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

8210

I N S E N A T E

June 16, 2010

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

AN ACT to amend the labor law, in relation to the payment of wages

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

Section 1. Subdivisions 2 and 3 of section 190 of the labor law, subdivision 2 as added by chapter 548 of the laws of 1966 and subdivision 3 as amended by chapter 281 of the laws of 2002, are amended and two new subdivisions 10 and 11 are added to read as follows:

2. "Employee" means [any person employed for hire by an employer in any employment] *A NATURAL PERSON WHO IS EMPLOYED IN THIS STATE BY AN EMPLOYER, INCLUDING AN INDIVIDUAL WHO IS IN RECEIPT OF OR IS ENTITLED TO ANY COMPENSATION FOR LABOR PERFORMED FOR ANY EMPLOYER. EMPLOYEE ALSO INCLUDES A COMMISSION SALESPERSON WHO TAKES ORDERS OR PERFORMS SERVICES ON BEHALF OF A PRINCIPAL AND WHO IS PAID ON THE BASIS OF COMMISSIONS, BUT DOES NOT INCLUDE PERSONS WHO PURCHASE FOR THEIR OWN ACCOUNT FOR RESALE.*

3. "Employer" [includes any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service] *MEANS A PERSON, FIRM OR CORPORATION, AGENT, MANAGER, REPRESENTATIVE, CONTRACTOR, SUBCONTRACTOR OR PRINCIPAL, OR OTHER PERSON ACTING DIRECTLY OR INDIRECTLY IN THE INTEREST OF AN EMPLOYER TO SUFFER OR PERMIT ANOTHER PERSON TO WORK; WHETHER A PERSON IS AN INDEPENDENT CONTRACTOR OR AN EMPLOYEE SHALL BE DETERMINED ACCORDING TO THE STANDARDS OF THE FEDERAL FAIR LABOR STANDARDS ACT, 29 U.S.C. 201 TO 219, BUT THE BURDEN OF PROOF SHALL BE UPON THE PARTY FOR WHOM THE WORK IS PERFORMED TO SHOW INDEPENDENT CONTRACTOR STATUS BY CLEAR AND CONVINCING EVIDENCE.* The term "employer" shall not include a governmental agency.

10. "INDEPENDENT CONTRACTOR" MEANS A PERSON WHO:

(A) PERFORMS SERVICES FREE FROM DIRECTION AND CONTROL OVER THE MEANS AND MANNER OF PROVIDING THE SERVICES, SUBJECT ONLY TO THE RIGHT OF THE PERSON OR ENTITY FOR WHOM SERVICES ARE PROVIDED TO SPECIFY THE DESIRED RESULT;

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

LBD17744-01-0

(B) FURNISHES THE TOOLS AND EQUIPMENT NECESSARY TO PROVIDE THE SERVICE;

(C) OPERATES A BUSINESS THAT IS CONSIDERED INSEPARABLE FROM THE INDIVIDUAL FOR PURPOSES OF TAXES, PROFITS, AND LIABILITIES:

(I) IN WHICH THE INDIVIDUAL:

(A) OWNS ALL OF THE ASSETS AND PROFITS OF THE BUSINESS; AND

(B) HAS SOLE, UNLIMITED, PERSONAL LIABILITY FOR ALL OF THE DEBTS AND LIABILITIES OF THE BUSINESS, UNLESS THE BUSINESS IS ORGANIZED AS A SINGLE-OWNED CORPORATE ENTITY, TO WHICH SOLE, UNLIMITED PERSONAL LIABILITY DOES NOT APPLY; AND

(II) FOR WHICH:

(A) THE INDIVIDUAL DOES NOT PAY TAXES FOR THE BUSINESS SEPARATELY BUT REPORTS BUSINESS INCOME AND LOSSES ON THE INDIVIDUAL'S PERSONAL TAX RETURN; AND

(B) IF THE BUSINESS IS ORGANIZED AS A CORPORATE ENTITY AND THE INDIVIDUAL OTHERWISE QUALIFIES AS AN EXEMPT PERSON UNDER THIS ARTICLE, THE INDIVIDUAL FILES A SEPARATE FEDERAL INFORMATIONAL TAX RETURN FOR THE ENTITY AS REQUIRED BY LAW;

(D) EXERCISES COMPLETE CONTROL OVER THE MANAGEMENT AND OPERATIONS OF THE BUSINESS; AND

(E) EXERCISES THE RIGHT AND OPPORTUNITY ON A CONTINUING BASIS TO PERFORM THE SERVICES OF THE BUSINESS FOR MULTIPLE ENTITIES AT THE INDIVIDUAL'S SOLE CHOICE AND DISCRETION.

