

STATE OF NEW YORK

541--B

2023-2024 Regular Sessions

IN SENATE

January 4, 2023

Introduced by Sens. HOYLMAN-SIGAL, BRESLIN, BRISPORT, CLEARE, COMRIE, FERNANDEZ, GIANARIS, GONZALEZ, GOUNARDES, HARCKHAM, HINCHEY, JACKSON, KENNEDY, KRUEGER, MAYER, MYRIE, RAMOS, RYAN, 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 -- recommitted to the Committee on Labor in accordance with Senate Rule 6, sec. 8 -- 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:

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

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

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

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

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

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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 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 36 to read as follows:

ARTICLE 36

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

1 they do not seek civil penalties for violations that personally affected
2 them in a public enforcement action under this chapter.

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

5 5. "representative organization" means a labor organization as defined
6 by subsection (g) of section four thousand four hundred two of the
7 insurance law and which has been selected by an affected employee or
8 whistleblower to initiate a public enforcement action on the affected
9 employee's or whistleblower's behalf, in written notice in such a manner
10 as the commissioner may prescribe by regulation. Where a representative
11 organization is designated as the relator, the affected employee or
12 whistleblower may elect to have their name and personal identifying
13 information be kept confidential until the relator, in its sole
14 discretion, deems sharing such information is necessary to establish,
15 litigate, mediate, settle, or otherwise pursue the claim.

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

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

24 8. "violation" means an employer's noncompliance with any of the
25 requirements of the following articles of this chapter and with regu-
26 lations and wage orders promulgated by the commissioner in implementing
27 such articles:

28 a. article six except sections one hundred ninety, one hundred nine-
29 ty-one-a, one hundred ninety-six, one hundred ninety-six-a, one hundred
30 ninety-eight-a, one hundred ninety-nine, and one hundred ninety-nine-a;

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

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

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

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

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

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

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

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

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

54 k. article twenty-C;

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

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

2 9. "organizational deputy" means a labor organization as defined by
3 subsection (g) of section four thousand four hundred two of the
4 insurance law that has been appointed by the commissioner or the attor-
5 ney general to represent the state as the relator in the public enforce-
6 ment action. The commissioner or the attorney general shall have
7 complete discretion to determine what labor organizations may serve as
8 their organizational deputy in a public enforcement action.

9 § 1021. Public enforcement action. 1. A relator may initiate a public
10 enforcement action to collect civil penalties on behalf of the commis-
11 sioner for a violation impacting affected employees pursuant to the
12 procedures specified in section one thousand twenty-two of this article.
13 A relator may allege multiple violations that have affected different
14 employees and may seek injunctive and declaratory relief that the state
15 would be entitled to seek.

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

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

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

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

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

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

1 general has intervened, thirty percent to the relator; and seventy
2 percent to the commissioner for enforcement of this chapter and educa-
3 tion of employers and employees about their rights and responsibilities
4 under this chapter, to be continuously appropriated to supplement and
5 not supplant the funding to the agency for those purposes.

6 b. The relator shall equitably distribute the share of penalties due
7 the relator among affected employees. If the relator is an affected
8 employee or whistleblower, they shall also be entitled to recover a
9 service award from the penalties recovered, if they prevail in achieving
10 relief, in whole or in part, for violations that affected other employ-
11 ees. The service award shall be not less than five thousand dollars and
12 not more than twenty thousand dollars, unless the amount recovered as
13 civil penalties is less than twenty thousand dollars. The court shall
14 determine the service award by taking due consideration of the burdens
15 and risks assumed by the relator in prosecuting the action. If the rela-
16 tor is a representative organization or an organizational deputy
17 appointed by the commissioner or the attorney general, it shall distrib-
18 ute all recovered penalties to affected employees but may recover
19 reasonable attorneys' fees and costs incurred in prosecuting the action
20 and ancillary costs associated with serving as a relator. The relator
21 shall submit a distribution summary to the commissioner and the attorney
22 general.

