

STATE OF NEW YORK

3683--A

2019-2020 Regular Sessions

IN SENATE

February 12, 2019

Introduced by Sens. HOYLMAN, BIAGGI, GOUNARDES, KRUEGER, MAYER, SALAZAR -- read twice and ordered printed, and when printed to be committed to the Committee on Labor -- recommitted to the Committee on Labor in accordance with Senate Rule 6, sec. 8 -- 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:

Section 1. Section 740 of the labor law, as added by chapter 660 of the laws of 1984, paragraph (g) of subdivision 1 as added and paragraph (a) of subdivision 2 as amended by chapter 442 of the laws of 2006, paragraph (d) of subdivision 4 as added by chapter 24 of the laws of 2002, and subdivision 7 as amended by chapter 684 of the laws of 2019, is amended to read as follows:

§ 740. Retaliatory [~~personnel~~] action by employers; prohibition. 1. Definitions. For purposes of this section, unless the context specifically indicates otherwise:

(a) "Employee" means an individual who performs services for and under the control and direction of an employer for wages or other remuneration.

(b) "Employer" means any person, firm, partnership, institution, corporation, or association that employs one or more employees.

(c) "Law, rule or regulation" includes: (i) any duly enacted federal, state or local statute or ordinance [~~ex~~]; (ii) any rule or regulation promulgated pursuant to [~~any federal, state or local~~] such statute or ordinance; or (iii) any judicial or administrative decision, ruling or order.

(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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(i) the United States Congress, any state legislature, or any ~~popularly-elected~~ elected local governmental body, or any member or employee thereof;

(ii) any federal, state, or local ~~judiciary~~ court, or any member or employee thereof, or any grand or petit jury;

(iii) any federal, state, or local regulatory, administrative, or public agency or authority, or instrumentality thereof; ~~or~~

(iv) any federal, state, or local law enforcement agency, prosecutorial office, or police or peace officer;

(v) any federal, state or local department of an executive branch of government; or

(vi) any division, board, bureau, office, committee, or commission of any of the public bodies described in subparagraphs (i) through (v) of this paragraph.

(e) "Retaliatory ~~personnel~~ action" means the discharge, suspension ~~or demotion of~~, demotion, penalization or discrimination against an employee or former employee, or other adverse ~~employment~~ action taken against an employee ~~in the terms and conditions of employment~~ or former employee.

(f) "Supervisor" means any individual within an employer's organization who has the authority to direct and control the work performance of ~~the affected~~ an employee; or who has ~~managerial~~ authority to take corrective action regarding the ~~violation of the law, rule or regulation~~ illegal or dangerous business activity of which the employee complains.

(g) ~~"Health care fraud" means health care fraud as defined by article one hundred seventy-seven of the penal law.~~ "Agent" means any individual, partnership, association, corporation or group of persons acting on behalf of an employer.

(h) "Illegal or dangerous business activity" means any practice, procedure, action or failure to act by an employer, or an employee or agent of such employer, taken in the course of the employer's business, whether or not within the scope of employment or agency, that: (i) is in violation of any law, rule or regulation; or (ii) creates and presents a substantial and specific danger to the public health or safety.

2. Prohibitions. An employer shall not take any retaliatory ~~personnel~~ action against an employee or former employee because such employee or former employee does any of the following while employed by the employer, whether or not within the scope of the employee's job duties:

(a) discloses to a supervisor or a public body, or threatens to ~~disclose~~ make a disclosure to a ~~supervisor or to a~~ public body unless the employer remedies the illegal or dangerous business activity, information about an illegal or dangerous business activity~~, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud~~;

(b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such ~~violation of a law, rule or regulation by such employer~~ illegal or dangerous business activity; or

(c) objects to, or refuses to participate in, any ~~such~~ illegal or dangerous business activity~~, policy or practice in violation of a law, rule or regulation~~.

