

STATE OF NEW YORK

3309

2023-2024 Regular Sessions

IN ASSEMBLY

February 2, 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 enacting the warehouse worker injury reduction act

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

1 Section 1. This act shall be known and may be cited as the "warehouse
2 worker injury reduction act".

3 § 2. Legislative findings. The legislature finds and declares that:

4 (a) Workplace injuries can take a terrible toll on workers, their
5 families and their communities, and can create substantial costs for
6 employers. According to the most recent data (2020) released by the
7 Bureau of Labor Statistics, the warehouse industry itself reports a rate
8 of serious work-related injuries involving lost time or restricted duty
9 (4.0 cases/100 full-time workers) that is more than twice the average
10 injury rate for all private industry (1.7 cases/100 full-time workers).
11 The most common types of work-related serious injuries reported by
12 employers in the warehouse sector are musculoskeletal injuries, which
13 often require workers to miss work and can force workers permanently out
14 of the job and even out of the workforce.

15 (b) Warehouse companies often require workers to perform fast paced
16 manual material handling tasks. These involve well-known risk factors
17 for serious injury such as rapid pace, repetitive forceful exertions
18 like lifting heavy packages, and awkward postures like twisting/bending,
19 and combinations thereof that are likely to cause musculoskeletal in-
20 juries. Scientific evidence shows that effective ergonomic interventions,
21 such as reducing the pace, package weights and stressful postures, can
22 lower the incidence and severity of work-related musculoskeletal in-
23 juries. The research is clear that the most effective method for reducing
24 or eliminating these risk factors is to implement an ergonomics program
25 that includes well-informed analysis of the worksite, implementation of

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

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1 solutions to reduce the dangerous risk factors, professionally competent
 2 medical management, effective worker training, and meaningful involve-
 3 ment by workers and their representatives in all aspects of the program.
 4 § 3. The labor law is amended by adding a new article 21-B to read as
 5 follows:

6 ARTICLE 21-B

7 WAREHOUSE WORKER INJURY REDUCTION ACT

8 Section 790. Definitions.

9 791. Injury reduction program.

10 792. Unlawful retaliation.

11 793. Subpoena.

12 794. Enforcement.

13 795. Private right of action.

14 796. Records.

15 797. Other powers.

16 § 790. Definitions. As used in this article:

17 1. "Employer" means a person who directly or indirectly, or through an
 18 agent or any other person, including through the services of a third-
 19 party employer, temporary services, or staffing agency, independent
 20 contractor, or any similar entity, at any time in the prior twelve
 21 months, employs or exercises control over the wages, hours, or working
 22 conditions of one hundred or more employees at a single warehouse
 23 distribution center or five hundred or more employees at one or more
 24 warehouse distribution centers in the state.

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

41 2. "Musculoskeletal injuries and disorders" means work related inju-
 42 ries, or disorders, of the muscles, nerves, tendons, ligaments, joints,
 43 cartilage of the upper and lower limbs, neck and lower back (including
 44 spinal discs) that (a) are caused by sudden or sustained physical
 45 exertion, or (b) are not the result of any instantaneous non-exertion
 46 event, such as slips, trips, or falls.

47 3. "Person" means an individual, corporation, partnership, limited
 48 partnership, limited liability partnership, limited liability company,
 49 business trust, estate, trust, association, joint venture, agency,
 50 instrumentality, or any other legal or commercial entity, whether domes-
 51 tic or foreign.

52 4. "Qualified ergonomist" means an ergonomist who is able to demon-
 53 strate proficiency in the core, minimum competencies of ergonomics and
 54 injury prevention, as defined by the commissioner. Until the commis-
 55 sioner defines such competencies and approves ergonomists in accordance with
 56 such competencies, consultants approved by the commissioner under 12

1 NYCRR 59 and 60 with a credential as a certified safety professional or
2 certified industrial hygienist shall be deemed to qualify as an ergonom-
3 ist.