11. "LIQUIDATED DAMAGES" MEANS THE SUM OF FIVE PERCENT MULTIPLIED BY THE AMOUNT OF ANY WAGES THAT WERE NOT PAID OR OF ANY AUTHORIZED EXPENSES THAT WERE NOT REIMBURSED ON A REGULAR PAYDAY OR ON ANOTHER DAY, MULTIPLIED BY THE TOTAL NUMBER OF DAYS, EXCLUDING SUNDAYS, LEGAL HOLIDAYS, AND THE FIRST SEVEN DAYS AFTER THE REGULAR PAYDAY ON WHICH WAGES WERE NOT PAID OR EXPENSES WERE NOT REIMBURSED. HOWEVER, SUCH SUM SHALL NOT EXCEED TWICE THE AMOUNT OF THE UNPAID WAGES AND SHALL NOT ACCUMULATE WHEN AN EMPLOYER IS SUBJECT TO A PETITION FILED IN BANKRUPTCY.

S 2. Section 198-a of the labor law is amended by adding a new subdivision 4 to read as follows:

4. ANY WEEK WHERE AN INDIVIDUAL EMPLOYEE WAS NOT PAID THE LEGALLY REQUIRED WAGES UNDER THIS ARTICLE, STATE TAXES WERE NOT WITHHELD, OR IN THE CASE OF RETALIATION AGAINST AN EMPLOYEE, EVERY WEEK AFTER RETALIATION HAS OCCURRED UNTIL COMPENSATION IS FINALLY MADE, SHALL CONSTITUTE A SEPARATE VIOLATION OF THE PROVISIONS OF THIS ARTICLE.

S 3. Section 195 of the labor law is amended by adding a new subdivision 7 to read as follows:

7. ON EACH REGULAR PAYDAY, SEND TO EACH EMPLOYEE BY MAIL OR PROVIDE AT THE EMPLOYEE'S NORMAL PLACE OF EMPLOYMENT DURING NORMAL EMPLOYMENT HOURS A STATEMENT SHOWING THE HOURS THE EMPLOYEE WORKED, THE WAGES EARNED BY THE EMPLOYEE, AND DEDUCTIONS MADE FOR THE EMPLOYEE.

S 4. Subdivision 1-a of section 198 of the labor law, as amended by chapter 372 of the laws of 2009, is amended to read as follows:

1-a. On behalf of any employee paid less than the wage to which he or she is entitled under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim and as part of such legal action, in addition to any other remedies and penalties otherwise available under this article, the commissioner may assess against the employer an additional amount as liquidated damages [equal to twenty-five percent of the total amount of wages found to be due] AS DEFINED IN SECTION ONE HUNDRED NINETY OF THIS ARTICLE, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law. In any

action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee reasonable attorney's fees and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages [equal to twenty-five percent of the total amount of the wages found to be due] AS DEFINED IN SECTION ONE HUNDRED NINETY OF THIS ARTICLE.

S 5. The labor law is amended by adding a new section 191-d to read as follows:

S 191-D. PRIVATE RIGHT OF ACTION BY MISCLASSIFIED EMPLOYEES. 1. NOTWITHSTANDING ANY REMEDY AVAILABLE UNDER THIS ARTICLE, AN INDIVIDUAL WHO HAS NOT BEEN PROPERLY CLASSIFIED AS AN EMPLOYEE MAY BRING A CIVIL ACTION FOR DAMAGES AGAINST THE EMPLOYER FOR ANY VIOLATION OF THIS ARTICLE.

2. AN ACTION FILED UNDER THIS SECTION SHALL BE FILED WITHIN THREE YEARS AFTER THE DATE THE CAUSE OF ACTION ACCRUES.

3. IF THE COURT DETERMINES THAT AN INDIVIDUAL OR CLASS OF INDIVIDUALS IS ENTITLED TO JUDGMENT IN AN ACTION AGAINST AN EMPLOYER FILED IN ACCORDANCE WITH THIS SECTION, THE COURT MAY AWARD EACH INDIVIDUAL:

(A) ANY DAMAGES TO WHICH THE INDIVIDUAL MAY BE ENTITLED UNDER THIS ARTICLE;

(B) AN ADDITIONAL AMOUNT UP TO THREE TIMES THE AMOUNT OF ANY SUCH DAMAGES, IF THE EMPLOYER KNOWINGLY FAILED TO PROPERLY CLASSIFY THE INDIVIDUAL;

(C) REASONABLE COUNSEL FEES AND OTHER COSTS OF THE ACTION; AND

(D) ANY OTHER APPROPRIATE RELIEF.