3. Application. The protection against retaliatory ~~personnel~~ action provided by paragraphs (a), (b) and (c) of subdivision two of this section shall apply to any employee who in good faith reasonably

1 believes that an illegal or dangerous business activity has occurred or
2 will occur, based on information that the employee in good faith reason-
3 ably believes to be true; provided however that the protection against
4 retaliatory action provided by paragraph (a) of subdivision two of this
5 section pertaining to disclosure to a public body shall not apply to an
6 employee who makes such disclosure to a public body unless the employee
7 has [~~brought~~] made a good faith effort to notify his or her employer by
8 bringing the illegal or dangerous business activity[~~, policy or practice~~
9 ~~in violation of law, rule or regulation~~] to the attention of a supervi-
10 sor [~~of the employer~~] and has afforded such employer a reasonable oppor-
11 tunity to correct such activity[~~, policy or practice~~]. Such employer
12 notification shall not be required where: (a) the employer has not post-
13 ed any notice required by subdivision eight of this section; (b) there
14 is an imminent and serious danger to the public health or safety; (c)
15 the employee reasonably believes that reporting to the supervisor would
16 result in a destruction of evidence or other concealment of the illegal
17 or dangerous business activity; (d) such activity could reasonably be
18 expected to lead to endangering the welfare of a minor; (e) the employee
19 reasonably believes that reporting to the supervisor would result in
20 physical harm to the employee or any other person; or (f) the employee
21 reasonably believes that the supervisor is already aware of the illegal
22 or dangerous business activity and will not correct such activity.

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

28 (b) Any action authorized by this section may be brought in the county
29 in which the alleged retaliatory [~~personnel~~] action occurred, in the
30 county in which the complainant resides, or in the county in which the
31 employer has its principal place of business. In any such action, the
32 parties shall be entitled to a jury trial.

33 (c) [~~It shall be a defense to any action brought pursuant to this~~
34 ~~section that the personnel action was predicated upon grounds other than~~
35 ~~the employee's exercise of any rights protected by this section.~~] Except
36 as otherwise provided in this section, a violation of this section is
37 established when the complainant demonstrates that a motivating factor
38 for the retaliatory action violates subdivision two of this section.
39 Remedies for violation of subdivision two of this section shall be
40 limited solely to those provided in paragraphs (e), (f) and (g) of
41 subdivision five of this section if the employer demonstrates that it
42 would have taken the same action in the absence of the impermissible
43 motivating factor. It shall [~~also~~] be a defense that the individual was
44 an independent contractor.

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

~~established pursuant to section ninety-seven aaaa of the state finance law.]~~

5. Relief. In any action brought pursuant to subdivision four of this section, the court may order relief as follows, with monetary amounts as determined by the jury other than under paragraph (e) and/or paragraph (g) of this subdivision:

(a) ~~[an injunction to restrain continued violation of this section, (b)]~~ the reinstatement of the employee to the same position held before the retaliatory ~~[personnel]~~ action~~[,]~~ or to an equivalent position, or front pay in lieu thereof;

~~[(e)]~~ (b) the reinstatement of full fringe benefits and seniority rights;

~~[(d)]~~ (c) the compensation for lost wages, benefits and other remuneration; ~~[and]~~

(d) compensatory damages for economic loss and for emotional distress;

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

(f) an injunction to restrain the employer's continued violation of this section; and

(g) a civil penalty of an amount not to exceed ten thousand dollars and/or a liquidated damages award equal to amounts of damages pursuant to paragraphs (c) and (d) of this subdivision, unless the court finds that the employer acted in good faith in the retaliatory action.

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

7. Existing rights. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract.

8. Publication. Every employer shall inform employees of their protections, rights and obligations under this section, by posting a notice thereof. Such notices shall be posted conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment.

§ 2. Subdivision 4 of section 741 of the labor law, as added by chapter 24 of the laws of 2002, is amended and a new subdivision 6 is added to read as follows:

4. Enforcement. A health care employee may seek enforcement of this section pursuant to ~~[paragraph (d) of subdivision]~~ subdivisions four and five of section seven hundred forty of this article.

6. Publication. Every employer shall inform employees of their protections, rights and obligations under this section by posting a notice thereof. Such notices shall be posted conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment.

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

2. (a) A public employer shall not dismiss, suspend, demote, penalize, threaten or discriminate against, or take other disciplinary or other ~~[adverse personnel action]~~ act of reprisal against a public employee regarding the employee's employment because the employee: (i) discloses to a public body or threatens to make a disclosure to a public body or supervisor if the employer does not remedy the improper conduct, to a

1 governmental body information[~~+(i)~~] regarding a violation of a law,
2 rule or regulation which violation creates [and] or presents a substan-
3 tial and specific danger to the public health or safety[~~+(or (ii) which~~
4 ~~the employee reasonably believes to be true and reasonably believes~~], or
5 which constitutes an improper governmental action[~~."Improper govern-~~
6 ~~mental action" shall mean any action by a public employer or employee,~~
7 ~~or an agent of such employer or employee, which is undertaken in the~~
8 ~~performance of such agent's official duties, whether or not such action~~
9 ~~is within the scope of his employment, and which is in violation of any~~
10 ~~federal, state or local law, rule or regulation~~], or which could reason-
11 ably be expected to lead to endangering the welfare of a minor; (ii)
12 provides information to, or testifies before, any public body conducting
13 an investigation, hearing or inquiry into any violation or improper
14 governmental action; or (iii) objects to, or refuses to participate in,
15 any such violation or improper governmental action.

