STATE OF NEW YORK

1848--A

2019-2020 Regular Sessions

IN SENATE

January 16, 2019

Introduced by Sens. HOYLMAN, GIANARIS, JACKSON, KRUEGER, MAYER, MYRIE, RAMOS, SALAZAR, SANDERS, SERRANO -- 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, 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

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

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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 operating 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.

§ 3. The labor law is amended by adding a new article 34 to read as follows:

ARTICLE 34

EMPOWERING PEOPLE IN RIGHTS ENFORCEMENT (EMPIRE) WORKER PROTECTION ACT

Section 960. Definitions.
961. Representative civil action.
962. Procedure.
963. Non-application.

§ 960. Definitions. Whenever used in this article:

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, or was alleged to have been 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, whether or not that person has received full or partial relief from harm.

2. "relator" means an aggrieved party, whistleblower, or a representative organization that acts as a plaintiff in a public enforcement action under this chapter.

3. "whistleblower" means any current or former employee, contractor, subcontractor, or employee of a contractor or subcontractor of the defendant with knowledge of the alleged violations that is independent of and materially adds to any publicly disclosed information about the alleged violations.

4. "employer" means any employer as defined by section two of article one of this chapter. The term "employer" shall not include a governmental agency.

5. "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 assists in enforcement of the provisions of this chapter and which has been selected by an aggrieved employee or whistle-

blower to initiate a public enforcement action on the aggrieved employee's or whistleblower's behalf, in written notice in such a manner as the commissioner may prescribe by regulation. Where a representative organization is designated as the relator, the aggrieved employee or whistleblower may elect to have their name and personal identifying information be kept confidential.

6. "public enforcement action" means an action brought under this article intended to enforce this chapter's protections enforceable by the commissioner. Nothing in this article shall be interpreted to permit a public enforcement action against a governmental agency.

7. "community-based enforcement" means activities conducted by non-profit community-based organizations to assist workers in enforcing their employment rights, including outreach, education, training materials, technical assistance, counseling, research and referral services, as further defined by the commissioner.

8. "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.

9. "violation" means an employer's noncompliance with any of the requirements of the following articles of this chapter and with regulations and wage orders promulgated by the commissioner in implementing such articles:

a. article two except sections ten through twenty-five-c, sections twenty-seven through thirty, and sections thirty-three through forty-three;

b. article four except sections one hundred thirty, one hundred thirty-seven, one hundred forty, one hundred forty-one, and one hundred forty-five;

c. article four-a except sections one hundred fifty and one hundred fifty-three through one hundred fifty-four-a;

d. article five except sections one hundred sixty-eight through one hundred sixty-nine-a;

e. article six except sections one hundred ninety, one hundred ninety-one-a, one hundred ninety-six, one hundred ninety-six-a, one hundred ninety-eight-a, one hundred ninety-nine and one hundred ninety-nine-a;

f. article seven except sections two hundred-a, two hundred one, two hundred two-b through two hundred two-g, two hundred four, two hundred four-b, two hundred six, two hundred six-b, two hundred eight through two hundred ten, two hundred eleven, two hundred eleven-a, two hundred twelve-c, two hundred thirteen through two hundred fourteen, two hundred fifteen-a, two hundred fifteen-b, two hundred sixteen, two hundred nineteen-a, and two hundred nineteen-c;

g. article nine except sections two hundred thirty, two hundred thirty-four through two hundred thirty-six, and two hundred thirty-eight;

h. article ten except section two hundred forty-two;

i. article eleven except sections two hundred sixty through two hundred sixty-eight, two hundred seventy-five through two hundred seventy-seven, two hundred ninety-seven, and three hundred fifteen;

j. article thirteen except sections three hundred fifty through three hundred fifty-three, and three hundred fifty-five through three hundred sixty-three;

k. article fourteen;

l. article fifteen except sections four hundred, four hundred one, four hundred twenty-five, four hundred thirty-two, four hundred thirty-six and four hundred thirty-seven;

m. article sixteen except sections four hundred fifty, four hundred fifty-one, four hundred fifty-six, four hundred fifty-eight through four hundred sixty, four hundred sixty-two, four hundred sixty-three, and four hundred sixty-five;

