STATE OF NEW YORK

1000

2023-2024 Regular Sessions

IN ASSEMBLY

January 12, 2023

Introduced by M. of A. JOYNER -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to establishing the warehouse worker protection act; and to amend a chapter of the laws of 2022 amending the labor law relating to establishing the warehouse worker protection act, as proposed in legislative bills numbers S. 8922-A and A. 10020-A, in relation to the effectiveness thereof

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

Section 1. Sections 780, 781, 784, 785, 786 and 787 of the labor law, as added by a chapter of the laws of 2022 amending the labor law relating to establishing the warehouse worker protection act, as proposed in legislative bills numbers S. 8922-A and A. 10020-A, are amended to read as follows:

§ 780. Definitions. As used in this article:

1. "Defined time period" means any unit of time measurement equal to or less than the duration of an employee's shift, and includes hours, minutes, and seconds and any fraction thereof.

2. [~~"Designated employee representative" means any employee representative, including but not limited to an authorized employee representative that has a collective bargaining relationship with the employer.~~

~~3.~~] "Employee" means [~~a nonexempt and non-administrative~~] **an** employee **who is not exempt from the minimum wage and any overtime compensation provisions of this chapter and any applicable minimum wage orders and** who works at a warehouse distribution center and is subject to a quota as defined in this section**; provided, however, that "employee" does not include a driver or courier to or from a warehouse distribution center**.

[~~4.~~] **3.** (a) "Employee work speed data" means information an employer collects, stores, analyzes, or interprets relating to an individual employee's performance of a quota, including, but not limited to, quantities of tasks performed, quantities of items or materials handled or

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

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produced, rates or speeds of tasks performed, measurements or metrics of employee performance in relation to a quota, and time categorized as performing tasks or not performing tasks.

(b) "Aggregated **work speed** data" means [~~information that an employer has combined or collected together~~] **a compilation of employee work speed data for multiple employees,** in summary [~~or other~~] form**, assembled in full or in another form** such that the data cannot be identified with any individual.

[~~5.~~] **4.** "Employer" means a person who directly or indirectly, or through an agent or any other person, including through the services of a third-party employer, temporary services, or staffing agency, independent contractor, or any similar entity, [~~at any time in the prior twelve months,~~] employs or exercises control over the wages, hours, or working conditions of one hundred or more employees at a single warehouse distribution center or [~~five hundred~~] **one thousand** or more employees at one or more warehouse distribution centers in the state.

For the purposes of this [~~subdivision: (a) all employees employed directly or indirectly, or through an agent or any other person, as described in the opening paragraph of this subdivision, as well as any employee employed by a member of a controlled group of corporations of which the employer is a member, shall be counted in determining the number of employees employed at a single warehouse distribution center or at one or more warehouse distribution centers in the state; and (b) all agents or other persons, as described in the opening paragraph of this subdivision, and all members of a controlled group of corporations of which the employer is a member, shall be deemed to be employers and shall be jointly and severally responsible for compliance with this article. For purposes of this subdivision, the term "controlled group of corporations" shall be defined as provided under Section 1563 of the Internal Revenue Code, 26 U.S.C. section 1563, except that fifty percent shall be substituted for eighty percent where eighty percent is specified in that~~] definition**, all employees of a controlled group of corporations shall be counted in determining the number of employees employed at a single warehouse distribution center or at one or more warehouse distribution centers in the state**.

[~~6.~~] **5.** "Person" means an individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.

[~~7.~~] **6.** "Quota" means a work standard which:

(a) an employee is assigned or required to perform: [~~(i)~~] at a specified productivity speed; or a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period; or **under which the employee may suffer an adverse employment action if they fail to complete the performance standard.**

(b) an employee's actions are categorized between time performing tasks and not performing tasks, and the employee's failure to complete a task performance standard or recommendation may have an adverse impact on the employee's continued employment or the conditions of such employment.