S 6. Subdivision 2 of section 196 of the labor law, as added by chapter 548 of the laws of 1966, is amended to read as follows:

2. THE COMMISSIONER MAY HOLD HEARINGS AND INVESTIGATE CHARGES OF VIOLATIONS OF THIS ARTICLE.

3. THE COMMISSIONER MAY, CONSISTENT WITH DUE PROCESS OF LAW, ENTER ANY PLACE OF EMPLOYMENT TO INSPECT RECORDS CONCERNING WAGES AND PAYROLLS, TO QUESTION THE EMPLOYER AND EMPLOYEES, AND TO INVESTIGATE SUCH FACTS, CONDITIONS OR MATTERS AS ARE DEEMED APPROPRIATE IN DETERMINING WHETHER ANY PERSON HAS VIOLATED THE PROVISIONS OF THIS ARTICLE. THE NAME OF ANY EMPLOYEE IDENTIFIED IN A COMPLAINT TO THE DEPARTMENT SHALL BE KEPT CONFIDENTIAL AS LONG AS POSSIBLE. WHERE THE DEPARTMENT DETERMINES THAT AN EMPLOYEE'S NAME MUST BE DISCLOSED IN ORDER TO INVESTIGATE A COMPLAINT FURTHER, IT MAY DO SO ONLY WITH THE EMPLOYEE'S CONSENT.

4. Nothing in this section shall be construed as requiring the commissioner in every instance to investigate and attempt to adjust controversies, or to take assignments of wage claims, or to institute criminal prosecutions for any violation under this article, but he shall be deemed vested with discretion in such matters.

S 7. The labor law is amended by adding a new section 196-b to read as follows:

S 196-B. RETALIATION AGAINST EMPLOYEES PROHIBITED. NO PERSON OR EMPLOYER SHALL DISCHARGE OR IN ANY OTHER MANNER DISCRIMINATE OR RETALIATE AGAINST AN EMPLOYEE OR OTHER PERSON FOR EXERCISING ANY RIGHT UNDER THIS ARTICLE OR ANY REGULATION IMPLEMENTING ITS PROVISIONS, OR AGAINST ANY PERSON FOR PROVIDING ASSISTANCE TO ANY EMPLOYEE OR INFORMATION REGARDING THE SAME, OR FOR TESTIFYING OR PLANNING TO TESTIFY IN ANY INVESTIGATION OR PROCEEDING REGARDING THE SAME. TAKING ADVERSE ACTION AGAINST A PERSON WITHIN NINETY DAYS OF A PERSON'S ENGAGING IN THE FOREGOING ACTIVITIES SHALL RAISE A PRESUMPTION THAT SUCH ACTION WAS RETALIATION, WHICH MAY BE REBUTTED BY CLEAN AND CONVINCING EVIDENCE THAT SUCH

ACTION WAS TAKEN FOR OTHER PERMISSIBLE REASONS. ANY EMPLOYEE MAY FILE A COMPLAINT WITH THE COMMISSIONER ALLEGING DISCHARGE OR DISCRIMINATION WITHIN THIRTY DAYS AFTER SUCH VIOLATION OCCURS. UPON RECEIPT OF THE COMPLAINT, THE COMMISSIONER SHALL CAUSE AN INVESTIGATION TO BE MADE TO THE EXTENT DEEMED APPROPRIATE. IF THE COMMISSIONER DETERMINES FROM THE INVESTIGATION THAT THE PROVISIONS OF THIS ARTICLE HAVE BEEN VIOLATED, THE COMMISSIONER SHALL BRING AN ACTION IN A COURT OF COMPETENT JURISDICTION AGAINST SUCH PERSON. SUCH COURT SHALL ORDER ALL APPROPRIATE RELIEF INCLUDING REHIRING OR REINSTATEMENT OF THE EMPLOYEE TO THE FORMER POSITION WITH BACK PAY. A CIVIL ACTION TO ENFORCE THIS ARTICLE MAY ALSO BE MAINTAINED IN ANY COURT OF COMPETENT JURISDICTION BY THE STATE OR BY ANY PARTY INURED BY A VIOLATION OF THIS ARTICLE. ANY EMPLOYER WHO RETALIATES AGAINST AN EMPLOYEE OR OTHER PERSON IN VIOLATION OF THIS ARTICLE SHALL BE REQUIRED TO PAY THE PERSON AN AMOUNT SET BY THE DEPARTMENT OR A COURT SUFFICIENT TO COMPENSATE THE EMPLOYEE AND DETER FUTURE VIOLATIONS, BUT NOT LESS THAN ONE HUNDRED DOLLARS FOR EACH DAY THAT THE VIOLATIONS CONTINUED, OR UNTIL LEGAL JUDGMENT IS FINAL.

