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2011-2012 Regular Sessions

I N S E N A T E

June 7, 2011

Introduced by Sens. SAVINO, ADDABBO -- 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. This act shall be known and may be cited as the "whistle-
2 blower protection act".
3 S 2. Section 740 of the labor law, as added by chapter 660 of the laws
4 of 1984, paragraph (g) of subdivision 1 as added and paragraph (a) of
5 subdivision 2 as amended by chapter 442 of the laws of 2006 and para-
6 graph (d) of subdivision 4 as added by chapter 24 of the laws of 2002,
7 is amended to read as follows:
8 S 740. Retaliatory personnel action by employers; prohibition. 1.
9 Definitions. For purposes of this section, unless the context specif-
10 ically indicates otherwise:
11 (a) "Employee" means an individual who performs services for and under
12 the control and direction of an employer for wages or other remunera-
13 tion.
14 (b) "Employer" means any person, firm, partnership, institution,
15 corporation, or association that employs one or more employees.
16 (c) "Law, rule or regulation" includes: (I) any duly enacted FEDERAL,
17 STATE OR LOCAL statute or ordinance [or]; (II) any rule or regulation
18 promulgated pursuant to [any federal, state or local] SUCH statute or
19 ordinance; OR (III) ANY JUDICIAL OR ADMINISTRATIVE DECISION, RULING OR
20 ORDER.
21 (d) "Public body" includes the following:
22 (i) the United States Congress, any state legislature, or any [popu-
23 larly-elected] ELECTED local governmental body, or any member or employ-
24 ee thereof;

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

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1 (ii) any federal, state, or local [judiciary] COURT, or any member or
2 employee thereof, or any grand or petit jury;
3 (iii) any federal, state, or local regulatory, administrative, or
4 public agency or authority, or instrumentality thereof; [or]
5 (iv) any federal, state, or local law enforcement agency, prosecutori-
6 al office, or police or peace officer;
7 (V) ANY FEDERAL, STATE OR LOCAL DEPARTMENT OF AN EXECUTIVE BRANCH OF
8 GOVERNMENT; OR
9 (VI) ANY DIVISION, BOARD, BUREAU, OFFICE, COMMITTEE, OR COMMISSION OF
10 ANY OF THE PUBLIC BODIES DESCRIBED IN SUBPARAGRAPHS (I) THROUGH (V) OF
11 THIS PARAGRAPH.

12 (e) "Retaliatory personnel action" means the discharge, suspension [or
13 demotion of], DEMOTION, PENALIZATION OR DISCRIMINATION AGAINST an
14 employee, or other adverse employment action taken against an employee
15 in the terms and conditions of employment.

16 (f) "Supervisor" means any individual within an employer's organiza-
17 tion who has the authority to direct and control the work performance of
18 [the affected] AN employee; or who has [managerial] authority to take
19 corrective action regarding the [violation of the law, rule or regu-
20 lation] ILLEGAL BUSINESS ACTIVITY of which the employee complains.

21 (g) "Health care fraud" means health care fraud as defined by article
22 one hundred seventy-seven of the penal law.

23 (H) "AGENT" MEANS ANY INDIVIDUAL, PARTNERSHIP, ASSOCIATION, CORPO-
24 RATION OR GROUP OF PERSONS ACTING ON BEHALF OF AN EMPLOYER.

25 (I) "ILLEGAL BUSINESS ACTIVITY" MEANS ANY PRACTICE, PROCEDURE, ACTION
26 OR FAILURE TO ACT BY AN EMPLOYER, OR AN EMPLOYEE OR AGENT OF SUCH
27 EMPLOYER, TAKEN IN THE COURSE OF THE EMPLOYER'S BUSINESS, WHETHER OR NOT
28 WITHIN THE SCOPE OF EMPLOYMENT OR AGENCY, WHICH IS IN VIOLATION OF ANY
29 LAW, RULE OR REGULATION.

30 2. Prohibitions. An employer shall not take any retaliatory personnel
31 action against an employee because such employee does any of the follow-
32 ing:

33 (a) discloses, or threatens to disclose to a supervisor or to a public
34 body INFORMATION ABOUT an ILLEGAL BUSINESS activity[, policy or practice
35 of the employer that is in violation of law, rule or regulation which
36 violation creates and presents a substantial and specific danger to the
37 public health or safety, or which constitutes health care fraud];

38 (b) provides information to, or testifies before, any public body
39 conducting an investigation, hearing or inquiry into any such [violation
40 of a law, rule or regulation by such employer] ILLEGAL BUSINESS
41 ACTIVITY; or

42 (c) objects to, or refuses to participate in any [such] ILLEGAL BUSI-
43 NESS activity[, policy or practice in violation of a law, rule or regu-
44 lation].

45 3. Application. The protection against retaliatory personnel action
46 provided by SUBDIVISION TWO OF THIS SECTION SHALL APPLY TO ANY EMPLOYEE
47 WHO IN GOOD FAITH REASONABLY BELIEVES THAT AN ILLEGAL BUSINESS ACTIVITY
48 HAS OCCURRED OR WILL OCCUR, BASED ON INFORMATION THAT THE EMPLOYEE IN
49 GOOD FAITH REASONABLY BELIEVES TO BE TRUE; PROVIDED, HOWEVER, THAT THE
50 PROTECTION AGAINST RETALIATORY PERSONNEL ACTION PROVIDED BY paragraph
51 (a) of subdivision two of this section pertaining to disclosure to a
52 public body shall not apply to an employee who makes such disclosure to
53 a public body unless the employee has [brought] MADE A GOOD FAITH EFFORT
54 TO NOTIFY HIS OR HER EMPLOYER BY BRINGING the ILLEGAL BUSINESS activ-
55 ity[, policy or practice in violation of law, rule or regulation] to the
56 attention of a supervisor [of the employer] and has afforded such

1 employer a reasonable opportunity to correct such activity[, policy or
2 practice]. EMPLOYER NOTIFICATION SHALL NOT BE REQUIRED WHERE: (A) THE
3 EMPLOYER HAS NOT COMPLIED WITH THE PUBLICATION REQUIREMENTS OF SUBDIVI-
4 SION EIGHT OF THIS SECTION; (B) THERE IS AN IMMINENT AND SERIOUS DANGER
5 TO THE PUBLIC HEALTH OR SAFETY; OR (C) THE EMPLOYEE REASONABLY BELIEVES
6 THAT REPORTING TO THE SUPERVISOR WOULD RESULT IN A DESTRUCTION OF
7 EVIDENCE OR OTHER CONCEALMENT OF THE ILLEGAL BUSINESS ACTIVITY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 7. Existing rights. Nothing in this section shall be deemed to dimin-
2 ish the rights, privileges, or remedies of any employee under any other
3 law or regulation or under any collective bargaining agreement or
4 employment contract; except that the institution of an action in accord-
5 ance with this section shall be deemed a waiver of the rights and reme-
6 dies available under any other contract, collective bargaining agree-
7 ment, law, rule or regulation or under the common law.

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

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

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

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

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

34 (III) OBJECTS TO, OR REFUSES TO PARTICIPATE IN, ANY SUCH VIOLATION OR
35 ACTION.

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

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

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

10 S 4. Paragraph (c) of subdivision 3 of section 75-b of the civil
11 service law, as added by chapter 660 of the laws of 1984, is amended to
12 read as follows:

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

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

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

26 S 6. This act shall take effect on the ninetieth day after it shall
27 have become a law.