

5696--A

2013-2014 Regular Sessions

I N A S S E M B L Y

March 6, 2013

Introduced by M. of A. BENEDETTO, BRONSON, LUPARDO, CAHILL, HEASTIE, FAHY, SKOUFIS, GUNTHER, HEVESI, STECK, CAMARA -- Multi-Sponsored by -- M. of A. GLICK, GOTTFRIED, RODRIGUEZ -- read once and referred to the Committee on Labor -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the labor law and the civil service law, in relation to protection of employees and former 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:

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

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1 (i) the United States Congress, any state legislature, or any [popu-
2 larly-elected] ELECTED local governmental body, or any member or employ-
3 ee thereof;

4 (ii) any federal, state, or local [judiciary] COURT, or any member or
5 employee thereof, or any grand or petit jury;

6 (iii) any federal, state, or local regulatory, administrative, or
7 public agency or authority, or instrumentality thereof; [or]

8 (iv) any federal, state, or local law enforcement agency, prosecutori-
9 al office, or police or peace officer;

10 (V) ANY FEDERAL, STATE OR LOCAL DEPARTMENT OF AN EXECUTIVE BRANCH OF
11 GOVERNMENT; OR

12 (VI) ANY DIVISION, BOARD, BUREAU, OFFICE, COMMITTEE, OR COMMISSION OF
13 ANY OF THE PUBLIC BODIES DESCRIBED IN SUBPARAGRAPHS (I) THROUGH (V) OF
14 THIS PARAGRAPH.

15 (e) "Retaliatory [personnel] action" means the discharge, suspension
16 [or demotion of], DEMOTION, PENALIZATION OR DISCRIMINATION AGAINST an
17 employee OR FORMER EMPLOYEE, or other adverse [employment] action taken
18 against an employee OR FORMER EMPLOYEE [in the terms and conditions of
19 employment].

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

25 (g) ["Health care fraud" means health care fraud as defined by article
26 one hundred seventy-seven of the penal law.] "AGENT" MEANS ANY INDIVID-
27 UAL, PARTNERSHIP, ASSOCIATION, CORPORATION OR GROUP OF PERSONS ACTING ON
28 BEHALF OF AN EMPLOYER.

29 (H) "ILLEGAL BUSINESS ACTIVITY" MEANS ANY PRACTICE, PROCEDURE, ACTION
30 OR FAILURE TO ACT BY AN EMPLOYER, OR AN EMPLOYEE OR AGENT OF SUCH
31 EMPLOYER, TAKEN IN THE COURSE OF THE EMPLOYER'S BUSINESS, WHETHER OR NOT
32 WITHIN THE SCOPE OF EMPLOYMENT OR AGENCY, THAT IS IN VIOLATION OF ANY
33 LAW, RULE OR REGULATION PUNISHABLE BY IMPRISONMENT OR CIVIL OR CRIMINAL
34 PENALTY.

35 2. Prohibitions. An employer shall not take any retaliatory [person-
36 nel] action against an employee OR FORMER EMPLOYEE because such employee
37 OR FORMER EMPLOYEE does any of the following WHILE EMPLOYED BY THE
38 EMPLOYER, WHETHER OR NOT WITHIN THE SCOPE OF THE EMPLOYEE'S JOB DUTIES:

39 (a) discloses TO A SUPERVISOR OR A PUBLIC BODY, or threatens to
40 [disclose] MAKE A DISCLOSURE to a [supervisor or to a] public body
41 UNLESS THE EMPLOYER REMEDIES THE ILLEGAL BUSINESS ACTIVITY, INFORMATION
42 ABOUT an ILLEGAL BUSINESS activity[, policy or practice of the employer
43 that is in violation of law, rule or regulation which violation creates
44 and presents a substantial and specific danger to the public health or
45 safety, or which constitutes health care fraud];

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

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

53 3. Application. The protection against retaliatory [personnel] action
54 provided by PARAGRAPHS (A), (B) AND (C) OF SUBDIVISION TWO OF THIS
55 SECTION SHALL APPLY TO ANY EMPLOYEE WHO IN GOOD FAITH REASONABLY
56 BELIEVES THAT AN ILLEGAL BUSINESS ACTIVITY HAS OCCURRED OR WILL OCCUR,