S 8. Subdivision 1 of section 198-a of the labor law, as amended by chapter 241 of the laws of 2002, is amended to read as follows:

1. Every employer who does not pay the wages of all of his employees in accordance with the provisions of this chapter, and the officers and agents of any corporation [who knowingly permit the corporation to violate] WHICH VIOLATES this chapter by failing to pay the wages of any of its employees in accordance with the provisions thereof, shall be guilty of a misdemeanor for the first offense and upon conviction therefor shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year, and, in the event that any second or subsequent offense occurs within six years of the date of conviction for a prior offense, shall be guilty of a felony for the second or subsequent offense, and upon conviction therefor, shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year plus one day, or punished by both such fine and imprisonment, for each such offense. ADDITIONALLY, THE TEN LARGEST SHAREHOLDERS, AS DETERMINED BY THE FAIR VALUE OF THEIR BENEFICIAL INTEREST AS OF THE BEGINNING OF THE PERIOD DURING WHICH THE UNPAID SERVICES REFERRED TO IN THIS ARTICLE ARE PERFORMED, OF EVERY CORPORATION (OTHER THAN AN INVESTMENT COMPANY REGISTERED AS SUCH UNDER AN ACT OF CONGRESS ENTITLED "INVESTMENT COMPANY ACT OF 1940"), NO SHARES OF WHICH ARE LISTED ON A NATIONAL SECURITIES EXCHANGE OR REGULARLY QUOTED IN AN OVER-THE-COUNTER MARKET BY ONE OR MORE MEMBERS OF A NATIONAL OR AN AFFILIATED SECURITIES ASSOCIATION, SHALL JOINTLY AND SEVERALLY BE PERSONALLY LIABLE FOR ALL DEBTS, WAGES OR SALARIES DUE AND OWING TO ANY OF ITS EMPLOYEES FOR SERVICES PERFORMED BY THEM FOR SUCH CORPORATION. A CIVIL ACTION MAY BE BROUGHT AGAINST A SHAREHOLDER LIABLE FOR WAGES DUE UNDER THIS CHAPTER INSTEAD OF AND IN ADDITION TO THE EMPLOYER. An indictment of a person or corporation operating a steam surface railroad for an offense specified in this section may be found and tried in any county within the state in which such railroad ran at the time of such offense.

S 9. The labor law is amended by adding a new section 191-e to read as follows:

S 191-E. PRIVATE ATTORNEYS GENERAL PROVISION FOR ENFORCEMENT. 1. (A) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, ANY PROVISION OF THIS ARTICLE THAT PROVIDES FOR A CIVIL PENALTY TO BE ASSESSED AND COLLECTED BY THE COMMISSIONER MAY, AS AN ALTERNATIVE, BE RECOVERED THROUGH A CIVIL

ACTION BROUGHT BY AN AGGRIEVED EMPLOYEE ON BEHALF OF HIMSELF OR HERSELF AND OTHER CURRENT OR FORMER EMPLOYEES.

(B) NO ACTION MAY BE BROUGHT UNDER THIS SECTION BY AN AGGRIEVED EMPLOYEE IF THE COMMISSIONER ON THE SAME FACTS AND THEORIES, CITES A PERSON WITHIN THE TIMEFRAMES SET FORTH IN THIS ARTICLE FOR A VIOLATION OF THE SAME SECTION OR SECTIONS OF LAW UNDER WHICH THE AGGRIEVED EMPLOYEE IS ATTEMPTING TO RECOVER A CIVIL PENALTY ON BEHALF OF HIMSELF OR HERSELF OR OTHERS.

