

5237--A

2013-2014 Regular Sessions

I N A S S E M B L Y

February 21, 2013

Introduced by M. of A. WRIGHT, ROZIC, GOLDFEDER, PERRY, KELLNER, WEPRIN, KAVANAGH, MILLER, CLARK, JAFFEE, BROOK-KRASNY, ENGLEBRIGHT, CYMBROW-ITZ, COLTON, MILLMAN, BRAUNSTEIN, SIMOTAS, SCHIMEL, ROSENTHAL, ABBATE, QUART, AUBRY, SKOUFIS, SCARBOROUGH, MOYA, GIBSON, BENEDETTO, ESPINAL -- Multi-Sponsored by -- M. of A. BRENNAN, DINOWITZ, GOTTFRIED, HEASTIE, HEVESI, JACOBS, MARKEY, NOLAN, O'DONNELL, SEPULVEDA, SWEENEY, THIELE, TITUS -- read once and referred to the Committee on Labor -- reported and referred to the Committee on Codes -- reported and referred to the Committee on Ways and Means -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the labor law, in relation to enacting the "New York state commercial goods transportation 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:

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

3 ARTICLE 25-C

4 THE NEW YORK STATE COMMERCIAL GOODS TRANSPORTATION INDUSTRY
5 FAIR PLAY ACT

6 SECTION 862. SHORT TITLE.

7 862-A. DEFINITIONS.

8 862-B. PRESUMPTION OF EMPLOYMENT IN THE COMMERCIAL GOODS TRANS-
9 PORTATION INDUSTRY.

10 862-C. NOTICE TO PERSONS RECEIVING REMUNERATION FROM COMMERCIAL
11 GOODS TRANSPORTATION CONTRACTORS AND COMMERCIAL GOODS
12 TRANSPORTATION SUBCONTRACTORS.

13 862-D. VIOLATIONS AND PENALTIES.

14 862-E. RETALIATION.

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

LBD00724-02-3

1 S 862. SHORT TITLE. THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS
2 THE "NEW YORK STATE COMMERCIAL GOODS TRANSPORTATION INDUSTRY FAIR PLAY
3 ACT".

4 S 862-A. DEFINITIONS. AS USED IN THIS ARTICLE:

5 1. "COMMERCIAL GOODS TRANSPORTATION CONTRACTOR" MEANS ANY SOLE PROPRI-
6 ETOR, PARTNERSHIP, FIRM, CORPORATION, LIMITED LIABILITY COMPANY, ASSOCI-
7 ATION OR OTHER LEGAL ENTITY PERMITTED BY LAW TO DO BUSINESS WITHIN THE
8 STATE WHO COMPENSATES COMMERCIAL VEHICLE DRIVERS WHO POSSESSES A STATE-
9 ISSUED COMMERCIAL DRIVER'S LICENSE TO TRANSPORT GOODS IN THE STATE OF
10 NEW YORK.

11 2. "COMMERCIAL GOODS TRANSPORTATION CONTRACTOR" INCLUDES A GENERAL
12 COMMERCIAL GOODS TRANSPORTATION CONTRACTOR OR A COMMERCIAL GOODS TRANS-
13 PORTATION SUBCONTRACTOR.

14 3. "COMMERCIAL GOODS TRANSPORTATION SERVICES" MEANS THE TRANSPORTATION
15 OF GOODS FOR COMPENSATION BY A COMMERCIAL VEHICLE DRIVER WHO POSSESSES A
16 STATE-ISSUED COMMERCIAL DRIVER'S LICENSE AND TRANSPORTS GOODS IN THE
17 STATE OF NEW YORK.

18 4. "DEPARTMENT" MEANS THE DEPARTMENT OF LABOR.

19 5. "COMMISSIONER" MEANS THE COMMISSIONER OF LABOR.

