

4362

2013-2014 Regular Sessions

I N S E N A T E

March 22, 2013

Introduced by Sens. SEWARD, GRIFFO -- (at request of the Department of Financial Services) -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

AN ACT to amend the financial services law, in relation to protecting and compensating whistleblowers who provide original information to the department of financial services as to violations of the banking law, the insurance law, the financial services law and any other applicable law

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

- 1 Section 1. Subsection (a) of section 104 of the financial services law
2 is amended by adding seven new paragraphs 6, 7, 8, 9, 10, 11 and 12 to
3 read as follows:
4 (6) "COVERED JUDICIAL OR ADMINISTRATIVE ACTION" SHALL MEAN ANY JUDI-
5 CIAL OR ADMINISTRATIVE ACTION BROUGHT, WITHIN THE SOLE DISCRETION OF THE
6 SUPERINTENDENT, BY THE DEPARTMENT UNDER THE INSURANCE LAW, THE BANKING
7 LAW OR THIS CHAPTER THAT RESULTS IN FINES, PENALTIES, SETTLEMENT MONIES
8 OR OTHER MONETARY RESOLUTION ON BEHALF OF THE DEPARTMENT EXCEEDING ONE
9 MILLION DOLLARS.
10 (7) "EMPLOYER" SHALL MEAN ANY INDIVIDUAL OR ENTITY WHO OR THAT
11 RETAINED THE SERVICES OF THE WHISTLEBLOWER EITHER BY EMPLOYMENT AGREE-
12 MENT OR ANY OTHER CONTRACTUAL OR SUB-CONTRACTUAL ARRANGEMENT.
13 (8) "MONETARY SANCTIONS" SHALL MEAN:
14 (A) ANY MONIES, INCLUDING PENALTIES, DISGORGEMENT AND INTEREST ORDERED
15 TO BE PAID; AND
16 (B) ANY MONIES DEPOSITED INTO A DISGORGEMENT FUND OR OTHER FUND PURSU-
17 ANT TO THE BANKING LAW, THE INSURANCE LAW OR THIS CHAPTER OR RULES OR
18 REGULATIONS PROMULGATED THEREUNDER, AS A RESULT OF A COVERED JUDICIAL OR
19 ADMINISTRATIVE ACTION OR ANY SETTLEMENT OF SUCH ACTION.
20 (9) "ORIGINAL INFORMATION" SHALL MEAN INFORMATION THAT:

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

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1 (A) IS DERIVED FROM THE INDEPENDENT KNOWLEDGE OR ANALYSIS OF A WHIST-
2 BLOWER;

3 (B) IS NOT KNOWN TO THE DEPARTMENT FROM ANY OTHER SOURCE, UNLESS THE
4 WHISTLEBLOWER IS THE ORIGINAL SOURCE OF THE INFORMATION; AND

5 (C) IS NOT EXCLUSIVELY DERIVED FROM AN ALLEGATION MADE IN A JUDICIAL
6 OR ADMINISTRATIVE HEARING, IN A GOVERNMENTAL REPORT, HEARING, AUDIT OR
7 INVESTIGATION OR FROM THE NEWS MEDIA, UNLESS THE WHISTLEBLOWER IS A
8 SOURCE OF THE INFORMATION.

9 (10) "RELATED ACTION" WHEN USED WITH RESPECT TO ANY COVERED JUDICIAL
10 OR ADMINISTRATIVE ACTION BROUGHT BY THE DEPARTMENT UNDER THE BANKING
11 LAW, THE INSURANCE LAW OR THIS CHAPTER OR RULES AND REGULATIONS PROMUL-
12 GATED THEREUNDER SHALL MEAN ANY JUDICIAL OR ADMINISTRATIVE ACTION
13 BROUGHT BY ANOTHER STATE AGENCY AND/OR FEDERAL REGULATOR OR LAW ENFORCE-
14 MENT AGENCY WITH WHOM THE DEPARTMENT SHARES JURISDICTION THAT IS BASED
15 UPON THE ORIGINAL INFORMATION PROVIDED BY A WHISTLEBLOWER AND THAT WAS
16 THE BASIS OF THE DEPARTMENT'S SUCCESSFUL ENFORCEMENT OF THE RELATED
17 COVERED JUDICIAL OR ADMINISTRATIVE ACTION.

