

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:

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

6 § 780. Definitions. As used in this article:

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

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

13 ~~3-]~~ "Employee" means [~~a nonexempt and non-administrative~~] an employee
14 who is not exempt from the minimum wage and any overtime compensation
15 provisions of this chapter and any applicable minimum wage orders and
16 who works at a warehouse distribution center and is subject to a quota
17 as defined in this section; provided, however, that "employee" does not
18 include a driver or courier to or from a warehouse distribution center.

19 [4-] 3. (a) "Employee work speed data" means information an employer
20 collects, stores, analyzes, or interprets relating to an individual
21 employee's performance of a quota, including, but not limited to, quan-
22 tities 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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1 produced, rates or speeds of tasks performed, measurements or metrics of
2 employee performance in relation to a quota, and time categorized as
3 performing tasks or not performing tasks.

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

9 [~~5-~~] 4. "Employer" means a person who directly or indirectly, or
10 through an agent or any other person, including through the services of
11 a third-party employer, temporary services, or staffing agency, inde-
12 pendent contractor, or any similar entity, [~~at any time in the prior~~
13 ~~twelve months,~~] employs or exercises control over the wages, hours, or
14 working conditions of one hundred or more employees at a single ware-
15 house distribution center or [~~five hundred~~] one thousand or more employ-
16 ees at one or more warehouse distribution centers in the state.

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

36 [~~6-~~] 5. "Person" means an individual, corporation, partnership, limit-
37 ed partnership, limited liability partnership, limited liability compa-
38 ny, business trust, estate, trust, association, joint venture, agency,
39 instrumentality, or any other legal or commercial entity, whether domes-
40 tic or foreign.

41 [~~7-~~] 6. "Quota" means a work standard which:

42 (a) an employee is assigned or required to perform: [~~(i)~~] at a speci-
43 fied productivity speed; or a quantified number of tasks, or to handle
44 or produce a quantified amount of material, within a defined time peri-
45 od; or under which the employee may suffer an adverse employment action
46 if they fail to complete the performance standard.

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

52 [~~8-~~] 7. "Warehouse distribution center" means an establishment as
53 defined by any of the following North American industry classification
54 system ("NAICS") codes, however such establishment is denominated:

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

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

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

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

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

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

25 § 784. Recordkeeping. 1. Each employer shall establish, maintain, and
26 preserve for three years contemporaneous, true, and accurate records [~~of~~
27 ~~the following: (a) each employee's own personal work speed data; (b)~~
28 ~~the aggregated work speed data for similar employees at the same estab-~~
29 ~~lishment; and (c) the written descriptions of the quota such employee~~
30 ~~was provided pursuant to section seven hundred eighty-one of this arti-~~
31 ~~cle. Such records shall be maintained and preserved throughout the dura-~~
32 ~~tion of each employee's period of employment and made available to the~~
33 ~~commissioner upon request.~~

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

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

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

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

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

18 ~~5.]~~ 3. An employer that receives a written or oral request for infor-
19 mation pursuant to this section shall comply with the request as soon as
20 practicable, but no later than fourteen calendar days from the date of
21 the request.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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