20 6. "EMPLOYER" MEANS ANY COMMERCIAL GOODS TRANSPORTATION CONTRACTOR
21 WHICH COMPENSATES COMMERCIAL VEHICLE DRIVERS WHO POSSESS A STATE-ISSUED
22 COMMERCIAL DRIVER'S LICENSE TO TRANSPORT GOODS IN THE STATE OF NEW YORK.

23 S 862-B. PRESUMPTION OF EMPLOYMENT IN THE COMMERCIAL GOODS TRANSPORTA-
24 TION INDUSTRY. 1. ANY PERSON PERFORMING COMMERCIAL GOODS TRANSPORTATION
25 SERVICES FOR A COMMERCIAL GOODS TRANSPORTATION CONTRACTOR SHALL BE CLAS-
26 SIFIED AS AN EMPLOYEE UNLESS THE PERSON IS A SEPARATE BUSINESS ENTITY
27 UNDER SUBDIVISION TWO OF THIS SECTION OR ALL OF THE FOLLOWING CRITERIA
28 ARE MET, IN WHICH CASE THE PERSON SHALL BE AN INDEPENDENT CONTRACTOR:

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

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

33 (C) THE INDIVIDUAL IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTAB-
34 LISHED TRADE, OCCUPATION, PROFESSION, OR BUSINESS THAT IS SIMILAR TO THE
35 SERVICE AT ISSUE.

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

41 (A) THE BUSINESS ENTITY IS PERFORMING THE SERVICE FREE FROM THE DIREC-
42 TION OR CONTROL OVER THE MEANS AND MANNER OF PROVIDING THE SERVICE,
43 SUBJECT ONLY TO THE RIGHT OF THE COMMERCIAL GOODS TRANSPORTATION
44 CONTRACTOR FOR WHOM THE SERVICE IS PROVIDED TO SPECIFY THE DESIRED
45 RESULT OR FEDERAL RULE OR REGULATION;

46 (B) THE BUSINESS ENTITY IS NOT SUBJECT TO CANCELLATION OR DESTRUCTION
47 UPON SEVERANCE OF THE RELATIONSHIP WITH THE COMMERCIAL GOODS TRANSPORTA-
48 TION CONTRACTOR;

49 (C) THE BUSINESS ENTITY HAS A SUBSTANTIAL INVESTMENT OF CAPITAL IN THE
50 BUSINESS ENTITY, INCLUDING BUT NOT LIMITED TO ORDINARY TOOLS AND EQUIP-
51 MENT;

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

54 (E) THE BUSINESS ENTITY HAS AN OPTION TO MAKE ITS SERVICES AVAILABLE
55 TO THE GENERAL PUBLIC OR THE BUSINESS COMMUNITY ON A CONTINUING BASIS;

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

3 (G) THE BUSINESS ENTITY PERFORMS SERVICES FOR THE COMMERCIAL GOODS
4 TRANSPORTATION CONTRACTOR UNDER THE BUSINESS ENTITY'S NAME PURSUANT TO A
5 WRITTEN CONTRACT SPECIFYING THEIR RELATIONSHIP TO BE AS INDEPENDENT
6 CONTRACTORS OR SEPARATE BUSINESS ENTITIES;

7 (H) WHEN THE SERVICES BEING PROVIDED REQUIRE A LICENSE OR PERMIT, THE
8 BUSINESS ENTITY PAYS FOR THE LICENSE OR PERMIT IN THE BUSINESS ENTITY'S
9 NAME OR, WHERE PERMITTED BY LAW, PAYS FOR REASONABLE USE OF THE COMMER-
10 CIAL GOODS TRANSPORTATION CONTRACTOR'S LICENSE OR PERMIT;

11 (I) IF NECESSARY, THE BUSINESS ENTITY HIRES ITS OWN EMPLOYEES WITHOUT
12 THE COMMERCIAL GOODS TRANSPORTATION CONTRACTOR'S APPROVAL, PAYS THE
13 EMPLOYEES WITHOUT REIMBURSEMENT FROM THE COMMERCIAL GOODS TRANSPORTATION
14 CONTRACTOR AND REPORTS THE EMPLOYEES' INCOME TO THE INTERNAL REVENUE
15 SERVICE;

