STATE OF NEW YORK

8562

IN SENATE

June 16, 2020

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

AN ACT to amend the labor law, in relation to removing the exclusion of part-time employees from certain definitions relating to employment and expanding the definition of employer; removing certain exclusions for employer notice requirements for the closing of a facility; removing the discretionary reduction of penalties for employers for certain acts or omissions concerning notice requirements for mass layoffs, relocations or employment loss; removing the maximum time period for determining back pay and other liabilities for certain employees who experience employment loss; and allowing the attorney general to take certain action to assist certain employees in receiving back pay and other liabilities

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

Section 1. Section 860-a of the labor law, as added by chapter 475 of the laws of 2008, is amended to read as follows:

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

1. "Affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed [~~plant~~] **facility** closing or mass layoff by their employer.

2. "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified person.

3. "Associate", when used to indicate a relationship with any person, means:

(a) any entity of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of ten percent or more of any class of voting securities;

(b) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity; and

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

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(c) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person.

4. "Beneficial owner", when used with respect to any securities, means a person:

(a) that, individually or with or through any of its affiliates or associates, beneficially owns such securities, directly or indirectly; or

(b) that, individually or with or through any of its affiliates or associates, has (i) the right to acquire such securities, whether such right is exercisable immediately or only after the passage of time, pursuant to any agreement, arrangement or understanding, whether or not in writing, or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise; or (ii) the right to vote such securities pursuant to any agreement, arrangement or understanding, whether or not in writing; provided, however, that a person shall not be deemed the beneficial owner of any securities under this subparagraph if the agreement, arrangement or understanding to vote such securities (1) arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act and (2) is not then reportable on a Schedule 13D under the Exchange Act, or any comparable or successor report; or

(c) that has any agreement, arrangement or understanding, whether or not in writing, for the purpose of acquiring, holding, voting, except voting pursuant to a revocable proxy or consent as described in subparagraph (ii) of paragraph (b) of this subdivision, or disposing of such securities with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such securities.

5. "Control", including the terms "controlling", "controlled by" and "under common control with", means the possession, directly or indirectly, of the power to direct or cause the direction of (a) the management and policies of a person, (b) the operation of a person, or (c) substantially all of the assets of a person, whether through the ownership of voting securities, by contract, or otherwise. A person's beneficial ownership of ten percent or more of an entity's outstanding voting securities shall create a presumption that such person has control of such entity. Notwithstanding the foregoing, a person shall not be deemed to have control of an entity if such person holds voting securities, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of such entity.

6. "Employment loss" means:

(a) an employment termination, other than a discharge for cause, voluntary departure other than in anticipation of an announced facility closing or mass layoff, or retirement;

(b) a mass layoff exceeding six months;

(c) a reduction in hours of work of more than fifty percent during each month of any consecutive six-month period.

"Employment loss" shall not result under circumstances where a [~~plant~~] facility closing or mass layoff is the result of the relocation or consolidation of part or all of the employer's business and, before the closing or mass layoff, the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment, or the employer

offers to transfer the employee to any other site of employment, regardless of distance, with no more than a six-month break in employment, and the employee accepts within thirty days of the offer or of the closing or mass layoff, whichever is later.

[~~3.~~] 7. "Employer" means any business enterprise that employs fifty or more employees[~~, excluding part-time employees, or fifty or more employees that work in the aggregate at least two thousand hours per week~~]. "Employer" shall not include the federal or state government or any of their political subdivisions, including any unit of local government or any school district.

[~~4.~~] 8. "Exchange Act" means the act of Congress known as the Securities Exchange Act of 1934, as the same has been or hereafter may be amended from time to time.

9. "Mass layoff" means a reduction in force which:

(a) is not the result of a [~~plant~~] facility closing; and

(b) results in an employment loss for those working at or reporting to a single site of employment during any thirty-day period for[~~:~~

~~(i) at least thirty-three percent of the employees (excluding part-time employees); and~~

~~(ii) at least twenty-five employees (excluding part-time employees); or~~

~~(iii) at least two hundred fifty employees (excluding part-time employees)~~] twenty or more employees.

[~~5. "Part-time employee" means an employee who is employed for an average of fewer than twenty hours per week or who has been employed for fewer than six of the twelve months preceding the date on which notice is required.~~

~~6. "Plant~~] 10. "Facility closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any thirty-day period for [~~twenty-five~~] twenty or more employees [~~(other than part-time employees)~~].

[~~7.~~] 11. "Representative" means an exclusive representative within the meaning of section 9(a) or 8(f) of the National Labor Relations Act (29 U.S.C. 159(a), 158(f)) or section 2 of the Railway Labor Act (45 U.S.C. 152).

[~~8.~~] 12. "Relocation" means the removal of all or substantially all of the industrial or commercial operations of an employer to a different location fifty miles or more away.

13. "Person" means any individual, partnership, association, corporation, cooperative, limited liability company, firm, trust, or other entity.

§ 2. Subdivisions 5 and 7 of section 860-b of the labor law, as added by chapter 475 of the laws of 2008, are amended to read as follows:

5. In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any [~~plant~~] facility closing or mass layoff in accordance with this section, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any [~~plant~~] facility closing or mass layoff in accordance with this section. Notwithstanding any other provision of this article, any person who is an employee of the seller as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

7. Nothing set forth herein shall be read to prevent an employer who is not required to comply with the notice requirements of this section, to the extent possible, to provide notice to its employees about a proposal to close a [~~plant~~] facility or permanently reduce its workforce.

