

# STATE OF NEW YORK

S5867/A5237

2013-2014 Regular Sessions

## IN SENATE

June 18, 2013

AN ACT to amend the labor law, in relation to enacting the "New York state commercial goods transportation industry fair play act"; and to amend the workers' compensation law, in relation to the definition of employee

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

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

1 Section 1. The labor law is amended by adding a new article 25-C to  
2 read as follows:

3 **ARTICLE 25-C**

4 **THE NEW YORK STATE COMMERCIAL GOODS TRANSPORTATION INDUSTRY**  
5 **FAIR PLAY ACT**

6 **Section 862. Short title.**

7 **862-a. Definitions.**

8 **862-b. Presumption of employment in the commercial goods trans-**  
9 **portation industry.**

10 **862-c. Notice to persons receiving remuneration from commercial**  
11 **goods transportation contractors and commercial goods**  
12 **transportation subcontractors.**

13 **862-d. Violations and penalties.**

14 **862-e. Retaliation.**

15 **§ 862. Short title. This article shall be known and may be cited as**  
16 **the "New York state commercial goods transportation industry fair play**  
17 **act".**

18 **§ 862-a. Definitions. As used in this article:**

19 **1. "Commercial goods transportation contractor" means any sole propri-**  
20 **etor, partnership, firm, corporation, limited liability company, associ-**  
21 **ation or other legal entity permitted by law to do business within the**

1 state who compensates commercial vehicle drivers who possesses a state-  
2 issued commercial driver's license to transport goods in the state of  
3 New York.

4 2. "Commercial goods transportation contractor" includes a general  
5 commercial goods transportation contractor or a commercial goods trans-  
6 portation subcontractor.

7 3. "Commercial goods transportation services" means the transportation  
8 of goods for compensation by a commercial vehicle driver who possesses a  
9 state-issued commercial driver's license and transports goods in the  
10 state of New York.

11 4. "Department" means the department of labor.

12 5. "Commissioner" means the commissioner of labor.

13 6. "Employer" means any commercial goods transportation contractor  
14 which compensates commercial vehicle drivers who possess a state-issued  
15 commercial driver's license to transport goods in the state of New York.

16 § 862-b. Presumption of employment in the commercial goods transporta-  
17 tion industry. 1. Any person performing commercial goods transportation  
18 services for a commercial goods transportation contractor shall be clas-  
19 sified as an employee unless the person is a separate business entity  
20 under subdivision two of this section or all of the following criteria  
21 are met, in which case the person shall be an independent contractor:

22 (a) the individual is free from control and direction in performing  
23 the job, both under his or her contract and in fact;

24 (b) the service must be performed outside the usual course of business  
25 for which the service is performed; and

26 (c) the individual is customarily engaged in an independently estab-  
27 lished trade, occupation, profession, or business that is similar to the  
28 service at issue.

29 2. A business entity, including any sole proprietor, partnership,  
30 corporation or entity that may be a commercial goods transportation  
31 contractor under this section shall be considered a separate business  
32 entity from the commercial goods transportation contractor where all the  
33 following criteria are met:

34 (a) the business entity is performing the service free from the direc-  
35 tion or control over the means and manner of providing the service,  
36 subject only to the right of the commercial goods transportation  
37 contractor for whom the service is provided to specify the desired  
38 result or federal rule or regulation;

39 (b) the business entity is not subject to cancellation or destruction  
40 upon severance of the relationship with the commercial goods transporta-  
41 tion contractor;

42 (c) the business entity has a substantial investment of capital in the  
43 business entity, including but not limited to ordinary tools and equip-  
44 ment;

45 (d) the business entity owns or leases the capital goods and gains the  
46 profits and bears the losses of the business entity;

47 (e) the business entity has an option to make its services available  
48 to the general public or the business community on a continuing basis;

49 (f) the business entity includes services rendered on a Federal Income  
50 Tax Schedule as an independent business or profession;

51 (g) the business entity performs services for the commercial goods  
52 transportation contractor pursuant to a written contract, under the  
53 business entity's name, specifying their relationship to be as independ-  
54 ent contractors or separate business entities;

55 (h) when the services being provided require a license or permit, the  
56 business entity pays for the license or permit in the business entity's

1 name or, where permitted by law, pays for reasonable use of the commer-  
2 cial goods transportation contractor's license or permit;

3 (i) if necessary, the business entity hires its own employees, subject  
4 to applicable qualification requirements or federal or state laws, rules  
5 or regulations, pays the employees without reimbursement from the  
6 commercial good transportation contractor and reports the employees'  
7 income to the Internal Revenue Service;

8 (j) the commercial goods transportation contractor does not require  
9 that the business entity be represented as an employee of the commercial  
10 goods transportation contractor to its customers; and

11 (k) the business entity has the right to perform similar services for  
12 others on whatever basis and whenever it chooses.