16 (J) THE COMMERCIAL GOODS TRANSPORTATION CONTRACTOR DOES NOT REQUIRE
17 THAT THE BUSINESS ENTITY BE REPRESENTED AS AN EMPLOYEE OF THE COMMERCIAL
18 GOODS TRANSPORTATION CONTRACTOR TO ITS CUSTOMERS; AND

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

21 3. THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES OR TO PAY
22 UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMI-
23 UMS WITH RESPECT TO AN INDIVIDUAL'S WAGES SHALL NOT BE CONSIDERED IN
24 MAKING A DETERMINATION UNDER THIS SECTION, EXCEPT AS SET FORTH IN PARA-
25 GRAPH (F) OF SUBDIVISION TWO OF THIS SECTION.

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

29 5. WHEN A BUSINESS ENTITY MEETS THE DEFINITION OF A SEPARATE BUSINESS
30 ENTITY PURSUANT TO SUBDIVISION TWO OF THIS SECTION, THE SEPARATE BUSI-
31 NESS ENTITY WILL BE CONSIDERED A COMMERCIAL GOODS TRANSPORTATION
32 CONTRACTOR SUBJECT TO ALL THE PROVISIONS OF THIS ARTICLE IN REGARD TO
33 THE CLASSIFICATION OF INDIVIDUALS PERFORMING SERVICES FOR IT.

34 S 862-C. NOTICE TO PERSONS RECEIVING REMUNERATION FROM COMMERCIAL
35 GOODS TRANSPORTATION CONTRACTORS AND COMMERCIAL GOODS TRANSPORTATION
36 SUBCONTRACTORS. 1. EVERY COMMERCIAL GOODS TRANSPORTATION CONTRACTOR
37 SHALL POST IN A PROMINENT AND ACCESSIBLE PLACE ON THE SITE WHERE COMMER-
38 CIAL GOODS TRANSPORTATION ACTIVITY IS CONDUCTED A LEGIBLE STATEMENT,
39 PROVIDED BY THE COMMISSIONER, THAT DESCRIBES THE RESPONSIBILITY OF INDE-
40 PENDENT CONTRACTORS TO PAY TAXES REQUIRED BY STATE AND FEDERAL LAW, THE
41 RIGHTS OF EMPLOYEES TO WORKERS' COMPENSATION, UNEMPLOYMENT BENEFITS,
42 MINIMUM WAGE, OVERTIME AND OTHER FEDERAL AND STATE WORKPLACE
43 PROTECTIONS, AND THE PROTECTIONS AGAINST RETALIATION AND THE PENALTIES
44 IN THIS ARTICLE IF THE CONTRACTOR FAILS TO PROPERLY CLASSIFY AN INDIVID-
45 UAL AS AN EMPLOYEE. THIS NOTICE SHALL ALSO CONTAIN CONTACT INFORMATION
46 FOR INDIVIDUALS TO FILE COMPLAINTS OR INQUIRE WITH THE COMMISSIONER
47 ABOUT EMPLOYMENT CLASSIFICATION STATUS. THIS INFORMATION SHALL BE
48 PROVIDED IN ENGLISH, SPANISH OR OTHER LANGUAGES REQUIRED BY THE COMMIS-
49 SIONER. THE POSTED STATEMENT SHALL BE CONSTRUCTED OF MATERIALS CAPABLE
50 OF WITHSTANDING ADVERSE WEATHER CONDITIONS.

