

# STATE OF NEW YORK

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1848

2019-2020 Regular Sessions

## IN SENATE

January 16, 2019

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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:

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

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

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

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

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

24 5. The legislature further finds and declares that the purpose of the  
25 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.

LBD00280-01-9

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.

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

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

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

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

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

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

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

40 3. Civil penalties recovered by aggrieved employees or a represen-  
41 tative organization in public enforcement actions shall be distributed  
42 as follows: forty-five percent to the aggrieved employee or employees;  
43 and fifty-five percent to the commissioner for enforcement of this chap-  
44 ter and education of employers and employees about their rights and  
45 responsibilities under this chapter, to be continuously appropriated to  
46 supplement and not supplant the funding to the agency for those  
47 purposes. If an aggrieved employee or employees elect a representative  
48 organization to bring the public enforcement action, civil penalties  
49 recovered shall be distributed as follows: thirty percent to the  
50 aggrieved employee or employees; fifteen percent to the representative  
51 organization; fifty-five percent to the commissioner for enforcement of  
52 this chapter and education of employers and employees about their rights  
53 and responsibilities under this chapter, to be continuously appropriated  
54 to supplement and not supplant the funding to the agency for those  
55 purposes.

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

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

12     6. Public enforcement actions belong to the state and preclude subse-  
13 quent state enforcement efforts, whether brought by the state or an  
14 aggrieved employee or representative organization; provided, however,  
15 public enforcement actions are not duplicative of private actions  
16 related to the same issues or touching the same nucleus of operative  
17 facts. Therefore, a public enforcement action brought under this arti-  
18 cle does not have any preclusive effect on private actions addressing  
19 similar wrongdoing.

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

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

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

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

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

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

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

41     (v) a statement of the underlying claim.

42     (vi) estimated number of employees affected.

43     b. if the commissioner, at any time prior to the end of the thirty day  
44 notice period prescribed in paragraph a of this subdivision or prior to  
45 commencement of such action, whichever is later, and upon written notice  
46 to the aggrieved employee who provided the notice prescribed in para-  
47 graph a of this subdivision, has commenced and is actively prosecuting  
48 an administrative enforcement proceeding pursuant to this chapter rela-  
49 tive to the alleged violation.

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

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

1 a. as of right within the thirty day notice period prescribed in para-  
2 graph a of subdivision one of this section; or

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

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

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

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

21 d. Items required to be submitted to the commissioner under this  
22 subdivision shall be transmitted in such a manner as the commissioner  
23 shall prescribe for the filing of notices under paragraph a of subdivi-  
24 sion one of this section.

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

31 5. Such regulations prescribed pursuant to paragraph a of subdivision  
32 one of this section shall provide for the right of the aggrieved employ-  
33 ee or representative organization to furnish an amended notice, after  
34 the notice by the commissioner to the aggrieved employee or represen-  
35 tative organization that the original notice was not in compliance with  
36 this section or the regulations issued thereunder and specifying with  
37 particularity what the deficiencies were in the original notice. Such  
38 notice and opportunity to amend shall be provided by the commissioner  
39 within thirty days of the original notice or the original notice shall  
40 be deemed in compliance with this section. The aggrieved employee or  
41 representative organization shall have thirty days from receiving notice  
42 from the commissioner that their original notice was not in compliance  
43 with this section to amend the notice.

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

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

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

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

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

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

10 § 4. This act shall take effect immediately.