1 BASED ON INFORMATION THAT THE EMPLOYEE IN GOOD FAITH REASONABLY BELIEVES
2 TO BE TRUE; PROVIDED HOWEVER THAT THE PROTECTION AGAINST RETALIATORY
3 ACTION PROVIDED BY paragraph (a) of subdivision two of this section
4 pertaining to disclosure to a public body shall not apply to an employee
5 who makes such disclosure to a public body unless the employee has
6 [brought] MADE A GOOD FAITH EFFORT TO NOTIFY HIS OR HER EMPLOYER BY
7 BRINGING the ILLEGAL BUSINESS activity[, policy or practice in violation
8 of law, rule or regulation] to the attention of a supervisor [of the
9 employer] and has afforded such employer a reasonable opportunity to
10 correct such activity[, policy or practice]. SUCH EMPLOYER NOTIFICATION
11 SHALL NOT BE REQUIRED WHERE: (A) THE EMPLOYER HAS NOT POSTED ANY NOTICE
12 REQUIRED BY SUBDIVISION EIGHT OF THIS SECTION; (B) THERE IS AN IMMINENT
13 AND SERIOUS DANGER TO THE PUBLIC HEALTH OR SAFETY; (C) THE EMPLOYEE
14 REASONABLY BELIEVES THAT REPORTING TO THE SUPERVISOR WOULD RESULT IN A
15 DESTRUCTION OF EVIDENCE OR OTHER CONCEALMENT OF THE ILLEGAL BUSINESS
16 ACTIVITY; (D) SUCH ACTIVITY COULD REASONABLY BE EXPECTED TO LEAD TO
17 ENDANGERING THE WELFARE OF A MINOR; (E) THE EMPLOYEE REASONABLY BELIEVES
18 THAT REPORTING TO THE SUPERVISOR WOULD RESULT IN PHYSICAL HARM TO THE
19 EMPLOYEE OR ANY OTHER PERSON; OR (F) THE EMPLOYEE REASONABLY BELIEVES
20 THAT THE SUPERVISOR IS ALREADY AWARE OF THE ILLEGAL BUSINESS ACTIVITY
21 AND WILL NOT CORRECT SUCH ACTIVITY.

22 4. Violation; remedy. (a) An employee who has been the subject of a
23 retaliatory [personnel] action in violation of this section may insti-
24 tute a civil action in a court of competent jurisdiction for relief as
25 set forth in subdivision five of this section within [one year] TWO
26 YEARS after the alleged retaliatory [personnel] action was taken.

27 (b) Any action authorized by this section may be brought in the county
28 in which the alleged retaliatory [personnel] action occurred, in the
29 county in which the complainant resides, or in the county in which the
30 employer has its principal place of business. IN ANY SUCH ACTION, THE
31 PARTIES SHALL BE ENTITLED TO A JURY TRIAL.

32 (c) [It shall be a defense to any action brought pursuant to this
33 section that the personnel action was predicated upon grounds other than
34 the employee's exercise of any rights protected by this section.] EXCEPT
35 AS OTHERWISE PROVIDED IN THIS SECTION, A VIOLATION OF THIS SECTION IS
36 ESTABLISHED WHEN THE COMPLAINANT DEMONSTRATES THAT A MOTIVATING FACTOR
37 FOR THE RETALIATORY ACTION VIOLATES SUBDIVISION TWO OF THIS SECTION.
38 REMEDIES FOR VIOLATION OF SUBDIVISION TWO OF THIS SECTION SHALL BE
39 LIMITED SOLELY TO THOSE PROVIDED IN PARAGRAPHS (E), (F) AND (G) OF
40 SUBDIVISION FIVE OF THIS SECTION IF THE EMPLOYER DEMONSTRATES THAT IT
41 WOULD HAVE TAKEN THE SAME ACTION IN THE ABSENCE OF THE IMPERMISSIBLE
42 MOTIVATING FACTOR. It shall [also] be a defense that the individual was
43 an independent contractor.

44 [(d) Notwithstanding the provisions of paragraphs (a) and (c) of this
45 subdivision, a health care employee who has been the subject of a retal-
46 iatory action by a health care employer in violation of section seven
47 hundred forty-one of this article may institute a civil action in a
48 court of competent jurisdiction for relief as set forth in subdivision
49 five of this section within two years after the alleged retaliatory
50 personnel action was taken. In addition to the relief set forth in that
51 subdivision, the court, in its discretion, based upon a finding that the
52 employer acted in bad faith in the retaliatory action, may assess the
53 employer a civil penalty of an amount not to exceed ten thousand
54 dollars, to be paid to the improving quality of patient care fund,
55 established pursuant to section ninety-seven-aaaa of the state finance
56 law.]