51 2. WITHIN THIRTY DAYS OF THE EFFECTIVE DATE OF THIS ARTICLE, THE
52 COMMISSIONER SHALL CREATE THE NOTICE DESCRIBED IN SUBDIVISION ONE OF
53 THIS SECTION AND POST THE NOTICE ON THE DEPARTMENT'S WEBSITE FOR DOWN-
54 LOADING BY COMMERCIAL GOODS TRANSPORTATION CONTRACTORS.

55 3. COMMERCIAL GOODS TRANSPORTATION CONTRACTORS WHO VIOLATE THIS
56 SECTION SHALL BE SUBJECT TO A CIVIL PENALTY OF UP TO ONE THOUSAND FIVE

1 HUNDRED DOLLARS FOR A FIRST VIOLATION, AND UP TO FIVE THOUSAND DOLLARS
2 FOR A SUBSEQUENT VIOLATION WITHIN A FIVE YEAR PERIOD.

3 S 862-D. VIOLATIONS AND PENALTIES. 1. ANY COMMERCIAL GOODS TRANSPORTA-
4 TION CONTRACTOR WHO WILLFULLY FAILS TO PROPERLY CLASSIFY AN INDIVIDUAL
5 AS AN EMPLOYEE AS PROVIDED UNDER SECTION EIGHT HUNDRED SIXTY-TWO-B OF
6 THIS ARTICLE SHALL BE SUBJECT TO THE CIVIL AND CRIMINAL PENALTIES
7 PROVIDED UNDER THIS SECTION. THE CIVIL PENALTIES SET FORTH IN THIS
8 SECTION SHALL BE IMPOSED AS FOLLOWS: BY THE COMMISSIONER WHERE SUCH
9 PENALTY IS BASED ON A VIOLATION OF THIS CHAPTER; BY THE CHAIR OF THE
10 WORKERS' COMPENSATION BOARD WHERE SUCH PENALTY IS BASED ON A VIOLATION
11 OF THE WORKERS' COMPENSATION LAW; AND BY THE COMMISSIONER OF TAXATION
12 AND FINANCE WHEN SUCH PENALTY IS BASED ON A VIOLATION OF THE TAX LAW,
13 PROVIDED THAT NO MORE THAN ONE CIVIL PENALTY UNDER THIS SECTION MAY BE
14 IMPOSED PER EMPLOYEE PER INCIDENT OF MISCLASSIFICATION.

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

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

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

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

36 3. ANY COMMERCIAL GOODS TRANSPORTATION CONTRACTOR WHO WILLFULLY
37 VIOLATES SECTION EIGHT HUNDRED SIXTY-TWO-B OF THIS ARTICLE SHALL BE
38 SUBJECT TO A CIVIL PENALTY OF UP TO TWENTY-FIVE HUNDRED DOLLARS FOR THE
39 FIRST VIOLATION PER MISCLASSIFIED EMPLOYEE AND TO A CIVIL PENALTY OF UP
40 TO FIVE THOUSAND DOLLARS FOR EACH SUBSEQUENT VIOLATION PER MISCLASSIFIED
41 EMPLOYEE WITHIN A FIVE YEAR PERIOD.

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

49 5. IF THE COMMERCIAL GOODS TRANSPORTATION CONTRACTOR IS A CORPORATION,
50 ANY OFFICER OF SUCH CORPORATION OR SHAREHOLDER WHO OWNS OR CONTROLS AT
51 LEAST TEN PERCENT OF THE OUTSTANDING STOCK OF SUCH CORPORATION WHO KNOW-
52 INGLY PERMITS THE CORPORATION TO WILLFULLY VIOLATE THE PROVISIONS OF
53 THIS ARTICLE SHALL ALSO BE IN VIOLATION OF THIS ARTICLE AND THE CIVIL
54 AND CRIMINAL PENALTIES HEREIN SHALL ATTACH TO SUCH OFFICER UPON
55 CONVICTION.

6. ANY COMMERCIAL GOODS TRANSPORTATION 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 COMMERCIAL GOODS TRANSPORTATION 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 COMMERCIAL GOODS TRANSPORTATION 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 862-E. 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 THIS CHAPTER, OR ANY OTHER STATUTE.