4 5. "Warehouse distribution center" means an establishment as defined
5 by any of the following North American industry classification system
6 ("NAICS") codes, however such establishment is denominated:

7 (a) four hundred ninety-three for warehousing and storage;

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

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

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

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

15 § 791. Injury reduction program. Every employer subject to this
16 section shall establish and implement an injury reduction program
17 designed to identify and minimize the risks of musculoskeletal injuries
18 and disorders among workers involved in performing manual materials
19 handling tasks. The program shall include: worksite evaluation; control
20 of exposures, including pace, which have caused or have the potential to
21 cause musculoskeletal injuries and disorders; employee training; medical
22 management; and employee involvement.

23 1. The employer shall ensure that each job, process, or operation of
24 work activity covered by this section or a representative number of such
25 jobs, processes, or operations of identical work activities shall have a
26 written work site evaluation by a qualified ergonomist for risk factors
27 which have or are likely to cause musculoskeletal injuries and disor-
28 ders. Such risk factors shall include, but are not limited to, rapid
29 pace, forceful exertions, repetitive motions, twisting, bending, and
30 awkward postures and combinations thereof that had caused or are likely
31 to cause musculoskeletal injuries and disorders.

32 (a) Any worksite evaluations shall also determine whether any employ-
33 ees exposed to such risk factors are subject to either personnel action
34 with the potential for adverse action, or adverse action or termination
35 themselves, arising in whole or in part from an employer's use of quotas
36 to determine employee assignments.

37 (b) All such worksite evaluations shall obtain recommendations from
38 workers who regularly perform those jobs on the possible risk factors
39 and any workplace changes that can reduce such risk factors.

40 (c) Copies of such worksite risk factor evaluations shall be made
41 available to workers and their representatives upon request, at no cost,
42 within one business day of such request. Workers and their represen-
43 tatives shall be notified in writing of the results of the worksite
44 evaluation. Employers shall maintain accessible copies of such evalu-
45 ations at locations within the warehouse and shall make such copies
46 readily available to workers.

47 (d) An initial worksite evaluation shall be conducted within three
48 months after the effective date of this article. Worksite evaluations
49 shall be reviewed and updated at least annually thereafter. A new analy-
50 sis of risk factors shall be conducted in accordance with the provisions
51 of the opening paragraph of this subdivision whenever a new job, proc-
52 ess, or operation is introduced which could increase the risk factors
53 for musculoskeletal injuries and disorders. Such new analysis shall be
54 conducted within thirty days of the creation or change of a job, process
55 or operation.

1 (e) Within three months of the effective date of this article, the
2 commissioner shall form a task force chaired by a recognized academic
3 leader in the field of ergonomics in New York state and including, but
4 not limited to, representatives from the warehouse workforce, labor
5 organizations active in the warehousing industry, and employers in the
6 industry, to recommend the core competencies required for the certifi-
7 cation of qualified ergonomists. Within six months of the effective
8 date of this article, the commissioner shall adopt a standard and proc-
9 ess for certifying qualified ergonomists based on the recommendations of
10 the task force.

11 2. The employer shall correct in a timely manner any risk factors
12 identified as having caused or being likely to cause musculoskeletal
13 injuries and disorders. For any corrections which require more than
14 thirty days to complete, the employer shall revise, as needed, and
15 provide a schedule for such proposed corrections. Such schedule shall be
16 included in the evaluations provided to workers and their represen-
17 tatives.

18 (a) Where the employer demonstrates that it is unable to eliminate
19 identified risk factors, the employer shall minimize the exposures to
20 the extent feasible.

21 (b) In reducing risk factors, the employer shall consider:

22 (i) engineering controls and redesigning work stations to change
23 shelving heights, provide adjustable fixtures or tool redesign; and

24 (ii) administrative controls, such as job rotation which reduces the
25 exposure to risk factors, reduced work pacing or additional work breaks.