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

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

4 (b)] the reinstatement of the employee to the same position held
5 before the retaliatory [personnel] action[, or to an equivalent posi-
6 tion, OR FRONT PAY IN LIEU THEREOF;

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

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

11 (e)] (D) COMPENSATORY DAMAGES FOR ECONOMIC LOSS AND FOR EMOTIONAL
12 DISTRESS;

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

15 (F) AN INJUNCTION TO RESTRAIN THE EMPLOYER'S CONTINUED VIOLATION OF
16 THIS SECTION; AND

17 (G) A CIVIL PENALTY OF AN AMOUNT NOT TO EXCEED TEN THOUSAND DOLLARS
18 AND/OR A LIQUIDATED DAMAGES AWARD EQUAL TO AMOUNTS OF DAMAGES PURSUANT
19 TO PARAGRAPHS (C) AND (D) OF THIS SUBDIVISION, IF THE COURT, IN ITS
20 DISCRETION, FINDS THAT THE EMPLOYER ACTED IN BAD FAITH IN THE RETALIATO-
21 RY ACTION.

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

26 7. Existing rights. Nothing in this section shall be deemed to dimin-
27 ish the rights, privileges, or remedies of any employee under any other
28 law or regulation or under any collective bargaining agreement or
29 employment contract[; except that the institution of an action in
30 accordance with this section shall be deemed a waiver of the rights and
31 remedies available under any other contract, collective bargaining
32 agreement, law, rule or regulation or under the common law].

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

38 S 2. Subdivision 4 of section 741 of the labor law, as added by chap-
39 ter 24 of the laws of 2002, is amended to read as follows:

40 4. Enforcement. A health care employee may seek enforcement of this
41 section pursuant to [paragraph (d) of subdivision] SUBDIVISIONS four AND
42 FIVE of section seven hundred forty of this article.

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

46 2. (a) A public employer shall not dismiss, SUSPEND, DEMOTE, PENALIZE,
47 THREATEN OR DISCRIMINATE AGAINST, or take other disciplinary or other
48 [adverse personnel action] ACT OF REPRISAL against a public employee
49 regarding the employee's employment because the employee: (I) discloses
50 TO A PUBLIC BODY OR THREATENS TO MAKE A DISCLOSURE TO A PUBLIC BODY OR
51 SUPERVISOR IF THE EMPLOYER DOES NOT REMEDY THE IMPROPER CONDUCT, to a
52 governmental body information[: (i)] regarding a violation of a law,
53 rule or regulation which violation creates [and] OR presents a substan-
54 tial and specific danger to the public health or safety[; or (ii) which
55 the employee reasonably believes to be true and reasonably believes], OR
56 WHICH constitutes an improper governmental action[. "Improper govern-

1 mental action" shall mean any action by a public employer or employee,
2 or an agent of such employer or employee, which is undertaken in the
3 performance of such agent's official duties, whether or not such action
4 is within the scope of his employment, and which is in violation of any
5 federal, state or local law, rule or regulation], OR WHICH COULD REASON-
6 ABLY BE EXPECTED TO LEAD TO ENDANGERING THE WELFARE OF A MINOR; (II)
7 PROVIDES INFORMATION TO, OR TESTIFIES BEFORE, ANY PUBLIC BODY CONDUCTING
8 AN INVESTIGATION, HEARING OR INQUIRY INTO ANY VIOLATION OR IMPROPER
9 GOVERNMENTAL ACTION; OR (III) OBJECTS TO, OR REFUSES TO PARTICIPATE IN,
10 ANY SUCH VIOLATION OR IMPROPER GOVERNMENTAL ACTION.

11 (b) THE PROTECTION AGAINST RETALIATORY ACTION PROVIDED IN SUBPARA-
12 GRAPHS (I) AND (II) OF PARAGRAPH (A) OF THIS SUBDIVISION SHALL APPLY TO
13 ANY EMPLOYEE WHO IN GOOD FAITH REASONABLY BELIEVES THAT A VIOLATION OR
14 IMPROPER GOVERNMENTAL ACTION HAS OCCURRED OR WILL OCCUR, BASED ON INFOR-
15 MATION THAT THE EMPLOYEE IN GOOD FAITH REASONABLY BELIEVES TO BE TRUE.