13 3. The failure to withhold federal or state income taxes or to pay  
14 unemployment compensation contributions or workers' compensation premi-  
15 ums with respect to an individual's wages shall not be considered in  
16 making a determination under this section, except as set forth in para-  
17 graph (f) of subdivision two of this section.

18 4. An individual's act of securing workers' compensation insurance  
19 with a carrier as a sole proprietor, partnership or otherwise shall not  
20 be binding on any determination under this section.

21 5. When a business entity meets the definition of a separate business  
22 entity pursuant to subdivision two of this section, the separate busi-  
23 ness entity will be considered a commercial goods transportation  
24 contractor subject to all the provisions of this article in regard to  
25 the classification of individuals performing services for it.

26 § 862-c. Notice to persons receiving remuneration from commercial  
27 goods transportation contractors and commercial goods transportation  
28 subcontractors. 1. Every commercial goods transportation contractor  
29 shall post in a prominent and accessible place on the site where commer-  
30 cial goods transportation activity is conducted a legible statement,  
31 provided by the commissioner, that describes the responsibility of inde-  
32 pendent contractors to pay taxes required by state and federal law, the  
33 rights of employees to workers' compensation, unemployment benefits,  
34 minimum wage, overtime and other federal and state workplace  
35 protections, and the protections against retaliation and the penalties  
36 in this article if the contractor fails to properly classify an individ-  
37 ual as an employee. This notice shall also contain contact information  
38 for individuals to file complaints or inquire with the commissioner  
39 about employment classification status. This information shall be  
40 provided in English, Spanish or other languages required by the commis-  
41 sioner. The posted statement shall be constructed of materials capable  
42 of withstanding adverse weather conditions.

43 2. Within thirty days of the effective date of this article, the  
44 commissioner shall create the notice described in subdivision one of  
45 this section and post the notice on the department's website for down-  
46 loading by commercial goods transportation contractors.

47 3. Commercial goods transportation contractors who violate this  
48 section shall be subject to a civil penalty of up to one thousand five  
49 hundred dollars for a first violation, and up to five thousand dollars  
50 for a subsequent violation within a five year period.

51 § 862-d. Violations and penalties. 1. Any commercial goods transporta-  
52 tion contractor who willfully fails to properly classify an individual  
53 as an employee as provided under section eight hundred sixty-two-b of  
54 this article shall be subject to the civil and criminal penalties  
55 provided under this section. The civil penalties set forth in this  
56 section shall be imposed as follows: by the commissioner where such

1 penalty is based on a violation of this chapter; by the chair of the  
2 workers' compensation board where such penalty is based on a violation  
3 of the workers' compensation law; and by the commissioner of taxation  
4 and finance when such penalty is based on a violation of the tax law,  
5 provided that no more than one civil penalty under this section may be  
6 imposed per employee per incident of misclassification.

7 (a) The workers' compensation board shall provide a copy of any order  
8 relating to the misclassification of an employee, the intentional and  
9 material underpayment or concealment of payroll, or the failure to  
10 secure workers' compensation in the commercial goods transportation  
11 industry to the commissioner and commissioner of taxation and finance no  
12 later than seven days after the issuance of the order.

13 (b) Notwithstanding the secrecy provisions contained in articles  
14 nine-A and twenty-two of the tax law, the department of taxation and  
15 finance shall provide a copy of any assessment for failure to pay busi-  
16 ness, corporate or personal income tax by an employer in the commercial  
17 goods transportation industry arising out of the misclassification of an  
18 employee to the commissioner and chair of the workers' compensation  
19 board no later than seven days after the issuance of the assessment.

20 (c) Upon the issuance of an order or determination by the commissioner  
21 for a violation and penalties under this article, the commissioner shall  
22 provide a copy of the order to the chair of the workers' compensation  
23 board and the commissioner of taxation and finance no later than seven  
24 days after the issuance of the order.

25 2. For the purposes of this section, the term "willfully violates"  
26 means a commercial goods transportation contractor knew or should have  
27 known that his or her conduct was prohibited by this section.

28 3. Any commercial goods transportation contractor who willfully  
29 violates section eight hundred sixty-two-b of this article shall be  
30 subject to a civil penalty of up to twenty-five hundred dollars for the  
31 first violation per misclassified employee and to a civil penalty of up  
32 to five thousand dollars for each subsequent violation per misclassified  
33 employee within a five year period.

34 4. In addition to civil penalties, the criminal penalties imposed on a  
35 commercial goods transportation contractor who willfully violates the  
36 provisions of this article shall be a misdemeanor and upon conviction  
37 shall be punished for a first offense by imprisonment for not more than  
38 thirty days or a fine not to exceed twenty-five thousand dollars and for  
39 a subsequent offense by imprisonment for not more than sixty days or a  
40 fine not to exceed fifty thousand dollars.

41 5. If the commercial goods transportation contractor is a corporation,  
42 any officer of such corporation or shareholder who owns or controls at  
43 least ten percent of the outstanding stock of such corporation who know-  
44 ingly permits the corporation to willfully violate the provisions of  
45 this article shall also be in violation of this article and the civil  
46 and criminal penalties herein shall attach to such officer upon  
47 conviction.