16 (b) The protection against retaliatory action provided in subpara-
17 graphs (i) and (ii) of paragraph (a) of this subdivision shall apply to
18 any employee who in good faith reasonably believes that a violation or
19 improper governmental action has occurred or will occur, based on infor-
20 mation that the employee in good faith reasonably believes to be true.

21 (c) Prior to disclosing information pursuant to subparagraph (i) of
22 paragraph (a) of this subdivision, an employee shall have made a good
23 faith effort to provide the appointing authority or his or her designee
24 the information to be disclosed and shall provide the appointing author-
25 ity or designee a reasonable time to take appropriate action unless
26 there is imminent and serious danger to public health or safety. For
27 the purposes of this subdivision, an employee who acts pursuant to
28 this paragraph shall be deemed to have disclosed information to a
29 governmental body under paragraph (a) of this subdivision. Notifica-
30 tion to the appointing authority or designee shall not be required
31 where: (i) the employer has not posted any notice required by subdivi-
32 sion five of this section; (ii) there is an imminent and serious danger
33 to the public health or safety; (iii) the employee reasonably believes
34 that reporting to the appointing authority or designee would result in a
35 destruction of evidence or other concealment of the improper govern-
36 mental action; or (iv) such activity could reasonably be expected to
37 lead to endangering the welfare of a minor.

38 (d) "Improper governmental action" shall mean any practice, procedure,
39 action or failure to act by a public employer or employee, or an agent
40 of such employer or employee, which is undertaken in the performance of
41 such agent's official duties, whether or not such action is within the
42 scope of such person's employment, and which is: (i) in violation of any
43 law, rule or regulation regarding governmental action; or (ii) creates
44 and presents a substantial and specific danger to the public health or
45 safety. "Law, rule or regulation" includes: (i) any duly enacted feder-
46 al, state or local statute or ordinance; (ii) any rule or regulation
47 promulgated pursuant to any such statute or ordinance; or (iii) any
48 judicial or administrative decision, ruling or order.

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

51 3. (a) Where an employee is subject to dismissal or other disciplinary
52 action under a final and binding arbitration provision, or other disci-
53 plinary procedure contained in a collectively negotiated agreement, or
54 under section seventy-five of this title or any other provision of state
55 or local law, or to the elimination of job title or classification that
56 uniquely fits and singles out such employee and the employee reasonably

1 believes that such dismissal [~~or~~], other disciplinary action or other
2 adverse action would not have been taken but for the conduct protected
3 under subdivision two of this section, he or she may assert such as a
4 defense before the designated arbitrator or hearing officer. The merits
5 of such defense shall be considered and determined as part of the arbi-
6 tration award or hearing officer decision of the matter. If there is a
7 finding that the dismissal or other disciplinary action is based solely
8 on a violation by the employer of such subdivision, the arbitrator or
9 hearing officer shall dismiss or recommend dismissal of the disciplinary
10 proceeding, as appropriate, and, if appropriate, reinstate the employee
11 with back pay, and, in the case of an arbitration procedure, may take
12 other appropriate action as is permitted in the collectively negotiated
13 agreement.

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

26 (c) [~~Where~~] In addition to or in lieu of the procedures set forth in
27 paragraphs (a) and (b) of this subdivision, or where an employee is not
28 subject to any of the provisions of [~~paragraph (a) or (b) of this subdivi-~~
29 ~~vision~~] such paragraphs, the employee may commence an action in a court
30 of competent jurisdiction under the same terms and conditions and for
31 the same relief as set forth in article twenty-C of the labor law.

32 § 5. Section 75-b of the civil service law is amended by adding a new
33 subdivision 5 to read as follows:

34 5. Every public employer shall inform employees of their protections,
35 rights and obligations under this section, by posting a notice thereof.
36 Such notices shall be posted conspicuously in easily accessible and
37 well-lighted places customarily frequented by employees and applicants
38 for employment.

39 § 6. This act shall take effect on the ninetieth day after it shall
40 have become a law.