26 (c) Employers shall maintain records of steps taken to eliminate or
27 reduce risk factors and shall make copies available to workers and their
28 representatives upon request.

29 3. All employers covered by this section shall provide injury
30 reduction training to all employees involved in performing manual mate-
31 rials handling jobs and tasks at the warehouse during normal work hours
32 and without suffering a loss of pay. Such training shall be provided in
33 a language and vocabulary that the workers understand and shall be
34 repeated annually. The training shall also be provided to the workers'
35 supervisors. Such training shall be in addition to the training required
36 under section twenty-seven-d of this chapter and shall include:

37 (a) The early symptoms of musculoskeletal injuries and disorders and
38 the importance of early detection;

39 (b) Musculoskeletal injury and disorder risk factors and exposures at
40 work, including the hazards posed by excessive rates of work;

41 (c) Methods to reduce risk factors for musculoskeletal injuries and
42 disorders, including both engineering controls and administrative
43 controls, such as limitations on work pace and increased scheduled and
44 unscheduled breaks;

45 (d) The employer's program to identify risk factors as required under
46 this section and prevent musculoskeletal injuries and disorders, includ-
47 ing the summary protocols for medical treatment approved by the employ-
48 er's medical consultant;

49 (e) The rights and function of workplace safety committees established
50 under section twenty-seven-d of this chapter and the rights of employees
51 to report any risk factors, other hazards, injuries or health and safety
52 concerns; and

53 (f) Training on the unlawful retaliation of any provision in this
54 section, including the disciplinary actions required when supervisors or
55 managers violate the law or policy, as well as the employer's policy
56 prohibiting any workplace discrimination.

1 4. Any on-site medical office or first aid station that sees workers
2 in warehouses covered by this section with symptoms of musculoskeletal
3 injuries and disorders shall be staffed with medical professionals oper-
4 ating within their legal scope of practice.

5 (a) Employers shall ensure that staffing and the practice of any first
6 aid or medical station meets state requirements for physician super-
7 vision of nurses, emergency medical technicians or other non-physician
8 personnel.

9 (b) In all warehouses where employers require that workers with signs
10 and symptoms of musculoskeletal injuries and disorders shall first be
11 seen by an on-site medical or first aid provider or have the approval of
12 the employer prior to being sent to a doctor, the employer shall consult
13 with a medical consultant who is licensed by New York state and board
14 certified in occupational medicine.

15 (i) The employer shall obtain from the medical consultant a written
16 evaluation of the medical management program and protocols followed in
17 the warehouse for identification and treatment of musculoskeletal inju-
18 ries and disorders and shall include recommendations to ensure compli-
19 ance with accepted medical practice of the staffing, supervision and
20 documentation of medical treatment protocols.

21 (ii) The employer shall obtain from the medical consultant a summary
22 of treatment protocols suitable for worker patients covering all aspects
23 of the medical management practices, from early detection of musculosk-
24 eletal injuries and disorders through evaluation by a qualified physi-
25 cian and physician provision of appropriate work restrictions in
26 languages understood by the employees.

27 (iii) The employer shall ensure that the medical consultant reviews
28 the previous medical consultant evaluation, related materials and proto-
29 cols on an annual basis, and recommends changes as appropriate.

30 (iv) The employer shall ensure that all designated medical and first
31 aid providers have observed, in person, the jobs involving manual mate-
32 rials handling within the warehouse and all risk factors identified in
33 the evaluation conducted under the medical consultant evaluation.

34 (c) There shall be no unnecessary delays in the provision of adequate
35 medical care to workers who report injuries to the on-site medical
36 services.

37 (d) Each employer shall ensure that no supervisory or managerial
38 employee or other person discriminates or retaliates against any
39 current, former, or prospective employee or other person for reporting a
40 work-related injury or illness, or health and safety concern.