n. article seventeen except sections four hundred seventy-one through four hundred seventy-four-a;

o. article nineteen except sections six hundred fifty, six hundred fifty-one, six hundred fifty-three through six hundred sixty, six hundred sixty-two, and six hundred sixty-five;

p. article nineteen-a except sections six hundred seventy through six hundred seventy-two, six hundred seventy-four through six hundred seventy-eight, six hundred eighty, and six hundred eighty-three;

q. article nineteen-b except sections six hundred ninety, six hundred ninety-three, and six hundred ninety-four;

r. article twenty-b except sections seven hundred thirty-three, seven hundred thirty-eight, and seven hundred thirty-nine;

s. article twenty-c;

t. article twenty-five-a except sections eight hundred sixty, eight hundred sixty-a, eight hundred sixty-c through eight hundred sixty-f, and eight hundred sixty-i;

u. article twenty-seven except sections eight hundred seventy-a through eight hundred seventy-f and eight hundred seventy-h through eight hundred seventy-o;

v. article twenty-eight except sections eight hundred seventy-five, eight hundred seventy-seven, and eight hundred eighty-one through eight hundred eighty-three; and

w. article thirty except sections nine hundred, nine hundred one, nine hundred three, and nine hundred five through nine hundred eight.

§ 961. Representative civil action. 1. A relator may initiate a public enforcement action to collect civil penalties on behalf of the commissioner for a violation 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. A relator may allege multiple violations that have affected different employees and may seek injunctive and declaratory relief that the state would be entitled to seek.

2. a. For purposes of this section, whenever the commissioner has discretion to assess a civil penalty, a court is 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 any violation defined in this article, 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. In any civil action commenced pursuant to this article, the court shall allow a prevailing relator to recover all reasonable attorneys' fees, expert fees and other costs. For the purposes of this article, the term "prevailing" includes a relator whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented volun-

tarily, as a result of a settlement or as a result of a judgment in such relator's favor.

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.

e. Nothing in this section shall operate to limit the commissioner's right to seek restitution and damages, where available, for aggrieved employees in conjunction with a public enforcement action in which it has intervened.

3. a. Civil penalties recovered in public enforcement actions shall be distributed as follows: where the commissioner has not intervened, forty percent to the relator; and sixty 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; where the commissioner has intervened, thirty percent to the relator; and seventy 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.

b. Twenty-five percent of the commissioner's penalty share shall be reserved for community-based enforcement.

c. The relator shall equitably distribute the share of penalties due the relator among aggrieved employees, with due consideration of the burdens and risks assumed by the relator in prosecuting the action. If the relator is a representative organization, it shall distribute all recovered penalties to aggrieved workers but may recover reasonable attorneys' fees and costs incurred in prosecuting the action and ancillary costs associated with serving as a relator. The relator, shall submit a distribution summary to the commissioner.

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 alleged 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 a relator 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. The commissioner shall establish a database of public enforcement notices submitted pursuant to this article, including the parties, the disposition and any other information which the commissioner shall by regulation prescribe and shall make such database available to the public online. The commissioner shall also publish an annual report of total penalties recovered under this chapter.

7. a. No employer or his or her agent, employee, contractor, subcontractor or the officer or agent of any corporation, partnership, or limited liability company, or any other person shall discharge, demote, suspend, threaten, harass, or in any other manner discriminate against any person because of any lawful act done because:

(i) the relator or potential relator brought or is perceived to have brought a public enforcement action;

(ii) the relator or potential relator has provided information, caused information to be provided, or otherwise assisted in a public enforcement action or provided information, or caused information to be provided to a person with supervisory authority over the relator or potential relator regarding conduct that the relator or potential relator reasonably believes constitutes a violation of this section; or

(iii) the person believes that the relator or potential relator may bring a public enforcement action or cooperate with one.

b. Any person aggrieved by a violation of this subdivision may bring a public enforcement action for all appropriate relief, including enjoining the conduct of any person or employer; ordering payment of civil penalties as provided by section two hundred fifteen of this chapter, costs and reasonable attorneys' fees to the employee by the person or entity in violation; and, where the person or entity in violation is an employer, ordering rehiring or reinstatement of the employee to his or her former position with restoration of seniority. Any person aggrieved by a violation of this subdivision may also bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated the provisions of this subdivision pursuant to subdivision two of section two hundred fifteen of this chapter.

c. There shall be a rebuttable presumption that any adverse actions taken against a relator within one hundred eighty days after the relator has filed an action under this chapter is retaliatory. Nothing in this subdivision shall be interpreted to prohibit an inference of retaliatory motive after one hundred eighty days after the relator has filed an action under this chapter.