[~~8.~~] **7.** "Warehouse distribution center" means an establishment as defined by any of the following North American industry classification system ("NAICS") codes, however such establishment is denominated:

(a) four hundred ninety-three for warehousing and storage **but does not include four hundred ninety-three thousand one hundred thirty for farm product warehousing and storage**;

(b) four hundred twenty-three for merchant wholesalers, durable goods;

(c) four hundred twenty-four for merchant wholesalers, nondurable goods;

(d) four hundred fifty-four thousand one hundred ten for electronic shopping and mail-order houses; or

(e) four hundred ninety-two thousand one hundred ten for couriers and express delivery services.

§ 781. Quotas. Each employer shall provide to each employee, upon hire, or within thirty days of the effective date of this article, a written description of each quota to which the employee is subject, including the quantified number of tasks to be performed or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota. Each time the quota changes thereafter, the employer shall provide an updated written description of each quota to which the employee is subject within two business days of such quota change. Each time an employer takes an adverse employment action against an employee, the employer shall provide that employee with the applicable quota for the employee**. The employer must provide the written description of any quota pursuant to this section in English and in the language identified by each employee as the primary language of such employee**.

§ 784. Recordkeeping. 1. Each employer shall establish, maintain, and preserve **for three years** contemporaneous, true, and accurate records [~~of the following: (a) each employee's own personal work speed data; (b) the aggregated work speed data for similar employees at the same establishment; and (c) the written descriptions of the quota such employee was provided pursuant to section seven hundred eighty-one of this article. Such records shall be maintained and preserved throughout the duration of each employee's period of employment and made available to the commissioner upon request.~~

~~2. Subsequent to any employee's separation from the employer, such records relating to the six month period prior to the date of the employee's separation from the employer shall be preserved for a period of time not less than three years subsequent to the date of such employee's separation and made available to the commissioner upon request. Nothing in this section shall require an employer to keep such records if such employer does not use quotas as defined in this article or monitor work speed data~~] **to ensure compliance with employee or commissioner requests for data**.

§ 785. Right to request. 1. A current employee has the right to request a written description of each quota to which the employee is subject[~~, a copy of the employee's own personal work speed data, and a copy of the prior six months of aggregated work speed data for similar employees at the same establishment~~]**. If a current or former employee believes that they have been disciplined as the result of failing to meet a quota, or that meeting a quota caused a violation of their right to a meal or rest period or use of bathroom facilities, including reasonable travel time to and from bathroom facilities, they have the right to request, and the employer shall provide, a written description of each quota to which the employee is subject, a copy of the most recent ninety days of the employee's own personal work speed data, and a copy of the aggregate work speed data for similar employees at the same establishment for the same time period**.

2. [~~A former employee has the right to request, within three years subsequent to the date of his or her separation from the employer, a written description of the quota to which they were subject as of the date of their separation, a copy of the employee's own personal work speed data for the six months prior to their date of separation, and a copy of aggregated work speed data for similar employees at the same establishment for the six months prior to their date of separation.~~

~~3.~~] Such requested records pursuant to this section shall be provided at no cost to the current or former employee. A former employee is limited to one request pursuant to this section.

[~~4. The employer shall provide such requested records pursuant to this section as soon as practicable, provided that requested written descriptions of the quota shall be provided no later than two business days following the date of the receipt of the request and requested personal work speed data and aggregated work speed data shall be provided no later than seven business days following the date of the receipt of the request.~~

~~5.~~] 3. An employer that receives a written or oral request for information pursuant to this section shall comply with the request as soon as practicable, but no later than fourteen calendar days from the date of the request.

4. Nothing in this section shall require an employer to use quotas as defined in this article or monitor work speed data. An employer that does not monitor this data has no obligation to provide it.

5. The employer must provide the requested written description of any quota and personal work speed data pursuant to this section in English and in the language identified by each employee as the primary language of such employee.