41 5. Employers shall ensure that employees and their designated repre-
42 sentatives are consulted both before and during the development and
43 implementation of all aspects of the program. Where employees have
44 established a workplace safety committee in compliance with section
45 twenty-seven-d of this chapter, the employer shall ensure that the
46 committee is consulted regarding the development and implementation of
47 all aspects of the injury reduction program. Any record created by the
48 employer according to this section shall be provided to the workplace
49 safety committee prior to consultation. All documents provided to
50 employees shall be provided in writing in English and in the language
51 identified by each employee as the primary language of such employee.

52 § 792. Unlawful retaliation. 1. No person, including but not limited
53 to an employer, his or her agent, or person acting as or on behalf of a
54 hiring entity, or the officer or agent of any entity, business, corpo-
55 ration, partnership, or limited liability company, shall discharge or in
56 any way retaliate, discriminate or take adverse action against any

1 person for exercising any rights conferred under this article, or for
2 being perceived as exercising rights conferred by this article, includ-
3 ing but not limited to making a complaint under this article.

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

8 3. If a person takes adverse action against an employee within ninety
9 days of the employee's engaging or attempting to engage in activities
10 protected by this article, such conduct shall raise a rebuttable
11 presumption that the action is an adverse action in violation of this
12 article. Such presumption may be rebutted by clear and convincing
13 evidence that:

14 (a) the action was taken for other permissible reasons; and

15 (b) the engaging or attempting to engage in activities protected by
16 this article was not a motivating factor in the adverse action.

17 § 793. Subpoena. Upon receiving a complaint regarding a violation of
18 this article, the commissioner may request or subpoena employer records
19 or data related to this article.

20 § 794. Enforcement. 1. The commissioner shall be authorized to enforce
21 the provisions of this article.

22 2. (a) Any employee or representative of employees who believes that
23 an employer may violate the requirements of this article or that an
24 imminent danger exists, may request an inspection by giving notice to
25 the commissioner of such violation or danger. Such notice and request
26 shall:

27 (i) be in writing, either physical or electronic;

28 (ii) set forth with reasonable particularity the grounds for the
29 notice;

30 (iii) be signed by the employee or representative of employees;

31 (iv) be provided by the commissioner to the employer or the person in
32 charge no later than the time of inspection, except that the name of the
33 person giving notice to the commissioner and the names of individual
34 employees or representatives of employees shall be withheld unless such
35 employees or representatives have provided express written permission
36 for such information to be shared.

37 (b) Inspections pursuant to this subdivision shall be made within
38 three days of receipt of notice by the commissioner.

39 3. A representative of the employer and a designated employee repre-
40 sentative shall be given the opportunity to accompany the commissioner
41 during an inspection for the purpose of aiding such inspection. A labor
42 union having a collective bargaining relationship with the employer
43 shall be considered an employee representative for the purposes of this
44 section. Where there is no designated employee representative, the
45 commissioner shall consult with a reasonable number of employees
46 concerning matters of safety and health in the workplace.

47 4. The authority of the commissioner to inspect premises pursuant to
48 an employee complaint shall not be limited to the alleged violation
49 contained in such complaint. The commissioner may inspect any other area
50 of the premises in which he or she has reason to believe that a
51 violation of this article exists.

52 5. No employee or designated employee representative who accompanies
53 the commissioner on an inspection shall suffer any reduction in wages as
54 a result of his or her participation in such inspection.

55 6. The commissioner may, upon his or her own initiative, conduct an
56 inspection of any premises occupied by an employer if the commissioner

1 has reason to believe that a violation of this article has occurred or
2 if the commissioner has a basis for such inspection.

3 7. Notwithstanding any other provisions of law, when a request for an
4 inspection has been made in a situation where there is an allegation of
5 an imminent danger such that an employee would be subjecting himself or
6 herself to serious injury or death because of the hazardous condition in
7 the workplace, the inspection shall be carried out immediately.