(C) CIVIL PENALTIES RECOVERED BY AGGRIEVED EMPLOYEES SHALL BE DISTRIBUTED AS FOLLOWS: SEVENTY-FIVE PERCENT TO THE COMMISSION FOR ENFORCEMENT OF LABOR LAWS AND EDUCATION OF EMPLOYERS AND EMPLOYEES ABOUT THEIR RIGHTS AND RESPONSIBILITIES UNDER THIS ARTICLE, TO BE CONTINUOUSLY APPROPRIATED TO SUPPLEMENT AND NOT SUPPLANT THE FUNDING TO THE AGENCY FOR THOSE PURPOSES; AND TWENTY-FIVE PERCENT TO THE AGGRIEVED EMPLOYEES.

(D) COURTS SHALL REVIEW AND APPROVE ANY PENALTIES SOUGHT AS PART OF A PROPOSED SETTLEMENT AGREEMENT PURSUANT TO THIS SECTION.

2. (A) A CIVIL ACTION BY AN AGGRIEVED EMPLOYEE SEEKING CIVIL PENALTIES PURSUANT TO THIS SECTION ALLEGING A VIOLATION OF ANY PROVISION SHALL COMMENCE ONLY AFTER THE FOLLOWING REQUIREMENTS HAVE BEEN MET:

(I) THE AGGRIEVED EMPLOYEE OR REPRESENTATIVE SHALL GIVE WRITTEN NOTICE BY CERTIFIED MAIL TO THE DEPARTMENT AND THE EMPLOYER OF THE SPECIFIC PROVISIONS OF THIS ARTICLE ALLEGED TO HAVE BEEN VIOLATED, INCLUDING THE FACTS AND THEORIES TO SUPPORT THE ALLEGED VIOLATION.

(II) (A) THE DEPARTMENT SHALL NOTIFY THE EMPLOYER AND THE AGGRIEVED EMPLOYEE OR REPRESENTATIVE BY CERTIFIED MAIL THAT IT DOES NOT INTEND TO INVESTIGATE THE ALLEGED VIOLATION WITHIN THIRTY CALENDAR DAYS OF THE POSTMARK DATE OF THE NOTICE RECEIVED PURSUANT TO SUBPARAGRAPH (I) OF THIS PARAGRAPH. UPON RECEIPT OF THAT NOTICE OR IF NO NOTICE IS PROVIDED WITHIN THIRTY-THREE CALENDAR DAYS OF THE POSTMARK DATE OF THE NOTICE GIVEN PURSUANT TO SUCH SUBPARAGRAPH (I), THE AGGRIEVED EMPLOYEE MAY COMMENCE A CIVIL ACTION.

(B) IF THE DEPARTMENT INTENDS TO INVESTIGATE THE ALLEGED VIOLATION, IT SHALL NOTIFY THE EMPLOYER AND THE AGGRIEVED EMPLOYEE OR REPRESENTATIVE BY CERTIFIED MAIL OF ITS DECISION WITHIN THIRTY-THREE CALENDAR DAYS OF THE POSTMARK DATE OF THE NOTICE RECEIVED PURSUANT TO SUBPARAGRAPH (I) OF THIS PARAGRAPH. WITHIN ONE HUNDRED TWENTY CALENDAR DAYS OF THAT DECISION, THE AGENCY MAY INVESTIGATE THE ALLEGED VIOLATION AND ISSUE ANY APPROPRIATE CITATION. IF THE AGENCY DETERMINES THAT NO CITATION WILL BE ISSUED, IT SHALL NOTIFY THE EMPLOYER AND AGGRIEVED EMPLOYEE OF THAT DECISION WITHIN FIVE BUSINESS DAYS THEREOF BY CERTIFIED MAIL. UPON RECEIPT OF THAT NOTICE OR IF NO CITATION IS ISSUED BY THE AGENCY WITHIN THE ONE HUNDRED FIFTY-EIGHT-DAY PERIOD PRESCRIBED BY THIS PARAGRAPH OR IF THE AGENCY FAILS TO PROVIDE TIMELY OR ANY NOTIFICATION, THE AGGRIEVED EMPLOYEE MAY COMMENCE A CIVIL ACTION.

(C) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, A PLAINTIFF MAY AS A MATTER OF RIGHT AMEND AN EXISTING COMPLAINT TO ADD A CAUSE OF ACTION ARISING UNDER THIS SECTION AT ANY TIME WITHIN SIXTY DAYS OF THE TIME PERIODS SPECIFIED IN THIS SECTION.

S 10. This act shall take effect immediately.