

STATE OF NEW YORK

2265

2019-2020 Regular Sessions

IN ASSEMBLY

January 22, 2019

Introduced by M. of A. JOYNER, ORTIZ, HEVESI, ROZIC, BRONSON, SIMON

--

read once and referred to the Committee on Labor

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
Assem-
bly, 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 to bring
public
12 enforcement actions in certain contexts in which the state does not
have
13 the means to fully enforce labor law protections.

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

17 4. The legislature further finds and declares that the purpose of
the
18 EMPIRE Worker Protection Act is to incentivize private parties
to
19 recover civil penalties for the government that otherwise may not
have
20 been assessed and collected by overburdened state enforcement
agencies.

21 Such representative actions are an efficient mechanism to limit
systemic
22 violations, will enforce the rights of more workers, and can benefit
the
23 department of labor with enhanced resources.

24 5. The legislature further finds and declares that the purpose of
the
25 EMPIRE Worker Protection Act is to benefit those employers who are oper-

EXPLANATION--Matter in italics (underscored) is new; matter in
brackets

[-] is old law to be omitted.

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1 ating within the labor law, and who, as a result, face unfair
competi-

2 tion from individuals and entities shirking the labor law.

3 6. The legislature further finds and declares that the purpose of
the
4 EMPIRE Worker Protection Act is to incentivize labor organizations
and

5 not-for-profit organizations to aid working people to report
violations

6 of the New York labor law.

7 7. The legislature further finds and declares that the purpose of
the

8 EMPIRE Worker Protection Act is to facilitate whistleblowers
suffering

9 from violations of the New York labor law to report abuses without
fear

10 of retaliation and intimidation.

11 8. The legislature further finds and declares that the EMPIRE
Worker

12 Protection Act is part of a history both in New York state and in
the

13 United States of laws enabling private citizens to aid in
public

14 enforcement in the whistleblower and more recently in the labor
context.

15 In similar qui tam legislation enabling private citizens to aid
in

16 public enforcement, the resulting action is in reality a public
enforce-
17 ment action.

18 9. The legislature further finds and declares that the EMPIRE
Worker
19 Protection Act further increases the capacity of the department of
labor
20 as almost all of the department of labor's investigatory work is
comp-
21 laint-driven rather than agency-driven. Moreover, the EMPIRE
Worker
22 Protection Act will help offset the loss of human capital at the
depart-
23 ment due to the decrease in senior labor investigators and
stagnant
24 numbers of labor investigators employed by the department of labor
since
25 2008.

26 10. The legislature further finds and declares that the mandate of
the
27 EMPIRE Worker Protection Act is consistent with the
legislature's
28 commitment to enhance worker protections, especially for low-wage
work-
29 ers, as the majority of wages owed by employers according to
department
30 of labor statistics are based on minimum wage violations.

31 § 3. The labor law is amended by adding a new article 33 to read
as
32 follows:

33 ARTICLE 33

34 EMPOWERING PEOPLE IN RIGHTS ENFORCEMENT (EMPIRE) WORKER PROTECTION

ACT

35 Section 960. Definitions.

36 961. Public enforcement action.

37 962. Procedure.

38 963. Construction and non-application.

39 § 960. Definitions. As used in this article, the following terms

shall

40 have the following meanings:

41 1. "aggrieved employee" means any employee as defined by section

two

42 of article one of this chapter who was employed by the alleged

violation

43 and against whom one of the alleged violations was

committed,

44 as well as any person who is not classified by a business as an

employee

45 but who claims to be an employee and whose claims against the

purported

46 employer relate to this alleged misclassification.

47 2. "employer" means any employer as defined by section two of

article

48 one of this chapter.

49 3. "representative organization" means a labor organization as

defined

50 by subdivision five of section seven hundred one of article twenty
of
51 this chapter or a not-for-profit corporation, as defined by
subpara-
52 graphs five and seven of paragraph (a) of section one hundred two
of
53 article one of the not-for-profit corporation law, which not-for-
profit
54 corporation regularly advocates on behalf of workers or employees
and/or
55 regularly advocates for or assists in enforcement of the provisions
of
56 this chapter.

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1 4. "public enforcement action" means an action brought under
this
2 article intended to enforce this chapter's protections enforceable
by
3 the commissioner.