23 4. The right to bring a public enforcement action under this article
24 shall not be subject to private agreements between an affected employee
25 and an employer or alleged employer, unless such agreements are collec-
26 tively bargained and the bargaining agreement provides a forum for the
27 enforcement of rights and remedies otherwise enforceable under this
28 article. The right to represent the state with respect to violations
29 affecting other workers shall not be waivable by private agreement,
30 unless such agreements are collectively bargained and the bargaining
31 agreement provides a forum for the enforcement of rights and remedies
32 otherwise enforceable under this article, including an award of penal-
33 ties authorized by this article.

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

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

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

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

55 (ii) the relator or potential relator has provided information, caused
56 information to be provided, or otherwise assisted in a public enforce-

1 ment action or provided information, or caused information to be
2 provided to a person with supervisory authority over the relator or
3 potential relator regarding conduct that the relator or potential rela-
4 tor reasonably believes constitutes a violation of this section; or

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

7 b. Any person affected by a violation of this subdivision, or any
8 affected employee, whistleblower, representative organization, organiza-
9 tional deputy, or the commissioner, or the attorney general may bring a
10 public enforcement action for all appropriate relief, including enjoin-
11 ing the conduct of any person or employer; ordering payment of civil
12 penalties as provided by section two hundred fifteen of this chapter,
13 costs and reasonable attorneys' fees to the employee by the person or
14 entity in violation; and, where the person or entity in violation is an
15 employer, ordering rehiring or reinstatement of the employee to his or
16 her former position with restoration of seniority. Any person affected
17 by a violation of this subdivision may also bring a civil action in a
18 court of competent jurisdiction against any employer or persons alleged
19 to have violated the provisions of this subdivision pursuant to subdivi-
20 sion two of section two hundred fifteen of this chapter.

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

27 § 1022. Procedure. 1. No public enforcement action by a relator pursu-
28 ant to section one thousand twenty-one of this article may be commenced:

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

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

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

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

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

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

53 (vi) a statement of the underlying claim.

54 (vii) if the relator is a "whistleblower", the relator's knowledge of
55 the alleged violations that is independent of and materially adds to
56 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

1 action and shall not be bound by an act of the relator bringing the
2 action. In such cases, the relator shall remain a party to the action.
3 The commissioner or the attorney general may also intervene in the
4 action for the limited purpose of filing a statement of interest or
5 otherwise advancing the state's view about legal issues at stake in the
6 action. If the commissioner or the attorney general has intervened for
7 the purpose of taking primary responsibility for litigating the action,
8 the commissioner or attorney general may dismiss or settle the action
9 after the relator has been notified of the filing of the motion and has
10 been provided with an opportunity to be heard, and the court determines
11 that such dismissal or settlement is fair, adequate, reasonable, and in
12 the public interest.

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

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

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

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

35 d. Items required to be submitted to the commissioner under this
36 subdivision shall be transmitted in such a manner as the commissioner
37 shall prescribe for the filing of notices under paragraph a of subdivi-
38 sion one of this section.

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

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

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

1 10. The rules governing pretrial discovery in a public enforcement
2 action brought pursuant to this article shall be the same as those
3 applicable to other civil actions. No special showing of merit or other
4 additional requirement shall be imposed on a relator's discovery rights
5 in such an action.

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

9 12. When related public enforcement actions are pending, the parties
10 shall immediately notify the courts overseeing such actions of the over-
11 lap and submit a joint statement describing the overlap, which may
12 propose a process to ensure the just, speedy, and efficient determi-
13 nation of the actions. The court may appoint lead enforcement counsel
14 with sole responsibility for asserting the related claims, with consid-
15 eration of the following factors:

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

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

19 c. counsel's diligence in advancing the case;

20 d. the resources that counsel has committed and will commit to prose-
21 cuting the case, and the relative resources at counsel's disposal; and

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

23 § 1023. Non-application. 1. This article shall not apply to the recov-
24 ery of administrative and civil penalties in connection with the unem-
25 ployment insurance law as contained in article eighteen of this chapter.

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

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

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

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