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

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

6 (1-C) AS AN EMPLOYEE IN THE COMMERCIAL GOODS TRANSPORTATION INDUSTRY
7 UNLESS THE PRESUMPTION OF EMPLOYMENT CAN BE OVERCOME, AS PROVIDED UNDER
8 SECTION EIGHT HUNDRED SIXTY-TWO-B OF THIS CHAPTER; OR

9 S 3. The opening paragraph of subdivision 4 of section 2 of the work-
10 ers' compensation law, as amended by chapter 418 of the laws of 2010, is
11 amended to read as follows:

12 "Employee" means a person engaged in one of the occupations enumerated
13 in section three of this article or who is in the service of an employer
14 whose principal business is that of carrying on or conducting a hazard-
15 ous employment upon the premises or at the plant, or in the course of
16 his or her employment away from the plant of his or her employer;
17 "employee" shall also mean for the purposes of this chapter any individ-
18 ual performing services in construction for a contractor who does not
19 overcome the presumption of employment as provided under section eight
20 hundred sixty-one-c of the labor law; "EMPLOYEE" SHALL ALSO MEAN FOR THE
21 PURPOSES OF THIS CHAPTER ANY INDIVIDUAL PERFORMING SERVICES IN THE
22 COMMERCIAL GOODS TRANSPORTATION INDUSTRY FOR A COMMERCIAL GOODS TRANS-
23 PORTATION CONTRACTOR WHO DOES NOT OVERCOME THE PRESUMPTION OF EMPLOYMENT
24 AS PROVIDED UNDER SECTION EIGHT HUNDRED SIXTY-TWO-B OF THE LABOR LAW;
25 "employee" shall also mean for the purposes of this chapter civil
26 defense volunteers who are personnel of volunteer agencies sponsored or
27 authorized by a local office under regulations of the civil defense
28 commission, to the extent of the provisions of groups seventeen and
29 nineteen; "employee" shall at the election of a municipal corporation
30 made pursuant to local law duly enacted also mean a member of an auxil-
31 iary police organization authorized by local law; and for the purposes
32 of this chapter only a newspaper carrier under the age of eighteen years
33 as defined in section thirty-two hundred twenty-eight of the education
34 law, and shall not include domestic servants except as provided in
35 section three of this chapter, and except where the employer has elected
36 to bring such employees under the law by securing compensation in
37 accordance with the terms of section fifty of this chapter. The term
38 "employee" shall not include persons who are members of a supervised
39 amateur athletic activity operated on a non-profit basis, provided that
40 said members are not also otherwise engaged or employed by any person,
41 firm or corporation participating in said athletic activity, nor shall
42 it include the spouse or minor child of an employer who is a farmer
43 unless the services of such spouse or minor child shall be engaged by
44 said employer under an express contract of hire nor shall it include an
45 executive officer of a corporation who at all times during the period
46 involved owns all of the issued and outstanding stock of the corporation
47 and holds all of the offices pursuant to paragraph (e) of section seven
48 hundred fifteen of the business corporation law or two executive offi-
49 cers of a corporation who at all times during the period involved
50 between them own all of the issued and outstanding stock of such corpo-
51 ration and hold all such offices except as provided in subdivision six
52 of section fifty-four of this chapter provided, however, that where
53 there are two executive officers of a corporation each officer must own
54 at least one share of stock, nor shall it include a self-employed person
55 or a partner of a partnership as defined in section ten of the partner-
56 ship law who is not covered under a compensation insurance contract or a

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

28 S 4. Notwithstanding any other provision of law to the contrary, the
29 provisions of section 862-b of the labor law, as added by section one of
30 this act, shall apply to and be utilized for all determinations of a
31 commercial goods transportation industry individual's employment status
32 under the labor law and the workers' compensation law, but not the tax
33 law.

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