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

8 § 961. Public enforcement action. 1. An aggrieved employee or
employ-
9 ees or a representative organization may initiate a public
enforcement
10 action on behalf of the commissioner for any provision of this
chapter,
11 or any regulation promulgated thereunder, that provides for a
civil
12 penalty to be assessed and collected by the commissioner for a
violation
13 of this chapter, or any regulation promulgated thereunder, on behalf
of
14 himself or herself and other current or former employees pursuant to
the
15 procedures specified in section nine hundred sixty-two of this
article.

16 An aggrieved employee or a representative organization may allege
multi-
17 ple violations that have affected different employees.

18 2. a. For purposes of this section, whenever the commissioner
has
19 discretion to assess a civil penalty, a court shall be authorized
to
20 exercise the same discretion to assess a civil penalty. To the
extent
21 that the commissioner is authorized to determine that an employer
has
22 violated a provision of this chapter or regulation promulgated
there-

23 under, in a public enforcement action, a court shall be authorized
to
24 determine that an employer has committed such a violation.
25 b. For all provisions of this chapter and regulations adopted
pursuant
26 to this chapter, except those for which a civil penalty is
specifically
27 provided, there is established a civil penalty of five hundred
dollars
28 for each aggrieved employee per pay period per violation. A court
may
29 not award a lesser amount, unless, based on the facts and
circumstances
30 of the particular case, the employer demonstrates that to do
otherwise
31 would result in an award that is unjust, arbitrary and oppressive,
or
32 confiscatory.
33 c. Any aggrieved employee or a representative organization
who
34 prevails in any public enforcement action shall be entitled to an
award
35 of reasonable attorney's fees and costs.
36 d. Nothing in this section shall operate to limit an aggrieved
employ-
37 ee's right to pursue or recover other remedies available under state
or
38 federal law, either separately or concurrently with an action
taken
39 under this section.
40 3. Civil penalties recovered by aggrieved employees or a
represent-
41 tative organization in public enforcement actions shall be
distributed
42 as follows: forty-five percent to the aggrieved employee or
employees;
43 and fifty-five percent to the commissioner for enforcement of this
chap-
44 ter and education of employers and employees about their rights
and
45 responsibilities under this chapter, to be continuously appropriated
to
46 supplement and not supplant the funding to the agency for
those
47 purposes. If an aggrieved employee or employees elect a
representative
48 organization to bring the public enforcement action, civil
penalties
49 recovered shall be distributed as follows: thirty percent to
the
50 aggrieved employee or employees; fifteen percent to the
representative
51 organization; fifty-five percent to the commissioner for enforcement
of
52 this chapter and education of employers and employees about their
rights

53 and responsibilities under this chapter, to be continuously
appropriated
54 to supplement and not supplant the funding to the agency for
those
55 purposes.

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1 4. The right to bring a public enforcement action under this
article
2 shall not be subject to private agreements between an aggrieved
employee
3 and an employer or purported employer.

4 5. Notwithstanding any other provision of law, a public
enforcement
5 action to recover upon a penalty imposed by this article must
be
6 commenced within six years. The statute of limitations for
bringing a
7 representative action under this article shall be tolled from the
date
8 an aggrieved employee or a representative organization files a
notice
9 pursuant to section nine hundred sixty-two of this article with
the
10 commissioner or the commissioner commences an investigation,
whichever

11 is earlier.
12 6. Public enforcement actions belong to the state and preclude
subse-
13 quent state enforcement efforts, whether brought by the state or
an
14 aggrieved employee or representative organization; provided,
however,
15 public enforcement actions are not duplicative of private
actions
16 related to the same issues or touching the same nucleus of
operative
17 facts. Therefore, a public enforcement action brought under this
arti-
18 cle does not have any preclusive effect on private actions
addressing
19 similar wrongdoing.

20 7. The commissioner shall establish a publicly available database
of
21 public enforcement actions brought pursuant to this article,
including
22 the parties, the disposition and any other information which the
commis-
23 sioner shall by regulation prescribe.

24 § 962. Procedure. 1. No public enforcement action by an
aggrieved
25 employee or a representative organization pursuant to section
nine
26 hundred sixty-one of this article alleging a violation of any
provision
27 of this chapter may be commenced:

28 a. prior to thirty days after written notice has been given by
the
29 aggrieved employee or a representative organization to the
commissioner.
30 Such written notice shall be given in such a manner as the
commissioner
31 may prescribe by regulation, shall be construed in a light favorable
to
32 the aggrieved employee or representative organization, and
shall
33 include:
34 (i) the name, address and contact information of the employer.
35 (ii) the name, address, occupation and contact information of
the
36 aggrieved employee.
37 (iii) the name, address and contact information of the
representative
38 organization, if the action is brought by a representative
organization.
39 (iv) the name, address and contact information of the
aggrieved
40 employee's legal counsel, should one exist.
41 (v) a statement of the underlying claim.
42 (vi) estimated number of employees affected.
43 b. if the commissioner, at any time prior to the end of the thirty
day
44 notice period prescribed in paragraph a of this subdivision or prior
to
45 commencement of such action, whichever is later, and upon written
notice
46 to the aggrieved employee who provided the notice prescribed in
para-
47 graph a of this subdivision, has commenced and is actively
prosecuting
48 an administrative enforcement proceeding pursuant to this chapter
rela-
49 tive to the alleged violation.
50 c. if the commissioner, on the same facts and theories, cites a
person
51 within the timeframes set forth in this section for a violation of
the
52 same section or sections of this chapter under which the
aggrieved
53 employee or representative organization is attempting to recover a
civil
54 penalty or remedy on behalf of himself or herself or others.
55 2. The commissioner may intervene in the public enforcement action
and
56 proceed with any and all claims in the action:
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1 a. as of right within the thirty day notice period prescribed in
para-
2 graph a of subdivision one of this section; or
3 b. for good cause, as determined by the court, after the expiration
of

4 the thirty day notice period prescribed in paragraph a of
subdivision
5 one of this section.
6 3. a. The aggrieved employee or representative organization
shall,
7 within ten days following commencement of a civil action pursuant
to
8 this article, provide the commissioner with a file-stamped copy of
the
9 complaint that includes the case number assigned by the court.
10 b. Either the commissioner or a federal or state court of
competent
11 jurisdiction shall review and approve any settlement of any civil
action
12 filed pursuant to this section. The commissioner or court shall
approve
13 the settlement if it is fair, reasonable, and adequate, in light of
the
14 statutory purpose of the provision of this chapter alleged to have
been
15 violated and the purpose of the EMPIRE Worker Protection Act.
16 c. A copy of the court's judgment in any civil action filed
pursuant
17 to this article and any other order in that action that either
provides
18 for or denies an award of civil penalties under this article shall
be
19 submitted to the commissioner within ten days after entry of the
judg-
20 ment or order.
21 d. Items required to be submitted to the commissioner under
this
22 subdivision shall be transmitted in such a manner as the
commissioner
23 shall prescribe for the filing of notices under paragraph a of
subdivi-
24 sion one of this section.
25 4. If a representative organization initiates a public
enforcement
26 action pursuant to this article, an aggrieved employee must elect
the
27 representative organization in writing in a form which the
commissioner
28 shall by regulation prescribe. In such cases, the aggrieved
employee's
29 name and personal identifying information shall be kept confidential
if
30 the aggrieved employee so chooses.
31 5. Such regulations prescribed pursuant to paragraph a of
subdivision
32 one of this section shall provide for the right of the aggrieved
employ-
33 ee or representative organization to furnish an amended notice,
after
34 the notice by the commissioner to the aggrieved employee or
represen-

35 tative organization that the original notice was not in compliance
with
36 this section or the regulations issued thereunder and specifying
with
37 particularity what the deficiencies were in the original notice.
Such
38 notice and opportunity to amend shall be provided by the
commissioner
39 within thirty days of the original notice or the original notice
shall
40 be deemed in compliance with this section. The aggrieved employee
or
41 representative organization shall have thirty days from receiving
notice
42 from the commissioner that their original notice was not in
compliance
43 with this section to amend the notice.

44 6. For the purposes of determining whether the aggrieved employee
or
45 representative organization complied with this section, the notice
shall
46 be construed in a light favorable to the employee or
representative
47 organization.

48 § 963. Construction and non-application. 1. This article shall
not
49 apply to the recovery of administrative and civil penalties
in
50 connection with the unemployment insurance law as contained in
article
51 eighteen of this chapter.

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

55 3. Severability. If any word, phrase, clause, sentence,
paragraph,
56 subdivision, section or part of this article or the application
thereof

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1 to any person or circumstances shall be adjudged invalid by a court
of
2 competent jurisdiction, such order or judgment shall be confined in
its
3 operation to the controversy in which it was rendered, and shall
not
4 affect or invalidate the remainder of this article, but shall
be
5 confined in its operation to the word, phrase, clause, sentence,
para-
6 graph, subdivision, section or part thereof directly involved in
the
7 controversy in which such judgment shall have been rendered.

8 4. This article shall be construed in light of its remedial
purposes

9 to expand the enforcement of this chapter.
10 § 4. This act shall take effect immediately.