18 (11) "WHISTLEBLOWER" SHALL MEAN ANY INDIVIDUAL WHO PROVIDES, OR TWO OR
19 MORE INDIVIDUALS ACTING JOINTLY WHO PROVIDE, INFORMATION RELATING TO A
20 VIOLATION OF THE BANKING LAW, THE INSURANCE LAW, THIS CHAPTER OR RULES
21 AND REGULATIONS PROMULGATED THEREUNDER TO THE DEPARTMENT, IN A MANNER
22 ESTABLISHED, BY RULE OR REGULATION, BY THE DEPARTMENT.

23 (12) "AWARD" SHALL MEAN A SHARE IN ANY MONEY SANCTIONS RECEIVED BY
24 THE DEPARTMENT PURSUANT TO A COVERED JUDICIAL OR ADMINISTRATIVE ACTION
25 AND PAID TO A WHISTLEBLOWER.

26 S 2. The financial services law is amended by adding a new section 410
27 to read as follows:

28 S 410. WHISTLEBLOWER AWARDS AND PROTECTIONS. (A) THE SUPERINTENDENT
29 SHALL GRANT AWARDS TO WHISTLEBLOWERS IN THE AMOUNTS SET FORTH BELOW:

30 (1) IN GENERAL, IN ANY COVERED JUDICIAL OR ADMINISTRATIVE ACTION OR
31 RELATED ACTION, THE DEPARTMENT, UNDER RULES AND REGULATIONS PRESCRIBED
32 BY THE SUPERINTENDENT AND SUBJECT TO THIS SECTION, SHALL PAY AN AWARD OR
33 AWARDS TO ONE OR MORE WHISTLEBLOWERS WHO VOLUNTARILY PROVIDED ORIGINAL
34 INFORMATION TO THE DEPARTMENT THAT WAS THE BASIS FOR THE SUCCESSFUL
35 ENFORCEMENT OF A COVERED JUDICIAL OR ADMINISTRATIVE ACTION, OR RELATED
36 ACTION, IN AN AGGREGATE AMOUNT EQUAL TO:

37 (A) NOT LESS THAN TEN PERCENT, IN TOTAL, OF WHAT HAS BEEN COLLECTED OF
38 THE MONETARY SANCTIONS IMPOSED IN THE ACTION OR RELATED ACTIONS; AND

39 (B) NOT MORE THAN THIRTY PERCENT, IN TOTAL, OF WHAT HAS BEEN COLLECTED
40 OF THE MONETARY SANCTIONS IMPOSED IN THE ACTION OR RELATED ACTIONS.

41 (2) ANY AMOUNT PAID UNDER PARAGRAPH ONE OF THIS SUBSECTION SHALL BE
42 FIRST APPLIED IN ACCORDANCE WITH THE PROVISIONS OF SUCH PARAGRAPH BEFORE
43 BEING APPLIED, IF APPLICABLE, IN ACCORDANCE WITH SUBPARAGRAPH (B) OF
44 PARAGRAPH ONE OF SUBSECTION (A) OF SECTION FOUR HUNDRED EIGHT OF THIS
45 ARTICLE.

46 (3) IF A RELATED ACTION RESULTS IN A MONETARY RECOVERY BY ANOTHER
47 STATE AGENCY, A FEDERAL REGULATOR OR A LAW ENFORCEMENT AGENCY OR ANY
48 COMBINATION OF ANY SUCH ENTITIES, BUT THE DEPARTMENT DOES NOT SHARE ANY
49 PORTION OF THE RECOVERY, OR ITS SHARE AMOUNTS TO LESS THAN ONE MILLION
50 DOLLARS, THE DEPARTMENT IS NOT REQUIRED TO PROVIDE ANY REWARD TO THE
51 WHISTLEBLOWER.

52 (B)(1) THE DETERMINATION OF THE AMOUNT OF AN AWARD MADE UNDER THIS
53 SECTION SHALL BE SOLELY IN THE DISCRETION OF THE SUPERINTENDENT.