§ 962. Procedure. 1. No representative civil action by a relator pursuant to section nine hundred sixty-one of this article may be commenced:

a. prior to thirty days after written notice has been given by the relator to the commissioner. The relator shall submit a filing fee of seventy-five dollars to the commissioner, and the time periods in this section shall begin when notice and filing fee have been submitted. The fees required by this paragraph are subject to waiver in accordance with rules promulgated by the commissioner. The 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 relator, and shall include:

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

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

(iii) if the action is brought by a representative organization, the name, address and contact information of the representative organization, it's qualification as a representative organization as defined in this chapter, and the form on which the whistleblower or aggrieved employee has designated the representative organization.

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

(v) a statement of the underlying claim.

(vi) if the relator is a "whistleblower," the relator's knowledge of the alleged violations that is independent of and materially adds to publicly disclosed information.

(vii) after searching the database established pursuant to subdivision six of section nine hundred sixty-one of this article for notices alleging the same facts and legal theories, a summary of such notices or statement that no such notices exist, provided that a notice filed by a

pro se litigant may not be rejected for failure to conduct such a search.

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 relator 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 relator is attempting to recover a civil penalty or remedy on behalf of himself or herself or others.

d. if the violation is of a posting or agency reporting requirement or agency filing requirement, except where the filing of reporting requirement involves mandatory payroll or injury reporting.

e. if the violation is for minor variations in the legal name or address of the employer in a wage statement or wage notice required under article six of this chapter, provided that the variations do not impair a worker's ability to promptly and easily identify the employer.

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. If the commissioner intervenes in an action, he or she shall have primary responsibility for litigating the action and shall not be bound by an act of the relator bringing the action. In such cases, the relator shall remain a party to the action. The commissioner may dismiss or settle the action after the relator has been notified of the filing of the motion and has been provided with an opportunity to be heard, and the court determines that such dismissal or settlement is fair, adequate, reasonable, and in the public interest.

4. 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 article or of any claim for which a relator has provided notice 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 this article.

5. a. The relator 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. If the commissioner so requests, he or she shall be served with copies of pleadings filed in the action and shall be supplied with copies of all deposition transcripts. The commissioner shall bear any costs associated with service of such pleadings and depositions if there are such costs.

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.

6. Such regulations prescribed pursuant to paragraph a of subdivision one of this section shall provide for the right of the relator to furnish an amended notice, after the notice by the commissioner to the relator 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 relator 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.

7. A public enforcement action shall be tried promptly, without regard to concurrent adjudication of private claims.

8. No public enforcement action brought pursuant to this article shall be required to meet the requirements of Rule 23(a) of the Federal Rules of Civil Procedure or article nine of the civil practice law and rules.

9. The rules governing pretrial discovery in a public enforcement action brought pursuant to this article shall be the same as those applicable to other civil actions. No special showing of merit or other additional requirement shall be imposed on a relator's discovery rights in such an action.

10. A relator bringing an action pursuant to this article shall be entitled to discovery regarding the alleged violations as to all aggrieved employees as defined in this article.

11. When related public enforcement actions are pending, the parties shall immediately notify the courts overseeing such actions of the overlap and submit a joint statement describing the overlap, which may propose a process to ensure the just, speedy, and efficient determination of the actions. The court may appoint lead enforcement counsel with sole responsibility for asserting the related claims, with consideration of the following factors: a. the work that counsel has done in investigating the claims; b. counsel's experience litigating labor law and past performance in similar cases; c. counsel's diligence in advancing the case; d. the resources that counsel has committed and will commit to prosecuting the case, and the relative resources at counsel's disposal; and e. the length of time each action has been pending.

§ 963. 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, para-

graph, 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.