STATE OF NEW YORK

541--A

2023-2024 Regular Sessions

IN SENATE

January 4, 2023

Introduced by Sens. HOYLMAN-SIGAL, CLEARE, GIANARIS, JACKSON, KENNEDY, KRUEGER, MAYER, MYRIE, RAMOS, SALAZAR, SANDERS, SERRANO, SKOUFIS -- read twice and ordered printed, and when printed to be committed to the Committee on Labor -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the labor law, in relation to enacting the "Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act"

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

Section 1. Short title. This act shall be known and may be cited as the "Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act".

§ 2. Legislative findings. 1. The legislature finds and declares that violations of the labor law are often systemic, affecting many workers.

2. The legislature further finds and declares that despite the labor law's strong protections for workers, limits on the availability of public enforcement resources have deleterious effects on the marketplace by allowing abuses targeting workers to persist unprosecuted. To ensure the robust enforcement of the labor law, while minimizing the outlay of scarce state funds, this act allows private individuals, labor organizations, and labor organizations deputized by the state to bring public enforcement actions in certain contexts in which the state does not have the means to fully enforce labor law protections.

3. The legislature further finds and declares that the purpose of the EMPIRE Worker Protection Act is to create a means of empowering citizens as private attorneys general to enforce the New York labor law.

4. The legislature further finds and declares that the purpose of the EMPIRE Worker Protection Act is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies. When the New York labor law is effectively enforced, it protects the

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

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interests of all New Yorkers and the state of New York. Such public enforcement actions are an efficient mechanism to limit systemic violations, will enforce the rights of more workers, and can benefit the department of labor with enhanced resources.

5. The legislature further finds and declares that the purpose of the EMPIRE Worker Protection Act is to benefit those employers who are operating within the labor law, and who, as a result, face unfair competition from individuals and entities shirking the labor law.

6. The legislature further finds and declares that the purpose of the EMPIRE Worker Protection Act is to deter employers from stealing wages or committing other violations of the New York labor law and raise the cost of noncompliance with the New York labor law.

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

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

9. The legislature further finds and declares that the EMPIRE Worker Protection Act is part of a history both in New York state and in the United States of laws enabling private citizens to aid in public enforcement. In similar qui tam legislation enabling private citizens to aid in public enforcement, the resulting action is a public enforcement action.

§ 3. The labor law is amended by adding a new article 35 to read as follows:

ARTICLE 35

EMPOWERING PEOPLE IN RIGHTS ENFORCEMENT (EMPIRE) WORKER PROTECTION ACT

Section 1020. Definitions.
1021. Public enforcement action.
1022. Procedure.
1023. Non-application.

§ 1020. Definitions. Whenever used in this article:

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

2. "relator" means an affected employee, a whistleblower, a representative organization, or an organizational deputy that acts as a plaintiff in a public enforcement action under this chapter.

3. "whistleblower" means any current or former employee, contractor, subcontractor, or employee of a contractor or subcontractor of the defendant with knowledge of the alleged violations that is independent of and materially adds to any publicly disclosed information about the alleged violations. Whistleblowers are not also "affected employees" if they do not seek civil penalties for violations that personally affected them in a public enforcement action under this chapter.

4. "employer" means any employer as defined by section two of this chapter. The term "employer" shall not include a governmental agency.

5. "representative organization" means a labor organization as defined by subsection (g) of section four thousand four hundred two of the

insurance law and which has been selected by an affected employee or whistleblower to initiate a public enforcement action on the affected employee's or whistleblower's behalf, in written notice in such a manner as the commissioner may prescribe by regulation. Where a representative organization is designated as the relator, the affected employee or whistleblower may elect to have their name and personal identifying information be kept confidential until the relator, in its sole discretion, deems sharing such information is necessary to establish, litigate, mediate, settle, or otherwise pursue the claim.

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

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

8. "violation" means an employer's noncompliance with any of the requirements of the following articles of this chapter and with regulations and wage orders promulgated by the commissioner in implementing such articles:

a. article six except sections one hundred ninety, one hundred ninety-one-a, one hundred ninety-six, one hundred ninety-six-a, one hundred ninety-eight-a, one hundred ninety-nine, and one hundred ninety-nine-a;

b. article nineteen except sections six hundred fifty, six hundred fifty-one, six hundred fifty-three through six hundred sixty, six hundred sixty-two, and six hundred sixty-five;

c. sections one hundred sixty, one hundred sixty-one, one hundred sixty-two, one hundred sixty-three-a, one hundred sixty-seven, and one hundred seventy of article five;

d. article nineteen-A except sections six hundred seventy through six hundred seventy-two, six hundred seventy-four through six hundred seventy-eight, six hundred eighty, and six hundred eighty-three;

e. article nineteen-B except sections six hundred ninety, six hundred ninety-three, and six hundred ninety-four;

f. article nine except sections two hundred thirty, two hundred thirty-four through two hundred thirty-six, and two hundred thirty-eight;

g. article twenty-five-A except sections eight hundred sixty, eight hundred sixty-a, eight hundred sixty-c through eight hundred sixty-f, and eight hundred sixty-i;

h. article twenty-five-B except sections eight hundred sixty-one through eight hundred sixty-one-b;

i. article twenty-five-C except sections eight hundred sixty-two and eight hundred sixty-two-a;

j. article eight except sections two hundred twenty-e through two hundred twenty-four, two hundred twenty-four-b, and two hundred twenty-four-c;

k. article twenty-C;

l. sections two hundred, two hundred one-g, two hundred six-c, two hundred fifteen, and two hundred eighteen-b of article seven; and

m. section twenty-seven-d of article two.