54 (2) IN DETERMINING THE AMOUNT OF AN AWARD MADE UNDER THIS SECTION, THE
55 SUPERINTENDENT SHALL TAKE INTO CONSIDERATION THE FOLLOWING FACTORS:

1 (A) THE SIGNIFICANCE OF THE INFORMATION PROVIDED BY THE WHISTLEBLOWER
2 TO THE SUCCESS OF THE COVERED JUDICIAL OR ADMINISTRATIVE ACTION;

3 (B) THE DEGREE OF ASSISTANCE PROVIDED BY THE WHISTLEBLOWER AND ANY
4 LEGAL REPRESENTATIVE OF THE WHISTLEBLOWER IN A COVERED JUDICIAL OR
5 ADMINISTRATIVE ACTION;

6 (C) THE INTEREST OF THE DEPARTMENT IN DETERRING VIOLATIONS OF THE
7 BANKING LAW, THE INSURANCE LAW OR THIS CHAPTER; AND

8 (D) SUCH ADDITIONAL RELEVANT FACTORS AS THE SUPERINTENDENT MAY ESTAB-
9 LISH BY RULE OR REGULATION.

10 (C) NO AWARD SHALL BE MADE TO ANY WHISTLEBLOWER IF THE SUPERINTENDENT
11 SHALL DETERMINE THAT:

12 (1) THE WHISTLEBLOWER IS, OR WAS AT THE TIME THE WHISTLEBLOWER
13 ACQUIRED THE ORIGINAL INFORMATION SUBMITTED TO THE DEPARTMENT, A MEMBER,
14 OFFICER OR EMPLOYEE OF THE DEPARTMENT, ANY AGENCY THAT REGULATES BANK-
15 ING, INSURANCE OR FINANCIAL SERVICES PRODUCTS, A STATE OR LOCAL LAW
16 ENFORCEMENT ORGANIZATION, ANY FEDERAL LAW ENFORCEMENT ORGANIZATION, OR A
17 SELF-REGULATORY AGENCY REGULATING BANKING, INSURANCE OR FINANCIAL
18 SERVICES PRODUCTS;

19 (2) THE WHISTLEBLOWER WAS CONVICTED OF A CRIMINAL VIOLATION RELATED TO
20 THE COVERED JUDICIAL OR ADMINISTRATIVE ACTION FOR WHICH THE WHISTLEBLOW-
21 ER OTHERWISE COULD RECEIVE AN AWARD UNDER THIS SECTION;

22 (3) THE WHISTLEBLOWER FAILED TO SUBMIT INFORMATION TO THE DEPARTMENT
23 IN SUCH FORM AS THE DEPARTMENT MAY REQUIRE; OR

24 (4) THE WHISTLEBLOWER KNOWINGLY AND WILLFULLY MADE FALSE, FICTITIOUS
25 OR FRAUDULENT STATEMENTS OR REPRESENTATIONS, OR USED ANY FALSE WRITING
26 OR DOCUMENT KNOWING THE WRITING OR DOCUMENT CONTAINED FALSE, FICTITIOUS
27 OR FRAUDULENT STATEMENTS OR ENTRIES, UNLESS SUCH FALSE, FICTITIOUS OR
28 FRAUDULENT STATEMENTS OR ENTRIES WERE NOT MADE BY THE WHISTLEBLOWER AND
29 REFLECT THE CONDUCT AND VIOLATIONS OF LAW THE WHISTLEBLOWER IS DISCLOS-
30 ING OR HAS DISCLOSED TO THE DEPARTMENT.

31 (D) (1) ANY WHISTLEBLOWER WHO MAKES A CLAIM FOR AN AWARD UNDER THIS
32 SECTION MAY BE REPRESENTED BY COUNSEL.

