STATE OF NEW YORK

6426

2017-2018 Regular Sessions

IN SENATE

May 18, 2017

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

AN ACT to amend the labor law, in relation to enacting the "Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act"

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the "Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act".

§ 2. Legislative findings. 1. The legislature finds and declares that violations of the labor law are often systemic, affecting many workers.

2. The legislature further finds and declares that despite the labor law's strong protections for workers, limits on the availability of public enforcement resources have deleterious effects on the marketplace by allowing abuses targeting workers to persist unprosecuted. To ensure the robust enforcement of the labor law, while minimizing the outlay of scarce state funds, this act allows private individuals to bring public enforcement actions in certain contexts in which the state does not have the means to fully enforce labor law protections.

3. The legislature further finds and declares that the purpose of the EMPIRE Worker Protection Act is to create a means of empowering citizens as private attorneys general to enforce the New York labor law.

4. The legislature further finds and declares that the purpose of the EMPIRE Worker Protection Act is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies. Such representative actions are an efficient mechanism to limit systemic violations, will enforce the rights of more workers, and can benefit the department of labor with enhanced resources.

5. The legislature further finds and declares that the purpose of the EMPIRE Worker Protection Act is to benefit those employers who are oper-

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

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ating within the labor law, and who, as a result, face unfair competition from individuals and entities shirking the labor law.

6. The legislature further finds and declares that the purpose of the EMPIRE Worker Protection Act is to incentivize labor organizations and not-for-profit organizations to aid working people to report violations of the New York labor law.

7. The legislature further finds and declares that the purpose of the EMPIRE Worker Protection Act is to facilitate whistleblowers suffering from violations of the New York labor law to report abuses without fear of retaliation and intimidation.

8. The legislature further finds and declares that the EMPIRE Worker Protection Act is part of a history both in New York state and in the United States of laws enabling private citizens to aid in public enforcement in the whistleblower and more recently in the labor context. In similar qui tam legislation enabling private citizens to aid in public enforcement, the resulting action is in reality a public enforcement action.

9. The legislature further finds and declares that the EMPIRE Worker Protection Act further increases the capacity of the department of labor as almost all of the department of labor's investigatory work is complaint-driven rather than agency-driven. Moreover, the EMPIRE Worker Protection Act will help offset the loss of human capital at the department due to the decrease in senior labor investigators and stagnant numbers of labor investigators employed by the department of labor since 2008.

10. The legislature further finds and declares that the mandate of the EMPIRE Worker Protection Act is consistent with the legislature's commitment to enhance worker protections, especially for low-wage workers, as the majority of wages owed by employers according to department of labor statistics are based on minimum wage violations.

§ 3. The labor law is amended by adding a new article 33 to read as follows:

ARTICLE 33

EMPOWERING PEOPLE IN RIGHTS ENFORCEMENT (EMPIRE) WORKER PROTECTION ACT

Section 960. Definitions.
961. Public enforcement action.
962. Procedure.
963. Construction and non-application.

§ 960. Definitions. As used in this article, the following terms shall have the following meanings:

1. "aggrieved employee" means any employee as defined by section two of article one of this chapter who was employed by the alleged violator employer and against whom one of the alleged violations was committed, as well as any person who is not classified by a business as an employee but who claims to be an employee and whose claims against the purported employer relate to this alleged misclassification.

2. "employer" means any employer as defined by section two of article one of this chapter.

3. "representative organization" means a labor organization as defined by subdivision five of section seven hundred one of article twenty of this chapter or a not-for-profit corporation, as defined by subparagraphs five and seven of paragraph (a) of section one hundred two of article one of the not-for-profit corporation law, which not-for-profit corporation regularly advocates on behalf of workers or employees and/or regularly advocates for or assists in enforcement of the provisions of this chapter.

4. "public enforcement action" means an action brought under this article intended to enforce this chapter's protections enforceable by the commissioner.

5. "commissioner" shall, for the purposes of this article, include the commissioner, and any division, board, commission, or part of the department authorized to impose or seek penalties or other remedies for violations of this chapter.

§ 961. Public enforcement action. 1. An aggrieved employee or employees or a representative organization may initiate a public enforcement action on behalf of the commissioner for any provision of this chapter, or any regulation promulgated thereunder, that provides for a civil penalty to be assessed and collected by the commissioner for a violation of this chapter, or any regulation promulgated thereunder, on behalf of himself or herself and other current or former employees pursuant to the procedures specified in section nine hundred sixty-two of this article. An aggrieved employee or a representative organization may allege multiple violations that have affected different employees.

2. a. For purposes of this section, whenever the commissioner has discretion to assess a civil penalty, a court shall be authorized to exercise the same discretion to assess a civil penalty. To the extent that the commissioner is authorized to determine that an employer has violated a provision of this chapter or regulation promulgated thereunder, in a public enforcement action, a court shall be authorized to determine that an employer has committed such a violation.

b. For all provisions of this chapter and regulations adopted pursuant to this chapter, except those for which a civil penalty is specifically provided, there is established a civil penalty of five hundred dollars for each aggrieved employee per pay period per violation. A court may not award a lesser amount, unless, based on the facts and circumstances of the particular case, the employer demonstrates that to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

c. Any aggrieved employee or a representative organization who prevails in any public enforcement action shall be entitled to an award of reasonable attorney's fees and costs.

d. Nothing in this section shall operate to limit an aggrieved employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this section.