8 8. If the commissioner determines that an employer has violated a
9 provision of this article, or a safety or health standard or regulation
10 promulgated pursuant to this article, he or she shall, within six months
11 of becoming aware of such violation, issue to the employer an order to
12 comply which shall describe particularly the nature of the violation,
13 including a reference to the provision of the section, standard, regu-
14 lation or order alleged to have been violated, fix a reasonable time for
15 compliance, and establish a penalty equivalent to the appropriate penal-
16 ties required pursuant to section 17 of the federal Occupational Safety
17 and Health Act (29 USC 666). An employer who fails to correct a non-ser-
18 ious violation by the time fixed for compliance may be assessed a civil
19 penalty pursuant to 29 USC 666 per day until the violation is corrected.
20 An employer who fails to correct a serious violation by the time fixed
21 for compliance may be assessed a civil penalty pursuant to 29 USC 666
22 until the violation is corrected. A serious violation shall be deemed to
23 exist in a place of employment if there is a substantial probability
24 that death or serious physical harm could result from a condition which
25 exists or from one or more practices, means, methods, operations, or
26 processes which have been adopted or are in use in such place of employ-
27 ment unless the employer did not, and could not with the exercise of
28 reasonable diligence, know of the presence of the violation. A non-ser-
29 ious violation shall be defined as any violation that does not fall
30 under the definition of serious violation.

31 9. Where the commissioner issues to an employer an order to comply,
32 the employer shall post such order or a copy thereof in a conspicuous
33 place at or near each place of violation cited in the order. The order
34 shall be placed where it is clearly visible to affected employees and
35 copies shall be provided to employees, on request, and to the designated
36 representatives of all affected employees. The commissioner shall make
37 such order available to employee representatives and provide a plain
38 English summary of the order to all workers.

39 10. Any employer or other party affected by a determination of the
40 commissioner issued pursuant to this section, including affected employ-
41 ees and their designated representatives, may petition the industrial
42 board of appeals for review of such determination in accordance with
43 section one hundred one of this chapter. Judicial review of the decision
44 of the industrial board of appeals may be obtained by any party affected
45 by such decision by commencing a proceeding pursuant to article seven-
46 ty-eight of the civil practice law and rules within sixty days after
47 such decision is issued. An appeal of any violation classified and cited
48 as serious, willful, repeated serious violation, or failure to abate a
49 serious violation shall not stay abatement dates and requirements.
50 Employees affected by the violation covered by such determination shall
51 be granted status as parties to: participate in the board's proceedings;
52 review any aspect of the commissioner's determinations; and request of
53 the issuance of subpoenas to compel the attendance of witnesses,
54 production of documents, permission to enter upon land, interrogatories
55 and depositions from affected employers and from the department pursuant
56 to section one hundred of this chapter. The board shall grant such

1 requests except that requests for depositions shall be granted by the
2 board upon a request stating good and just reasons.

3 11. If the time for compliance with an order of the commissioner
4 issued pursuant to this section has elapsed and the employer has not
5 complied with the provisions of the order, the commissioner shall seek
6 judicial enforcement of such order by commencing a proceeding pursuant
7 to article seventy-eight of the civil practice law and rules.

8 12. (a) The state supreme court shall have jurisdiction, upon petition
9 of the commissioner, pursuant to the civil practice law and rules to
10 restrain any violations, conditions or practices prohibited by this
11 article in any employer covered by this article which are such that a
12 danger exists which could reasonably be expected to cause death or seri-
13 ous physical harm immediately or before the imminence of such danger can
14 be eliminated through the abatement procedures otherwise provided for by
15 this article. Such proceeding shall be brought in the county in which
16 the violation is alleged to exist. Any order issued under this section
17 may require such steps to be taken as may be necessary to avoid, correct
18 or remove such imminent danger and prohibit the employment or presence
19 of any individual in locations or under conditions where such imminent
20 danger exists, except individuals whose presence is necessary to avoid,
21 correct, or remove such imminent danger or to maintain the capacity of a
22 continuous process operation to resume normal operations without a
23 complete cessation of operations, or where a cessation of operations is
24 necessary, to permit such to be accomplished in a safe and orderly
25 manner. The employer may contest such order pursuant to the civil prac-
26 tice law and rules.