33 (2) REPRESENTATION SHALL BE REQUIRED WHEN:

34 (A) ANY WHISTLEBLOWER WHO ANONYMOUSLY MAKES A CLAIM FOR AN AWARD UNDER
35 THIS SECTION AND SUBMITS THE INFORMATION UPON WHICH THE CLAIM IS BASED;
36 AND

37 (B) BEFORE THE PAYMENT OF AN AWARD, COUNSEL FOR THE WHISTLEBLOWER
38 DISCLOSES THE IDENTITY OF THE WHISTLEBLOWER AND PROVIDES SUCH OTHER
39 INFORMATION AS THE DEPARTMENT MAY REQUIRE, DIRECTLY OR THROUGH COUNSEL
40 FOR THE WHISTLEBLOWER, INCLUDING SUCH EVIDENCE AS MAY BE NECESSARY TO
41 DEMONSTRATE THAT THE WHISTLEBLOWER WAS REPRESENTED BY COUNSEL AS
42 REQUIRED BY THIS SECTION.

43 (E) NO CONTRACT WITH THE DEPARTMENT SHALL BE NECESSARY FOR ANY WHIST-
44 LEBLOWER TO RECEIVE AN AWARD UNDER THIS SECTION, UNLESS OTHERWISE
45 REQUIRED BY THE DEPARTMENT BY RULE OR REGULATION.

46 (F) ANY DETERMINATION MADE UNDER THIS SECTION, INCLUDING WHETHER, TO
47 WHOM, OR IN WHAT AMOUNT TO MAKE AWARDS, SHALL BE SOLELY IN THE
48 DISCRETION OF THE SUPERINTENDENT. ANY SUCH DETERMINATION MAY BE CHAL-
49 LENGED IN ACCORDANCE WITH ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE
50 LAW AND RULES, PROVIDED THAT ANY SUCH CHALLENGE SHALL BE BROUGHT WITHIN
51 FORTY-FIVE DAYS OF THE DATE OF ANY SUCH DETERMINATION UNDER CHALLENGE.

52 (G) (1) NO EMPLOYER MAY DISCHARGE, DEMOTE, SUSPEND, THREATEN OR
53 HARASS, DIRECTLY OR INDIRECTLY, OR IN ANY OTHER MANNER DISCRIMINATE
54 AGAINST A WHISTLEBLOWER IN THE TERMS AND CONDITIONS OF EMPLOYMENT
55 BECAUSE OF ANY LAWFUL ACT DONE BY THE WHISTLEBLOWER:

1 (A) IN PROVIDING INFORMATION TO THE DEPARTMENT IN ACCORDANCE WITH THIS
2 SECTION; AND

3 (B) IN INITIATING, TESTIFYING IN OR ASSISTING IN ANY INVESTIGATION OR
4 JUDICIAL OR ADMINISTRATIVE ACTION OF THE DEPARTMENT.

5 (2) ANY CURRENT OR FORMER EMPLOYEE, CONTRACTOR OR AGENT OF ANY PRIVATE
6 OR PUBLIC EMPLOYER WHO IS DISCHARGED, DEMOTED, SUSPENDED, THREATENED OR
7 HARASSED OR IN ANY OTHER MANNER DISCRIMINATED AGAINST IN THE TERMS AND
8 CONDITIONS OF EMPLOYMENT, OR OTHERWISE HARMED OR PENALIZED BY AN EMPLOY-
9 ER, OR A PROSPECTIVE EMPLOYER, BECAUSE OF LAWFUL ACTS DONE BY THE
10 EMPLOYEE, CONTRACTOR, AGENT OR ASSOCIATED WITH ACTS OF OTHERS IN FURTH-
11 ERANCE OF ANY COVERED JUDICIAL OR ADMINISTRATIVE ACTION OR OTHER EFFORTS
12 TO STOP ONE OR MORE VIOLATIONS OF THE INSURANCE LAW, BANKING LAW OR THIS
13 CHAPTER SHALL BE ENTITLED TO ALL RELIEF NECESSARY TO MAKE THE EMPLOYEE,
14 CONTRACTOR OR AGENT WHOLE. SUCH RELIEF SHALL INCLUDE BUT NOT BE LIMITED
15 TO:

16 (A) AN INJUNCTION TO RESTRAIN CONTINUED DISCRIMINATION;

17 (B) HIRING, CONTRACTING OR REINSTATEMENT TO THE POSITION SUCH PERSON
18 WOULD HAVE HAD BUT FOR THE DISCRIMINATION OR TO AN EQUIVALENT POSITION;

19 (C) REINSTATEMENT OF FULL FRINGE BENEFITS AND SENIORITY RIGHTS;

20 (D) PAYMENT OF TWO TIMES BACK PAY, PLUS INTEREST; AND

21 (E) COMPENSATION FOR ANY SPECIAL DAMAGES SUSTAINED AS A RESULT OF THE
22 DISCRIMINATION, INCLUDING LITIGATION COSTS AND REASONABLE ATTORNEYS'
23 FEES.

