# STATE OF NEW YORK

5081

2023-2024 Regular Sessions

# IN SENATE

February 22, 2023

Introduced by Sen. RAMOS -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to establishing the warehouse worker injury reduction program

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

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

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

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

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

LBD08912-01-3

solutions to reduce the dangerous risk factors, professionally competent medical management, effective worker training, and meaningful involvement by workers and their representatives in all aspects of the program.

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

**ARTICLE 21-B**

**WAREHOUSE WORKER INJURY REDUCTION ACT**

**Section 790. Definitions.**
**791. Injury reduction program.**
**792. Unlawful retaliation.**
**793. Subpoena.**
**794. Enforcement.**
**795. Private right of action.**
**796. Records.**
**797. Other powers.**

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

**1. "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 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.**

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

**3. "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.**

**4. "Qualified ergonomist" means an ergonomist who is able to demonstrate proficiency in the core, minimum competencies of ergonomics and injury prevention, as defined by the commissioner. Until the commissioner defines such competencies and approves ergonomists in accordance with such competencies, consultants approved by the commissioner under 12**

NYCRR 59 and 60 with a credential as a certified safety professional or certified industrial hygienist shall be deemed to qualify as an ergonomist.

5. "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;

(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.

§ 791. Injury reduction program. 1. Every employer subject to this section shall establish and implement an injury reduction program designed to identify and minimize the risks of musculoskeletal injuries and disorders among workers involved in performing manual materials handling tasks. The program shall include: worksite evaluation; control of exposures, including pace, which have caused or have the potential to cause musculoskeletal injuries and disorders; employee training; medical management; and employee involvement.

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

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

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

(c) Copies of such worksite risk factor evaluations shall be made available to workers and their representatives upon request, at no cost, within one business day of such request. Workers and their representatives shall be notified in writing of the results of the worksite evaluation. Employers shall maintain accessible copies of such evaluations at locations within the warehouse and shall make such copies readily available to workers.

(d) An initial worksite evaluation shall be conducted within three months after the effective date of this article. Worksite evaluations shall be reviewed and updated at least annually thereafter. A new analysis of risk factors shall be conducted in accordance with the provisions of subdivision one of this section whenever a new job, process, or operation is introduced which could increase the risk factors for musculoskeletal injuries and disorders. Such new analysis shall be conducted within thirty days of the creation or change of a job, process or operation.

(e) Within three months of the effective date of this article, the commissioner shall form a task force chaired by a recognized academic leader in the field of ergonomics in New York state and including, but not limited to, representatives from the warehouse workforce, labor organizations active in the warehousing industry, and employers in the industry, to recommend the core competencies required for the certification of qualified ergonomists. Within six months of the effective date of this article, the commissioner shall adopt a standard and process for certifying qualified ergonomists based on the recommendations of the task force.

3. The employer shall correct in a timely manner any risk factors identified as having caused or being likely to cause musculoskeletal injuries and disorders. For any corrections which require more than thirty days to complete, the employer shall revise, as needed, and provide a schedule for such proposed corrections. Such schedule shall be included in the evaluations provided to workers and their representatives.

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

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

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

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

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

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

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

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

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

(d) The employer's program to identify risk factors as required under this section and prevent musculoskeletal injuries and disorders, including the summary protocols for medical treatment approved by the employer's medical consultant;

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

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

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

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

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

(i) The employer shall obtain from the medical consultant a written evaluation of the medical management program and protocols followed in the warehouse for identification and treatment of musculoskeletal injuries and disorders and shall include recommendations to ensure compliance with accepted medical practice of the staffing, supervision and documentation of medical treatment protocols.

(ii) The employer shall obtain from the medical consultant a summary of treatment protocols suitable for worker patients covering all aspects of the medical management practices, from early detection of musculoskeletal injuries and disorders through evaluation by a qualified physician and physician provision of appropriate work restrictions in languages understood by the employees.

(iii) The employer shall ensure that the medical consultant reviews the previous medical consultant evaluation, related materials and protocols on an annual basis, and recommends changes as appropriate.

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

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

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

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

§ 792. 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, making a complaint related to section seven hundred ninety-one of this article.

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

section one hundred of this chapter. The board shall grant such requests except that requests for depositions shall be granted by the board upon a request stating good and just reasons.

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

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

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

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

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

14. If a particular worksite or employer is found to have an annual employee injury rate at least one and one-half times as high as the warehousing industry's average annual injury rate, the commissioner shall conduct an investigation of the facility to assess whether the employer is adequately protecting workers from musculoskeletal injuries and disorders according to section seven hundred ninety-one of this article and of violations pursuant to this article.

15. The commissioner shall have the authority to adopt rules and regulations relating to the procedures for an employee to make a complaint alleging a violation of this article.

16. In any successful action brought by the commissioner to enforce this article, the court may grant injunctive relief in order to obtain

compliance with this article and shall award costs and reasonable attorney's fees.

§ 795. Private right of action. A current or former employee or his or her representative may bring an action for injunctive relief to obtain compliance with this article and may, upon prevailing in the action, recover costs and reasonable attorney's fees in such action. In any action involving a quota that prevented the compliance with applicable regulations on workplace safety and health or meal or rest break requirements, the injunctive relief shall be limited to suspension of the quota and restitution and injunctive relief to address any retaliation or other adverse action taken by the employer in relation to the complaint or its enforcement. In any action involving a retaliation in violation of section seven hundred ninety-two of this article, in addition to the relief authorized above, a prevailing current or former employee or his or her representative shall be awarded damages equal to the greater of ten thousand dollars or three times the actual damages, including, but not limited to, unpaid wages and benefits.

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

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

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

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