16 (C) Prior to disclosing information pursuant to SUBPARAGRAPH (I) OF
17 paragraph (a) of this subdivision, an employee shall have made a good
18 faith effort to provide the appointing authority or his or her designee
19 the information to be disclosed and shall provide the appointing author-
20 ity or designee a reasonable time to take appropriate action unless
21 there is imminent and serious danger to public health or safety. For the
22 purposes of this subdivision, an employee who acts pursuant to this
23 paragraph shall be deemed to have disclosed information to a govern-
24 mental body under paragraph (a) of this subdivision. NOTIFICATION TO
25 THE APPOINTING AUTHORITY OR DESIGNEE SHALL NOT BE REQUIRED WHERE: (I)
26 THE EMPLOYER HAS NOT POSTED ANY NOTICE REQUIRED BY SUBDIVISION FIVE OF
27 THIS SECTION; (II) THERE IS AN IMMINENT AND SERIOUS DANGER TO THE PUBLIC
28 HEALTH OR SAFETY; (III) THE EMPLOYEE REASONABLY BELIEVES THAT REPORTING
29 TO THE APPOINTING AUTHORITY OR DESIGNEE WOULD RESULT IN A DESTRUCTION OF
30 EVIDENCE OR OTHER CONCEALMENT OF THE IMPROPER GOVERNMENTAL ACTION; OR
31 (IV) SUCH ACTIVITY COULD REASONABLY BE EXPECTED TO LEAD TO ENDANGERING
32 THE WELFARE OF A MINOR.

33 (D) "IMPROPER GOVERNMENTAL ACTION" SHALL MEAN ANY PRACTICE, PROCEDURE,
34 ACTION OR FAILURE TO ACT BY A PUBLIC EMPLOYER OR EMPLOYEE, OR AN AGENT
35 OF SUCH EMPLOYER OR EMPLOYEE, WHICH IS UNDERTAKEN IN THE PERFORMANCE OF
36 SUCH AGENT'S OFFICIAL DUTIES, WHETHER OR NOT SUCH ACTION IS WITHIN THE
37 SCOPE OF SUCH PERSON'S EMPLOYMENT, AND WHICH IS IN VIOLATION OF ANY LAW,
38 RULE OR REGULATION REGARDING GOVERNMENTAL ACTION PUNISHABLE BY IMPRISON-
39 MENT OR CIVIL OR CRIMINAL PENALTY. "LAW, RULE OR REGULATION" INCLUDES:
40 (I) ANY DULY ENACTED FEDERAL, STATE OR LOCAL STATUTE OR ORDINANCE; (II)
41 ANY RULE OR REGULATION PROMULGATED PURSUANT TO ANY SUCH STATUTE OR ORDI-
42 NANCE; OR (III) ANY JUDICIAL OR ADMINISTRATIVE DECISION, RULING OR
43 ORDER.

44 S 4. Subdivision 3 of section 75-b of the civil service law, as added
45 by chapter 660 of the laws of 1984, is amended to read as follows:

46 3. (a) Where an employee is subject to dismissal or other disciplinary
47 action under a final and binding arbitration provision, or other disci-
48 plinary procedure contained in a collectively negotiated agreement, or
49 under section seventy-five of this title or any other provision of state
50 or local law, OR TO THE ELIMINATION OF JOB TITLE OR CLASSIFICATION THAT
51 UNIQUELY FITS AND SINGLES OUT SUCH EMPLOYEE and the employee reasonably
52 believes THAT SUCH dismissal [or], other disciplinary action OR OTHER
53 ADVERSE ACTION would not have been taken but for the conduct protected
54 under subdivision two of this section, he or she may assert such as a
55 defense before the designated arbitrator or hearing officer. The merits
56 of such defense shall be considered and determined as part of the arbi-

1 tration award or hearing officer decision of the matter. If there is a
2 finding that the dismissal or other disciplinary action is based solely
3 on a violation by the employer of such subdivision, the arbitrator or
4 hearing officer shall dismiss or recommend dismissal of the disciplinary
5 proceeding, as appropriate, and, if appropriate, reinstate the employee
6 with back pay, and, in the case of an arbitration procedure, may take
7 other appropriate action as is permitted in the collectively negotiated
8 agreement.

9 (b) Where an employee is subject to a collectively negotiated agree-
10 ment which contains provisions preventing an employer from taking
11 adverse [personnel] actions and which contains a final and binding arbi-
12 tration provision to resolve alleged violations of such provisions of
13 the agreement and the employee reasonably believes that such [personnel]
14 action would not have been taken but for the conduct protected under
15 subdivision two of this section, he or she may assert such as a claim
16 before the arbitrator. The arbitrator shall consider such claim and
17 determine its merits and shall, if a determination is made that such
18 adverse [personnel] ion is based on a violation by the employer of such
19 subdivision, take such action to remedy the violation as is permitted by
20 the collectively negotiated agreement.

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

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

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

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