

STATE OF NEW YORK

5876--A

2021-2022 Regular Sessions

IN ASSEMBLY

March 1, 2021

Introduced by M. of A. JOYNER, SIMON, COOK, AUBRY, STECK, JACOBSON, GONZALEZ-ROJAS, J. D. RIVERA, KIM, FERNANDEZ, RAMOS, DAVILA -- read once and referred to the Committee on Labor -- recommitted to the Committee on Labor in accordance with Assembly Rule 3, sec. 2 -- 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:

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 public enforcement actions are an efficient mechanism to limit

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

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1 systemic violations, will enforce the rights of more workers, and can
2 benefit the department of labor with enhanced resources.

3 5. The legislature further finds and declares that the purpose of the
4 EMPIRE Worker Protection Act is to benefit those employers who are oper-
5 ating within the labor law, and who, as a result, face unfair competi-
6 tion from individuals and entities shirking the labor law.

7 6. The legislature further finds and declares that the purpose of the
8 EMPIRE Worker Protection Act is to incentivize labor organizations to
9 aid working people to report violations of the New York labor law.

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

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

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

23 ARTICLE 34

24 EMPOWERING PEOPLE IN RIGHTS ENFORCEMENT (EMPIRE) WORKER PROTECTION ACT
25 Section 960. Definitions.

26 961. Public enforcement civil action.

27 962. Procedure.

28 963. Non-application.

29 § 960. Definitions. Whenever used in this article:

30 1. "aggrieved employee" means any employee as defined by section two
31 of article one of this chapter who was employed by the alleged violator
32 employer and against whom one of the alleged violations was committed,
33 or was alleged to have been committed, as well as any person who is not
34 classified by a business as an employee but who claims to be an employee
35 and whose claims against the purported employer relate to this alleged
36 misclassification, whether or not that person has received full or
37 partial relief from harm.

38 2. "relator" means an aggrieved employee, whistleblower, or a repre-
39 sentative organization that acts as a plaintiff in a public enforcement
40 action under this chapter.

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

46 4. "employer" means any employer as defined by section two of article
47 one of this chapter. The term "employer" shall not include a govern-
48 mental agency.

49 5. "representative organization" means a labor organization as defined
50 by subsection (g) of section four thousand four hundred two of the
51 insurance law and which has been selected by an aggrieved employee or
52 whistleblower to initiate a public enforcement action on the aggrieved
53 employee's or whistleblower's behalf, in written notice in such a manner
54 as the commissioner may prescribe by regulation. Where a representative
55 organization is designated as the relator, the aggrieved employee or
56 whistleblower may elect to have their name and personal identifying

1 information be kept confidential until the relator, in its sole
2 discretion, deems sharing such information is necessary to establish,
3 litigate, mediate, settle, or otherwise pursue the claim.

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

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

12 8. "violation" means an employer's noncompliance with any of the
13 requirements of the following articles of this chapter and with regu-
14 lations and wage orders promulgated by the commissioner in implementing
15 such articles:

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

19 b. article four except sections one hundred thirty, one hundred thir-
20 ty-seven, one hundred forty, one hundred forty-one, and one hundred
21 forty-five;

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

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

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

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

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

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

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

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

45 k. article fourteen;

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

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

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

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

1 p. article nineteen-A except sections six hundred seventy through six
2 hundred seventy-two, six hundred seventy-four through six hundred seven-
3 ty-eight, six hundred eighty, and six hundred eighty-three;

4 q. article nineteen-B except sections six hundred ninety, six hundred
5 ninety-three, and six hundred ninety-four;

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

8 s. article twenty-C;

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

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

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

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

20 § 961. Public enforcement action. 1. A relator may initiate a public
21 enforcement action to collect civil penalties on behalf of the commis-
22 sioner for a violation on behalf of himself or herself and other current
23 or former employees pursuant to the procedures specified in section nine
24 hundred sixty-two of this article. A relator may allege multiple
25 violations that have affected different employees and may seek injunc-
26 tive and declaratory relief that the state would be entitled to seek.

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

34 b. For any violation defined in this article, except those for which a
35 civil penalty is specifically provided, there is established a civil
36 penalty of five hundred dollars for each aggrieved employee per pay
37 period per violation. A court may not award a lesser amount, unless,
38 based on the facts and circumstances of the particular case, the employ-
39 er demonstrates that to do otherwise would result in an award that is
40 unjust, arbitrary and oppressive, or confiscatory.

41 c. In any civil action commenced pursuant to this article, the court
42 shall allow a prevailing relator to recover all reasonable attorneys'
43 fees, expert fees and other costs. The court may also allow a prevail-
44 ing relator to recover all reasonable ancillary costs associated with
45 serving as a relator. For the purposes of this article, the term
46 "prevailing" includes a relator whose commencement of litigation has
47 acted as a catalyst to effect policy change on the part of the defend-
48 ant, regardless of whether that change has been implemented voluntarily,
49 as a result of a settlement or as a result of a judgment in such
50 relator's favor.

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

55 e. Nothing in this section shall operate to limit the commissioner's
56 right to seek restitution and damages, where available, for aggrieved

1 employees in conjunction with a public enforcement action in which it
2 has intervened.

3 3. a. Civil penalties recovered in public enforcement actions shall
4 be distributed as follows: where the commissioner has not intervened,
5 forty percent to the relator; and sixty percent to the commissioner for
6 enforcement of this chapter and education of employers and employees
7 about their rights and responsibilities under this chapter, to be
8 continuously appropriated to supplement and not supplant the funding to
9 the agency for those purposes; where the commissioner has intervened,
10 thirty percent to the relator; and seventy percent to the commissioner
11 for enforcement of this chapter and education of employers and employees
12 about their rights and responsibilities under this chapter, to be
13 continuously appropriated to supplement and not supplant the funding to
14 the agency for those purposes.