27 (b) Whenever and as soon as an inspector concludes that conditions or
28 practices described in paragraph (a) of this subdivision exist in any
29 place of employment covered by this article, the inspector shall inform
30 the affected employees and employers of the danger and of the recommen-
31 dation to the commissioner that relief be sought.

32 (c) If the commissioner fails to seek relief under this subdivision
33 within forty-eight hours of being notified of such condition, any
34 employee who may be injured by reason of such failure, or the authorized
35 employee representative of such employee, may seek injunctive relief as
36 provided in paragraph (a) of this subdivision.

37 13. The commissioner shall provide a report to the legislature one
38 year after the effective date of this section, and annually thereafter.
39 The report shall include all relevant information regarding implementa-
40 tion and enforcement of this article, including but not limited to the
41 number of claims filed with the commissioner under this article, and the
42 number of investigations undertaken and enforcement actions initiated,
43 per employer and per worksite.

44 14. If a particular worksite or employer is found to have an annual
45 employee injury rate at least one and one-half times as high as the
46 warehousing industry's average annual injury rate, the commissioner
47 shall conduct an investigation of the facility to assess whether the
48 employer is adequately protecting workers from musculoskeletal injuries
49 pursuant to this article.

50 15. The commissioner shall have the authority to adopt rules and regu-
51 lations relating to the procedures for an employee to make a complaint
52 alleging a violation of this article.

53 16. In any successful action brought by the commissioner to enforce
54 this article, the court may grant injunctive relief in order to obtain
55 compliance with this article and shall award costs and reasonable attor-
56 ney's fees.

1 § 795. Private right of action. A current or former employee or his or
2 her representative may bring an action for injunctive relief to obtain
3 compliance with this article and may, upon prevailing in the action,
4 recover costs and reasonable attorney's fees in such action. In any
5 action involving a quota that prevented the compliance with applicable
6 regulations on workplace safety and health or meal or rest break
7 requirements, the injunctive relief shall be limited to suspension of
8 the quota and restitution and injunctive relief to address any retali-
9 ation or other adverse action taken by the employer in relation to the
10 complaint or its enforcement. In any action involving a retaliation in
11 violation of this article, in addition to the injunctive relief author-
12 ized under this section, a prevailing current or former employee or his
13 or her representative shall be awarded damages equal to the greater of
14 ten thousand dollars or three times the actual damages, including, but
15 not limited to, unpaid wages and benefits.

16 § 796. Records. Any records collected by the state in any investi-
17 gation under this article shall be made public, without any restriction
18 regarding confidentiality, other than a restriction on the release of
19 personally identifiable information for individual non-supervisory
20 employees. All records maintained by the employer under this article
21 shall be made freely available to employees and their representatives on
22 request, within two business days of such request, at no cost to employ-
23 ees or their representatives.

24 § 797. Other powers. The attorney general, either upon his or her own
25 complaint or the complaint of any person acting for themselves or the
26 general public, has the authority to prosecute actions, either civil or
27 criminal, for violations of this article, or to enforce the provisions
28 thereof independently and without specific direction of the commission-
29 er.

30 § 4. Severability. If any provision of this act, or any application of
31 any provision of this act, is held to be invalid, that shall not affect
32 the validity or effectiveness of any other provision of this act, or of
33 any other application of any provision of this act, which can be given
34 effect without that provision or application; and to that end, the
35 provisions and applications of this act are severable.

36 § 5. This act shall take effect on the sixtieth day after it shall
37 have become a law.