3. Civil penalties recovered by aggrieved employees or a representative organization in public enforcement actions shall be distributed as follows: forty-five percent to the aggrieved employee or employees; and fifty-five percent to the commissioner for enforcement of this chapter and education of employers and employees about their rights and responsibilities under this chapter, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes. If an aggrieved employee or employees elect a representative organization to bring the public enforcement action, civil penalties recovered shall be distributed as follows: thirty percent to the aggrieved employee or employees; fifteen percent to the representative organization; fifty-five percent to the commissioner for enforcement of this chapter and education of employers and employees about their rights and responsibilities under this chapter, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

4. The right to bring a public enforcement action under this article shall not be subject to private agreements between an aggrieved employee and an employer or purported employer.

5. Notwithstanding any other provision of law, a public enforcement action to recover upon a penalty imposed by this article must be commenced within six years. The statute of limitations for bringing a representative action under this article shall be tolled from the date an aggrieved employee or a representative organization files a notice pursuant to section nine hundred sixty-two of this article with the commissioner or the commissioner commences an investigation, whichever is earlier.

6. Public enforcement actions belong to the state and preclude subsequent state enforcement efforts, whether brought by the state or an aggrieved employee or representative organization; provided, however, public enforcement actions are not duplicative of private actions related to the same issues or touching the same nucleus of operative facts. Therefore, a public enforcement action brought under this article does not have any preclusive effect on private actions addressing similar wrongdoing.

7. The commissioner shall establish a publicly available database of public enforcement actions brought pursuant to this article, including the parties, the disposition and any other information which the commissioner shall by regulation prescribe.

§ 962. Procedure. 1. No public enforcement action by an aggrieved employee or a representative organization pursuant to section nine hundred sixty-one of this article alleging a violation of any provision of this chapter may be commenced:

a. prior to thirty days after written notice has been given by the aggrieved employee or a representative organization to the commissioner. Such written notice shall be given in such a manner as the commissioner may prescribe by regulation, shall be construed in a light favorable to the aggrieved employee or representative organization, and shall include:

(i) the name, address and contact information of the employer.

(ii) the name, address, occupation and contact information of the aggrieved employee.

(iii) the name, address and contact information of the representative organization, if the action is brought by a representative organization.

(iv) the name, address and contact information of the aggrieved employee's legal counsel, should one exist.

(v) a statement of the underlying claim.

(vi) estimated number of employees affected.

b. if the commissioner, at any time prior to the end of the thirty day notice period prescribed in paragraph a of this subdivision or prior to commencement of such action, whichever is later, and upon written notice to the aggrieved employee who provided the notice prescribed in paragraph a of this subdivision, has commenced and is actively prosecuting an administrative enforcement proceeding pursuant to this chapter relative to the alleged violation.

c. if the commissioner, on the same facts and theories, cites a person within the timeframes set forth in this section for a violation of the same section or sections of this chapter under which the aggrieved employee or representative organization is attempting to recover a civil penalty or remedy on behalf of himself or herself or others.

2. The commissioner may intervene in the public enforcement action and proceed with any and all claims in the action:

a. as of right within the thirty day notice period prescribed in paragraph a of subdivision one of this section; or

b. for good cause, as determined by the court, after the expiration of the thirty day notice period prescribed in paragraph a of subdivision one of this section.

3. a. The aggrieved employee or representative organization shall, within ten days following commencement of a civil action pursuant to this article, provide the commissioner with a file-stamped copy of the complaint that includes the case number assigned by the court.

b. Either the commissioner or a federal or state court of competent jurisdiction shall review and approve any settlement of any civil action filed pursuant to this section. The commissioner or court shall approve the settlement if it is fair, reasonable, and adequate, in light of the statutory purpose of the provision of this chapter alleged to have been violated and the purpose of the EMPIRE Worker Protection Act.

c. A copy of the court's judgment in any civil action filed pursuant to this article and any other order in that action that either provides for or denies an award of civil penalties under this article shall be submitted to the commissioner within ten days after entry of the judgment or order.

d. Items required to be submitted to the commissioner under this subdivision shall be transmitted in such a manner as the commissioner shall prescribe for the filing of notices under paragraph a of subdivision one of this section.

4. If a representative organization initiates a public enforcement action pursuant to this article, an aggrieved employee must elect the representative organization in writing in a form which the commissioner shall by regulation prescribe. In such cases, the aggrieved employee's name and personal identifying information shall be kept confidential if the aggrieved employee so chooses.

5. Such regulations prescribed pursuant to paragraph a of subdivision one of this section shall provide for the right of the aggrieved employee or representative organization to furnish an amended notice, after the notice by the commissioner to the aggrieved employee or representative organization that the original notice was not in compliance with this section or the regulations issued thereunder and specifying with particularity what the deficiencies were in the original notice. Such notice and opportunity to amend shall be provided by the commissioner within thirty days of the original notice or the original notice shall be deemed in compliance with this section. The aggrieved employee or representative organization shall have thirty days from receiving notice from the commissioner that their original notice was not in compliance with this section to amend the notice.

6. For the purposes of determining whether the aggrieved employee or representative organization complied with this section, the notice shall be construed in a light favorable to the employee or representative organization.

§ 963. Construction and non-application. 1. This article shall not apply to the recovery of administrative and civil penalties in connection with the unemployment insurance law as contained in article eighteen of this chapter.

2. This article shall not apply to the recovery of administrative and civil penalties in connection with the New York state labor relations act as contained in article twenty of this chapter.

3. Severability. If any word, phrase, clause, sentence, paragraph, subdivision, section or part of this article or the application thereof

to any person or circumstances shall be adjudged invalid by a court of competent jurisdiction, such order or judgment shall be confined in its operation to the controversy in which it was rendered, and shall not affect or invalidate the remainder of this article, but shall be confined in its operation to the word, phrase, clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

4. This article shall be construed in light of its remedial purposes to expand the enforcement of this chapter.

§ 4. This act shall take effect immediately.