15 b. The relator shall equitably distribute the share of penalties due
16 the relator among aggrieved employees, with due consideration of the
17 burdens and risks assumed by the relator in prosecuting the action. If
18 the relator is a representative organization, it shall distribute all
19 recovered penalties to aggrieved workers but may recover reasonable
20 attorneys' fees and costs incurred in prosecuting the action and ancil-
21 lary costs associated with serving as a relator. The relator, shall
22 submit a distribution summary to the commissioner.

23 4. The right to bring a public enforcement action under this article
24 shall not be subject to private agreements between an aggrieved employee
25 and an employer or alleged employer, unless such agreements are collec-
26 tively bargained and the bargaining agreement provides a forum for the
27 enforcement of rights and remedies otherwise enforceable under this
28 article.

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

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

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

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

49 (ii) the relator or potential relator has provided information, caused
50 information to be provided, or otherwise assisted in a public enforce-
51 ment action or provided information, or caused information to be
52 provided to a person with supervisory authority over the relator or
53 potential relator regarding conduct that the relator or potential rela-
54 tor reasonably believes constitutes a violation of this section; or

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

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

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

19 § 962. Procedure. 1. No public enforcement action by a relator pursu-
20 ant to section nine hundred sixty-one of this article may be commenced:

21 a. prior to thirty days after written notice has been given by the
22 relator to the commissioner. The relator shall submit a filing fee of
23 seventy-five dollars to the commissioner, and the time periods in this
24 section shall begin when notice and filing fee have been submitted. The
25 fees required by this paragraph are subject to waiver in accordance with
26 rules promulgated by the commissioner. The written notice shall be given
27 in such a manner as the commissioner may prescribe by regulation, shall
28 be construed in a light favorable to the relator, and shall include:

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

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

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

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

39 (v) a statement of the underlying claim.

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

43 (vii) after searching the database established pursuant to subdivision
44 six of section nine hundred sixty-one of this article for notices alleg-
45 ing the same facts and legal theories, a summary of such notices or
46 statement that no such notices exist, provided that a notice filed by a
47 pro se litigant may not be rejected for failure to conduct such a
48 search.

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

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

6 d. if the violation is of a posting or agency reporting requirement or
7 agency filing requirement, except where the filing of reporting require-
8 ment involves mandatory payroll or injury reporting.

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

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

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

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

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

28 4. Either the commissioner or a federal or state court of competent
29 jurisdiction shall review and approve any settlement of any civil action
30 filed pursuant to this article or of any claim for which a relator has
31 provided notice pursuant to this section. The commissioner or court
32 shall approve the settlement if it is fair, reasonable and adequate, in
33 light of the statutory purpose of the provision of this chapter alleged
34 to have been violated and the purpose of this article.

35 5. a. The relator shall, within ten days following commencement of a
36 civil action pursuant to this article, provide the commissioner with a
37 file-stamped copy of the complaint that includes the case number
38 assigned by the court.

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

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

49 d. Items required to be submitted to the commissioner under this
50 subdivision shall be transmitted in such a manner as the commissioner
51 shall prescribe for the filing of notices under paragraph a of subdivi-
52 sion one of this section.

53 6. Such regulations prescribed pursuant to paragraph a of subdivision
54 one of this section shall provide for the right of the relator to
55 furnish an amended notice, after the notice by the commissioner to the
56 relator that the original notice was not in compliance with this section

1 or the regulations issued thereunder and specifying with particularity
2 what the deficiencies were in the original notice. Such notice and
3 opportunity to amend shall be provided by the commissioner within thirty
4 days of the original notice or the original notice shall be deemed in
5 compliance with this section. The relator shall have thirty days from
6 receiving notice from the commissioner that their original notice was
7 not in compliance with this section to amend the notice.

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

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

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

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

21 11. When related public enforcement actions are pending, the parties
22 shall immediately notify the courts overseeing such actions of the over-
23 lap and submit a joint statement describing the overlap, which may
24 propose a process to ensure the just, speedy, and efficient determi-
25 nation of the actions. The court may appoint lead enforcement counsel
26 with sole responsibility for asserting the related claims, with consid-
27 eration of the following factors: a. the work that counsel has done in
28 investigating the claims; b. counsel's experience litigating labor law
29 and past performance in similar cases; c. counsel's diligence in advanc-
30 ing the case; d. the resources that counsel has committed and will
31 commit to prosecuting the case, and the relative resources at counsel's
32 disposal; and e. the length of time each action has been pending.

33 § 963. Non-application. 1. This article shall not apply to the recov-
34 ery of administrative and civil penalties in connection with the unem-
35 ployment insurance law as contained in article eighteen of this chapter.

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

39 3. Severability. If any word, phrase, clause, sentence, paragraph,
40 subdivision, section or part of this article or the application thereof
41 to any person or circumstances shall be adjudged invalid by a court of
42 competent jurisdiction, such order or judgment shall be confined in its
43 operation to the controversy in which it was rendered, and shall not
44 affect or invalidate the remainder of this article, but shall be
45 confined in its operation to the word, phrase, clause, sentence, para-
46 graph, subdivision, section or part thereof directly involved in the
47 controversy in which such judgment shall have been rendered.

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

50 § 4. This act shall take effect immediately.