24 (3) FOR PURPOSES OF THIS SECTION, A "LAWFUL ACT" SHALL INCLUDE, BUT
25 NOT BE LIMITED TO, OBTAINING OR TRANSMITTING TO THE DEPARTMENT OR
26 PRIVATE COUNSEL SOLELY EMPLOYED TO INVESTIGATE OR POTENTIALLY FILE WITH
27 THE DEPARTMENT INFORMATION RELATING TO VIOLATIONS OF THE BANKING LAW,
28 THE INSURANCE LAW, OR THIS CHAPTER EVEN THOUGH SUCH ACT MAY VIOLATE A
29 CONTRACT, SEVERANCE AGREEMENT, EMPLOYMENT TERM, OR DUTY OWED TO THE
30 EMPLOYER OR CONTRACTOR.

31 (H) THE DEPARTMENT AND ANY OFFICER OR EMPLOYEE OF THE DEPARTMENT SHALL
32 NOT DISCLOSE ANY INFORMATION, INCLUDING INFORMATION PROVIDED BY A WHIST-
33 LEBLOWER TO THE DEPARTMENT, WHICH COULD REASONABLY BE EXPECTED TO REVEAL
34 THE IDENTITY OF A WHISTLEBLOWER, UNLESS IN THE JUDGMENT OF THE SUPER-
35 INTENDENT THE ENDS OF JUSTICE AND THE PUBLIC ADVANTAGE WILL BE SERVED BY
36 RELEASE OF SUCH INFORMATION.

37 (I) NOTHING IN THIS SECTION IS INTENDED TO LIMIT, OR SHALL BE
38 CONSTRUED TO LIMIT THE SUPERINTENDENT'S AUTHORITY UNDER SECTIONS TWO
39 HUNDRED TWO AND THREE HUNDRED ONE OF THIS CHAPTER, OR THAT OF OTHER LAW
40 ENFORCEMENT AUTHORITY PROVIDED UNDER SECTION FOUR HUNDRED SIX OF THIS
41 ARTICLE.

42 (J) THE RIGHTS AND REMEDIES PROVIDED FOR IN THIS SECTION MAY NOT BE
43 WAIVED BY ANY AGREEMENT, POLICY FORM, OR CONDITION OF EMPLOYMENT,
44 INCLUDING BY A PRE-DISPUTE ARBITRATION AGREEMENT, WHICH SHALL NOT BE
45 VALID OR ENFORCEABLE IF IT REQUIRES ARBITRATION OF A DISPUTE ARISING
46 UNDER THIS SECTION. NO SALARY OR WAGES EARNED BY THE WHISTLEBLOWER
47 DURING HIS OR HER EMPLOYMENT, NOR ANY CONSIDERATION PROVIDED THE WHIST-
48 LEBLOWER IN CONNECTION WITH HIS OR HER SEVERANCE FROM SUCH EMPLOYMENT,
49 RELATED TO ORIGINAL INFORMATION OR THE COVERED JUDICIAL OR ADMINISTRA-
50 TIVE ACTION MAY BE RECOUPED BY ANY RIGHT OF ACTION BROUGHT BY THE
51 EMPLOYER.

52 (K) THE SUPERINTENDENT IS HEREBY AUTHORIZED AND EMPOWERED TO PROMUL-
53 GATE SUCH RULES AND REGULATIONS AS THE SUPERINTENDENT SHALL DEEM APPRO-
54 PRIATE FOR THE ENFORCEMENT OF THIS ACTION.

55 S 3. This act shall take effect on the ninetieth day after it shall
56 have become a law.