9. "organizational deputy" means a labor organization as defined by subsection (g) of section four thousand four hundred two of the insurance law that has been appointed by the commissioner or the attorney general to represent the state as the relator in the public enforcement action. The commissioner or the attorney general shall have

complete discretion to determine what labor organizations may serve as their organizational deputy in a public enforcement action.

§ 1021. Public enforcement action. 1. A relator may initiate a public enforcement action to collect civil penalties on behalf of the commissioner for a violation impacting affected employees pursuant to the procedures specified in section one thousand twenty-two of this article. A relator may allege multiple violations that have affected different employees and may seek injunctive and declaratory relief that the state would be entitled to seek.

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

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

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

d. Nothing in this section shall operate to limit an affected employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this section.

e. Nothing in this section shall operate to limit the commissioner's or the attorney general's right to seek restitution and damages, where available, for affected employees in conjunction with a public enforcement action in which it has intervened.

3. a. Civil penalties recovered in public enforcement actions shall be distributed as follows: where the commissioner or the attorney general has not intervened, or where the commissioner or the attorney general has appointed an organizational deputy to proceed as the relator, forty percent to the relator; and sixty percent to the commissioner for enforcement of this chapter and education of employers and employees about their rights and responsibilities under this chapter, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; where the commissioner or the attorney general has intervened, thirty percent to the relator; and seventy percent to the commissioner for enforcement of this chapter and education of employers and employees about their rights and responsibilities under this chapter, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

b. The relator shall equitably distribute the share of penalties due the relator among affected employees. If the relator is an affected employee or whistleblower, they shall also be entitled to recover a service award from the penalties recovered, if they prevail in achieving relief, in whole or in part, for violations that affected other employees. The service award shall be not less than five thousand dollars and not more than twenty thousand dollars, unless the amount recovered as civil penalties is less than twenty thousand dollars. The court shall determine the service award by taking due consideration of the burdens and risks assumed by the relator in prosecuting the action. If the relator is a representative organization or an organizational deputy appointed by the commissioner or the attorney general, it shall distribute all recovered penalties to affected employees but may recover reasonable attorneys' fees and costs incurred in prosecuting the action and ancillary costs associated with serving as a relator. The relator shall submit a distribution summary to the commissioner and the attorney general.

4. The right to bring a public enforcement action under this article shall not be subject to private agreements between an affected employee and an employer or alleged employer, unless such agreements are collectively bargained and the bargaining agreement provides a forum for the enforcement of rights and remedies otherwise enforceable under this article. The right to represent the state with respect to violations affecting other workers shall not be waivable by private agreement, unless such agreements are collectively bargained and the bargaining agreement provides a forum for the enforcement of rights and remedies otherwise enforceable under this article, including an award of penalties authorized by this article.

5. Notwithstanding any other provision of law, a public enforcement action to recover upon a penalty imposed by this article must be commenced within six years. The statute of limitations for bringing a public enforcement action under this article shall be tolled from the date a relator files a notice pursuant to section one thousand twenty-two of this article with the commissioner and the attorney general, or the commissioner or the attorney general commences an investigation, whichever is earlier.

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

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

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

(ii) the relator or potential relator has provided information, caused information to be provided, or otherwise assisted in a public enforcement action or provided information, or caused information to be provided to a person with supervisory authority over the relator or potential relator regarding conduct that the relator or potential relator reasonably believes constitutes a violation of this section; or

(iii) the person believes that the relator or potential relator may bring a public enforcement action or cooperate with one.

b. Any person affected by a violation of this subdivision, or any affected employee, whistleblower, representative organization, organizational deputy, or the commissioner, or the attorney general may bring a public enforcement action for all appropriate relief, including enjoining the conduct of any person or employer; ordering payment of civil penalties as provided by section two hundred fifteen of this chapter, costs and reasonable attorneys' fees to the employee by the person or entity in violation; and, where the person or entity in violation is an employer, ordering rehiring or reinstatement of the employee to his or her former position with restoration of seniority. Any person affected by a violation of this subdivision may also bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated the provisions of this subdivision pursuant to subdivision two of section two hundred fifteen of this chapter.

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

§ 1022. Procedure. 1. No public enforcement action by a relator pursuant to section one thousand twenty-one of this article may be commenced:

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

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

(ii) the name, address, and contact information of the affected employee or whistleblower.

(iii) if the action is brought by a representative organization, the name, address and contact information of the representative organization, its qualification as a representative organization as defined in this chapter, and the form on which the whistleblower or affected employee has designated the representative organization.