§ 786. Unlawful retaliation. [~~1. No person, including but not limited to an employer, his or her agent, or person acting as or on behalf of a hiring entity, or the officer or agent of any entity, business, corporation, partnership, or limited liability company, shall discharge or in any way retaliate, discriminate or take adverse action against any person for exercising any rights conferred under this article, or for being perceived as exercising rights conferred by this article, including but not limited to:~~

~~(a) Initiating a request for information about a quota or personal work speed data pursuant to subdivision one of section seven hundred eighty-five of this article.~~

~~(b) Making a complaint related to a quota alleging any violation of section seven hundred eighty-one, seven hundred eighty-two, seven hundred eighty-three, or seven hundred eighty-five of this article to the commissioner, any other local, state, or federal governmental agency or official, or the employer.~~

~~2. An employee need not explicitly refer to this article or the rights enumerated herein to be protected from an adverse action. Protections of this section shall apply to former employees and to employees who mistakenly but in good faith allege violations of this article.~~

~~3. If a person takes adverse action against an employee within ninety days of the employee's engaging or attempting to engage in activities protected by this article, such conduct shall raise a rebuttable presumption that the action is an adverse action in violation of this article. Such presumption may be rebutted by clear and convincing evidence that: (a) the action was taken for other permissible reasons; and (b) the engaging or attempting to engage in activities protected by this article was not a motivating factor in the adverse action.~~] For

purposes of this article, there shall be a rebuttable presumption of unlawful retaliation if an employer in any manner discriminates, retaliates, or takes any adverse action against any employee within ninety days of the employee doing either of the following:

1. Initiating the employee's first request in a calendar year for information about a quota or personal work speed data pursuant to subdivisions one through three of section seven hundred eighty-five of this article.

2. Making a complaint related to a quota alleging any violation of sections seven hundred eighty-one to seven hundred eighty-five of this article, inclusive, to the commissioner, the department, other local or state governmental agency, or the employer.

§ 787. Enforcement. The commissioner [~~shall~~] may adopt rules and regulations implementing the provisions of this article. The commissioner shall be authorized to enforce the provisions of this article and to assess civil penalties [~~in a manner consistent with~~] as provided in sections [~~two hundred thirteen,~~] two hundred fifteen and two hundred eighteen of this chapter. The civil penalties provided for in this section shall be in addition to and may be imposed concurrently with any other remedy or penalty provided for in this chapter.

§ 2. The opening paragraph of subdivision 1 of section 218 of the labor law, as amended by chapter 2 of the laws of 2015, is amended to read as follows:

If the commissioner determines that an employer has violated a provision of article six (payment of wages), article nineteen (minimum wage act), article nineteen-A (minimum wage standards and protective labor practices for farm workers), article twenty-one-A (warehouse worker protection act), section two hundred twelve-a, section two hundred twelve-b, section one hundred sixty-one (day of rest) or section one hundred sixty-two (meal periods) of this chapter, or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation. A copy of such order shall be provided to any employee who has filed a complaint and any authorized representative of him or her. In addition to directing payment of wages, benefits or wage supplements found to be due, and liquidated damages in the amount of one hundred percent of unpaid wages, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount not to exceed double the total amount of wages, benefits, or wage supplements found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the liquidated damages in the amount of one hundred percent of unpaid wages, the appropriate civil penalty, and interest at the rate of interest then in effect, as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. In assessing the amount of the penalty, the commissioner shall give due consideration to the size

of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements.

§ 3. Section 5 of a chapter of the laws of 2022 amending the labor law relating to establishing the warehouse worker protection act, as proposed in legislative bills numbers S. 8922-A and A. 10020-A, is amended to read as follows:

§ 5. This act shall take effect on the [~~sixtieth~~] **one hundred eightieth** day after it shall have become a law**. Effective immediately, the adoption, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made by the commissioner on or before such effective date**.

§ 4. This act shall take effect immediately; provided, however, that sections one and two of this act shall take effect on the same date and in the same manner as a chapter of the laws of 2022 amending the labor law relating to establishing the warehouse worker protection act, as proposed in legislative bills numbers S. 8922-A and A. 10020-A, takes effect.