

STATE OF NEW YORK

12--A

2021-2022 Regular Sessions

IN SENATE

(Prefiled)

January 6, 2021

Introduced by Sens. HOYLMAN, BIAGGI, GIANARIS, JACKSON, KENNEDY, KRUEGER, MAYER, MYRIE, RAMOS, REICHLIN-MELNICK, SALAZAR, SANDERS, SERRANO, SKOUFIS -- 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:

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

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

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1 been assessed and collected by overburdened state enforcement agencies.
2 Such public enforcement actions are an efficient mechanism to limit
3 systemic violations, will enforce the rights of more workers, and can
4 benefit the department of labor with enhanced resources.

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

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

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

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

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

25 ARTICLE 34

26 EMPOWERING PEOPLE IN RIGHTS ENFORCEMENT (EMPIRE) WORKER PROTECTION ACT

27 Section 960. Definitions.

28 961. Public enforcement civil action.

29 962. Procedure.

30 963. Non-application.

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

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

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

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

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

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

1 organization is designated as the relator, the aggrieved employee or
2 whistleblower may elect to have their name and personal identifying
3 information be kept confidential until the relator, in its sole
4 discretion, deems sharing such information is necessary to establish,
5 litigate, mediate, settle, or otherwise pursue the claim.

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

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

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

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

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

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

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

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

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

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

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

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

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

47 k. article fourteen;

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

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

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

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

4 p. article nineteen-A except sections six hundred seventy through six
5 hundred seventy-two, six hundred seventy-four through six hundred seven-
6 ty-eight, six hundred eighty, and six hundred eighty-three;

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

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

11 s. article twenty-C;

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

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

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

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

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

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

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

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

54 d. Nothing in this section shall operate to limit an aggrieved employ-
55 ee's right to pursue or recover other remedies available under state or

1 federal law, either separately or concurrently with an action taken
2 under this section.

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

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

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

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

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

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

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

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

53 (ii) the relator or potential relator has provided information, caused
54 information to be provided, or otherwise assisted in a public enforce-
55 ment action or provided information, or caused information to be
56 provided to a person with supervisory authority over the relator or

1 potential relator regarding conduct that the relator or potential rela-
2 tor reasonably believes constitutes a violation of this section; or
3 (iii) the person believes that the relator or potential relator may
4 bring a public enforcement action or cooperate with one.

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

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

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

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

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

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

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

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

43 (v) a statement of the underlying claim.

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

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

53 b. if the commissioner, at any time prior to the end of the thirty day
54 notice period prescribed in paragraph a of this subdivision or prior to
55 commencement of such action, whichever is later, and upon written notice
56 to the relator who provided the notice prescribed in paragraph a of this

1 subdivision, has commenced and is actively prosecuting an administrative
2 enforcement proceeding pursuant to this chapter relative to the alleged
3 violation.

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

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

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

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

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

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

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

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

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

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

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

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

1 6. Such regulations prescribed pursuant to paragraph a of subdivision
2 one of this section shall provide for the right of the relator to
3 furnish an amended notice, after the notice by the commissioner to the
4 relator that the original notice was not in compliance with this section
5 or the regulations issued thereunder and specifying with particularity
6 what the deficiencies were in the original notice. Such notice and
7 opportunity to amend shall be provided by the commissioner within thirty
8 days of the original notice or the original notice shall be deemed in
9 compliance with this section. The relator shall have thirty days from
10 receiving notice from the commissioner that their original notice was
11 not in compliance with this section to amend the notice.

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

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

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

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

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

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

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

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

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

54 § 4. This act shall take effect immediately.