(iv) if the action is brought by an affected employee or whistleblower, the name, address, and contact information of any labor organization that has assisted with the filing of the written notice, and who would be available to serve as an organizational deputy should they be so appointed by the commissioner or the attorney general.

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

(vi) a statement of the underlying claim.

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

(viii) after searching the database established pursuant to subdivision six of section one thousand twenty-one of this article for notices alleging the same facts and legal theories, a summary of such notices or statement that no such notices exist, provided that a notice filed by a

pro se litigant may not be rejected for failure to conduct such a search.

b. if the commissioner or the attorney general, at any time prior to the end of the sixty-day notice period prescribed in paragraph a of this subdivision or prior to commencement of such action, whichever is later, and upon written notice to the relator who provided the notice prescribed in paragraph a of this subdivision, has commenced and is actively prosecuting an administrative enforcement proceeding pursuant to this chapter relative to the alleged violation.

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

d. if the violation is of a posting or agency reporting requirement or agency filing requirement, except where the filing or reporting requirement involves mandatory payroll or injury reporting.

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

2. The commissioner or the attorney general may, after receiving the notice, appoint an organizational deputy for the commissioner or the attorney general (based on who makes the appointment) to serve as the relator, instead of the person who filed the notice. That organizational deputy may then proceed with the public enforcement action on behalf of the state. If the commissioner or the attorney general has appointed an organizational deputy as the relator, that organizational deputy shall serve as the relator in accordance with all the other procedures outlined in this article. The decision to appoint an organizational deputy shall not be construed as the commissioner's or the attorney general's direct intervening in the public enforcement action.

3. The commissioner or the attorney general may intervene in the public enforcement action and proceed with any and all claims in the action:

a. as of right within the sixty-day notice period prescribed in paragraph a of subdivision one of this section;

b. for good cause, as determined by the court, after the expiration of the sixty-day notice period prescribed in paragraph a of subdivision one of this section; or

c. if a previous relator becomes unavailable to continue the public enforcement action, by appointing an organizational deputy for the commissioner or the attorney general (based on who makes the appointment) to proceed with the public enforcement action on behalf of the state. If the commissioner or the attorney general has so appointed an organizational deputy, the organizational deputy shall serve as the relator in accordance with all the other procedures outlined in this article. The decision to appoint an organizational deputy shall not be construed as the commissioner or the attorney general directly intervening in the public enforcement action.

4. If the commissioner or the attorney general intervenes in an action, he or she may take primary responsibility for litigating the action and shall not be bound by an act of the relator bringing the action. In such cases, the relator shall remain a party to the action. The commissioner or the attorney general may also intervene in the action for the limited purpose of filing a statement of interest or

otherwise advancing the state's view about legal issues at stake in the action. If the commissioner or the attorney general has intervened for the purpose of taking primary responsibility for litigating the action, the commissioner or attorney general may dismiss or settle the action after the relator has been notified of the filing of the motion and has been provided with an opportunity to be heard, and the court determines that such dismissal or settlement is fair, adequate, reasonable, and in the public interest.

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

6. a. The relator shall, within ten days following commencement of a civil action pursuant to this article, provide the commissioner and the attorney general with a file-stamped copy of the complaint that includes the case number assigned by the court.

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

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

d. Items required to be submitted to the commissioner under this subdivision shall be transmitted in such a manner as the commissioner shall prescribe for the filing of notices under paragraph a of subdivision one of this section.

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

8. A public enforcement action shall be tried promptly, without regard to concurrent adjudication of private claims, including without regard to concurrent adjudication of claims for violations personally affecting the relator.

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

10. The rules governing pretrial discovery in a public enforcement action brought pursuant to this article shall be the same as those applicable to other civil actions. No special showing of merit or other

additional requirement shall be imposed on a relator's discovery rights in such an action.

11. A relator bringing an action pursuant to this article shall be entitled to discovery regarding the alleged violations as to all affected employees as defined in this article.

12. When related public enforcement actions are pending, the parties shall immediately notify the courts overseeing such actions of the overlap and submit a joint statement describing the overlap, which may propose a process to ensure the just, speedy, and efficient determination of the actions. The court may appoint lead enforcement counsel with sole responsibility for asserting the related claims, with consideration of the following factors:

a. the work that counsel has done in investigating the claims;

b. counsel's experience litigating labor law and past performance in similar cases;

c. counsel's diligence in advancing the case;

d. the resources that counsel has committed and will commit to prosecuting the case, and the relative resources at counsel's disposal; and

e. the length of time each action has been pending.

§ 1023. Non-application. 1. This article shall not apply to the recovery of administrative and civil penalties in connection with the unemployment insurance law as contained in article eighteen of this chapter.

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

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

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

§ 4. This act shall take effect immediately, and shall permit relators to bring actions concerning New York Labor Law violations that occurred within the six years prior to this act's effective date, unless the Labor Law provides a shorter statute of limitations with respect to the specific violation in question, in which case that shorter statute of limitations shall apply.