the individual was an independent contrac-  
19 tor.

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

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

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

36 (b)] the reinstatement of the employee to the same position held  
37 before the retaliatory personnel action, or to an equivalent position;

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

40 [(d)] (C) the compensation for lost wages, benefits and other remuner-  
41 ation; [and

42 (e)] (D) COMPENSATORY DAMAGES FOR ECONOMIC LOSS;

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

45 (F) AN INJUNCTION TO RESTRAIN THE EMPLOYER'S CONTINUED VIOLATION OF  
46 THIS SECTION WITH RESPECT TO THE EMPLOYEE; AND

47 (G) A CIVIL PENALTY OF AN AMOUNT NOT TO EXCEED TEN THOUSAND DOLLARS,  
48 IF THE COURT, IN ITS DISCRETION, FINDS THAT THE EMPLOYER ACTED IN BAD  
49 FAITH IN THE RETALIATORY ACTION.

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

55 7. Existing rights. Nothing in this section shall be deemed to dimin-  
56 ish the rights, privileges, or remedies of any employee under any other

1 law or regulation or under any collective bargaining agreement or  
2 employment contract; except that the institution of an action in accord-  
3 ance with this section shall be deemed a waiver of the rights and reme-  
4 dies available under any other contract, collective bargaining agree-  
5 ment, law, rule or regulation or under the common law.

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

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

14 2. (a) A public employer shall not dismiss, SUSPEND, DEMOTE, PENALIZE  
15 OR DISCRIMINATE AGAINST, or take other disciplinary or other adverse  
16 personnel action against a public employee regarding the employee's  
17 employment because the employee:

18 (I) discloses OR THREATENS TO DISCLOSE to a governmental body  
19 information[: (i)] regarding a violation of a law, rule or regulation  
20 which violation creates and presents a substantial and specific danger  
21 to the public health or safety[; or (ii) which the employee reasonably  
22 believes to be true and reasonably believes] OR WHICH constitutes an  
23 improper governmental action[. "Improper governmental action" shall mean  
24 any action by a public employer or employee, or an agent of such employ-  
25 er or employee, which is undertaken in the performance of such agent's  
26 official duties, whether or not such action is within the scope of his  
27 employment, and which is in violation of any federal, state or local  
28 law, rule or regulation.];

29 (II) PROVIDES INFORMATION TO, OR TESTIFIES BEFORE, ANY PUBLIC BODY  
30 CONDUCTING AN INVESTIGATION, HEARING OR INQUIRY INTO ANY VIOLATION OR  
31 ACTION DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH; OR

32 (III) OBJECTS TO, OR REFUSES TO PARTICIPATE IN, ANY SUCH VIOLATION OR  
33 ACTION.

34 (b) THE PROTECTION AGAINST RETALIATORY PERSONNEL ACTION PROVIDED IN  
35 PARAGRAPH (A) OF THIS SUBDIVISION SHALL APPLY TO ANY EMPLOYEE WHO IN  
36 GOOD FAITH REASONABLY BELIEVES THAT A VIOLATION OR IMPROPER GOVERNMENTAL  
37 ACTION HAS OCCURRED OR WILL OCCUR, BASED ON INFORMATION THAT THE EMPLOY-  
38 EE IN GOOD FAITH REASONABLY BELIEVES TO BE TRUE.

39 (C) Prior to disclosing information pursuant to [paragraph (a)]  
40 SUBPARAGRAPH (I) OF PARAGRAPH (A) of this subdivision, an employee shall  
41 have made a good faith effort to provide the appointing authority or his  
42 or her designee the information to be disclosed and shall provide the  
43 appointing authority or designee a reasonable time to take appropriate  
44 action unless there is imminent and serious danger to public health or  
45 safety. For the purposes of this subdivision, an employee who acts  
46 pursuant to this paragraph shall be deemed to have disclosed information  
47 to a governmental body under paragraph (a) of this subdivision. NOTIFI-  
48 CATION TO THE APPOINTING AUTHORITY OR DESIGNEE SHALL NOT BE REQUIRED  
49 WHERE: (I) THE PUBLIC EMPLOYER HAS NOT COMPLIED WITH THE PUBLICATION  
50 REQUIREMENTS OF SUBDIVISION FIVE OF THIS SECTION; (II) THERE IS AN IMMI-  
51 NENT AND SERIOUS DANGER TO THE PUBLIC HEALTH OR SAFETY; OR (III) THE  
52 EMPLOYEE REASONABLY BELIEVES THAT REPORTING TO THE APPOINTING AUTHORITY  
53 OR DESIGNEE WOULD RESULT IN A DESTRUCTION OF EVIDENCE OR OTHER CONCEAL-  
54 MENT OF THE ILLEGAL BUSINESS ACTIVITY.

55 (D) "IMPROPER GOVERNMENTAL ACTION" SHALL MEAN ANY PRACTICE, PROCEDURE,  
56 ACTION OR FAILURE TO ACT BY A PUBLIC EMPLOYER OR EMPLOYEE, OR AN AGENT

1 OF SUCH EMPLOYER OR EMPLOYEE, WHICH IS UNDERTAKEN IN THE PERFORMANCE OF  
2 SUCH AGENT'S OFFICIAL DUTIES, WHETHER OR NOT SUCH ACTION IS WITHIN THE  
3 SCOPE OF SUCH PERSON'S EMPLOYMENT, AND WHICH IS IN VIOLATION OF ANY LAW,  
4 RULE OR REGULATION. "LAW, RULE OR REGULATION" INCLUDES: (I) ANY DULY  
5 ENACTED FEDERAL, STATE OR LOCAL STATUTE OR ORDINANCE; (II) ANY RULE OR  
6 REGULATION PROMULGATED PURSUANT TO ANY SUCH STATUTE OR ORDINANCE; OR  
7 (III) ANY JUDICIAL OR ADMINISTRATIVE DECISION, RULING OR ORDER.

8 S 3. Paragraph (c) of subdivision 3 of section 75-b of the civil  
9 service law, as added by chapter 660 of the laws of 1984, is amended to  
10 read as follows:

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

17 S 4. Section 75-b of the civil service law is amended by adding a new  
18 subdivision 5 to read as follows:

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

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