§ 3. Subdivision 1 of section 860-c of the labor law, as added by chapter 475 of the laws of 2008, is amended to read as follows:

1. In the case of a [~~plant~~] facility closing or mass layoff, an employer is not required to comply with the notice requirement in subdivision one of section eight hundred sixty-b of this article if:

(a)[~~(i) at the time the notice would have been required, the employer was actively seeking capital or business; and~~

~~(ii) the capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination; and~~

~~(iii) the employer reasonably and in good faith believed that giving the notice required by subdivision one of section eight hundred sixty-b of this article would have precluded the employer from obtaining the needed capital or business;~~

~~(b) the need for a notice was not reasonably foreseeable at the time the notice would have been required;~~

~~(c)~~] the [~~plant~~] facility closing is of a temporary facility or the [~~plant~~] facility closing or mass layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or project or undertaking;

[~~(d)~~] (b) the [~~plant~~] facility closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or drought, or a federal, state or local state of emergency has been declared; or

[~~(e)~~] (c) the facility closing or mass layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this article. Nothing in this article shall require an employer to serve written notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act (29 U.S.C. 151 et seq.). Nothing in this article shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

§ 4. The opening paragraph of section 860-d of the labor law, as added by chapter 475 of the laws of 2008, is amended to read as follows:

A mass layoff of more than six months which, at its outset, was announced to be a mass layoff of six months or less with an announced expected date of recall shall be treated as an employment loss under this article unless:

§ 5. Section 860-e of the labor law, as added by chapter 475 of the laws of 2008, is amended to read as follows:

§ 860-e. Determinations with respect to employment loss. In determining whether a [~~plant~~] facility closing or mass layoff has occurred or will occur, employment losses for two or more groups of employees at a single site of employment, each of which is less than the minimum number of employees specified in [~~subdivisions four or six~~] subdivision nine or ten of section eight hundred sixty-a of this article but which in the aggregate meet or exceed that minimum number set forth in such subdivisions, and which occur within any ninety-day period shall be considered to be a [~~plant~~] facility closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and

distinct actions and causes and are not an attempt by the employer to evade the requirements of this article.

§ 6. Subdivisions 2, 4, 6, 7 and 8 of section 860-g of the labor law, as added by chapter 475 of the laws of 2008, are amended to read as follows:

2. Back pay and other liability under this section is calculated for the period of the employer's violation, [~~up to a maximum of sixty days,~~] or one-half the number of days that the employee was employed by the employer, whichever period is smaller.

4. The amount of an employer's liability under subdivision one of this section, shall be reduced by the following:

(a) Any wages, except vacation moneys accrued before the period of the employer's violation, paid by the employer to the employee during the period of the employer's violation.

(b) Any voluntary and unconditional payments made by the employer to the employee that were not required to satisfy any legal obligation.

(c) Any [~~payments by the employer to a third party or trustee, such as premiums for health benefits or payments to a defined contribution pension plan, on behalf of and attributable to the employee for the period of the violation.~~

~~(d) Any~~] liability paid by the employer under any applicable federal law governing notification of mass layoffs, [~~plant~~] **facility** closings, or relocations.

[~~(e)~~] **(d)** In an administrative proceeding by the commissioner, any liability paid by the employer prior to the commissioner's determination as the result of a private action brought under this article.

[~~(f)~~] **(e)** In a private action brought under this article, any liability paid by the employer in an administrative proceeding by the commissioner prior to the adjudication of such private action.

6. [~~If an employer proves to the satisfaction of the commissioner that the act or omission that violated this article was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this article, the commissioner may, in his or her discretion, reduce the amount of liability provided for in this section. In determining the amount of such reduction, the commissioner shall consider (a) the size of the employer; (b) the hardships imposed on employees by the violation; (c) any efforts by the employer to mitigate the violation; and (d) the grounds for the employer's belief.~~

~~7.~~] An aggrieved employee, local government, or an employee representative seeking to establish liability against an employer may bring a civil action on behalf of the person, other persons similarly situated, or both, in any court of competent jurisdiction, within the time period provided by section two hundred thirteen of the civil practice law and rules. The court may award reasonable attorneys' fees as part of costs to any plaintiff who prevails in a civil action brought under this article. If the court determines that an employer conducted a reasonable investigation in good faith, and had reasonable grounds to believe that its conduct was not a violation of this article, the court may reduce the amount of any penalty it would otherwise impose against the employer under this article.

[~~8.~~] **7.** Neither the commissioner nor any court shall have the authority to enjoin a [~~plant~~] **facility** closing, relocation, or mass layoff under this article**; provided, however, whenever an employer is liable pursuant to subdivision one of this section, application may be made by the attorney general in the name of the people of the state of New York**

to a court or justice having jurisdiction by a special proceeding to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the actions of such employer or take such other actions the attorney general may deem appropriate to enforce the provisions of subdivision one of this section. In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

8. No waivers of liability under this article shall be enforceable unless supervised by a court, the commissioner or certified class counsel.

§ 7. This act shall take effect immediately.