48 6. Any commercial goods transportation contractor subject to civil  
49 penalties under this article shall also be subject to any other applica-  
50 ble penalties or remedies provided by law for failure to pay any other  
51 statutory payment or coverage obligations, including but not limited to,  
52 unemployment insurance, workers' compensation insurance, or business,  
53 corporate or personal income tax, as follows:

54 (a) for failure to pay unemployment insurance tax, the penalties  
55 imposed by section five hundred seventy of this chapter.

1 (b) for intentional and material understatement or concealment of  
2 payroll or failure to secure workers' compensation insurance, the penal-  
3 ties imposed by paragraph (d) of subdivision one of section fifty-two of  
4 the workers' compensation law, and for failure to keep a true and accu-  
5 rate record pursuant to section one hundred thirty-one of the workers'  
6 compensation law, the penalties of section one hundred thirty-one of the  
7 workers' compensation law.

8 (c) for failure to pay business, corporate or personal income tax, the  
9 penalties imposed by section six hundred eighty-five and one thousand  
10 eighty-five of the tax law.

11 7. Any commercial goods transportation contractor or any officer or  
12 shareholder who owns or controls at least ten percent of the outstanding  
13 stock of such corporation that has been convicted of a misdemeanor shall  
14 be subject to debarment and be ineligible to submit a bid on or be  
15 awarded any public works contract with the state, any municipal corpo-  
16 ration, public benefit corporation, public authority or public body for  
17 a period of up to one year from the date of such conviction or final  
18 determination, or up to five years in the event of any subsequent  
19 violation.

20 8. Any substantially owned affiliated entity of a commercial goods  
21 transportation contractor, as defined by paragraph g of subdivision five  
22 of section two hundred twenty of this chapter, shall be subject to the  
23 same civil penalty provided under this article for a violation of such  
24 provision.

25 9. Any penalties imposed under this section by the commissioner shall  
26 be appealed to the industrial board of appeals in accordance with arti-  
27 cle three of this chapter. Any penalties imposed under this section by  
28 the workers' compensation board or commissioner of taxation and finance  
29 shall be appealed in the same manner as the underlying violation.

30 10. Nothing in this section shall limit the availability of other  
31 remedies at law or in equity for a violation of this article.

32 11. Any fee or penalty assessed for a violation of this article shall  
33 be deposited into the department's fee and penalty account.

34 § 862-e. Retaliation. 1. It is a violation of this article for an  
35 employer or any agent of any employer, to retaliate through discharge or  
36 in any other manner against any person in the terms of conditions of his  
37 or her employment for exercising any rights granted under this article  
38 for:

39 (a) making, or threatening to make, a complaint to an employer,  
40 co-worker or to a public body that rights guaranteed under this article  
41 have been violated;

42 (b) causing to be instituted any proceeding under or related to this  
43 article; or

44 (c) providing information to, or testifying before, any public body  
45 conducting an investigation, hearing or inquiry into any such violation  
46 of a law, rule or regulation by such employer. Nothing in this section  
47 shall limit the commissioner's authority under section two hundred  
48 fifteen of this chapter, or any other statute.

49 2. Any act of retaliation under this section shall subject an employer  
50 to the civil penalties under section eight hundred sixty-two-d of this  
51 article, or to a private cause of action, or both.

52 § 2. Paragraph (b) of subdivision 1 of section 511 of the labor law is  
53 amended by adding a new subparagraph 1-c to read as follows:

54 (1-c) as an employee in the commercial goods transportation industry  
55 unless the presumption of employment can be overcome, as provided under  
56 section eight hundred sixty-two-b of this chapter; or

1 § 3. The opening paragraph of subdivision 4 of section 2 of the work-  
2 ers' compensation law, as amended by chapter 418 of the laws of 2010, is  
3 amended to read as follows:

4 "Employee" means a person engaged in one of the occupations enumerated  
5 in section three of this article or who is in the service of an employer  
6 whose principal business is that of carrying on or conducting a hazard-  
7 ous employment upon the premises or at the plant, or in the course of  
8 his or her employment away from the plant of his or her employer;  
9 "employee" shall also mean for the purposes of this chapter any individ-  
10 ual performing services in construction for a contractor who does not  
11 overcome the presumption of employment as provided under section eight  
12 hundred sixty-one-c of the labor law; **"employee" shall also mean for the**  
13 **purposes of this chapter any individual performing services in the**  
14 **commercial goods transportation industry for a commercial goods trans-**  
15 **portation contractor who does not overcome the presumption of employment**  
16 **as provided under section eight hundred sixty-two-b of the labor law;**

17 "employee" shall also mean for the purposes of this chapter civil  
18 defense volunteers who are personnel of volunteer agencies sponsored or  
19 authorized by a local office under regulations of the civil defense  
20 commission, to the extent of the provisions of groups seventeen and  
21 nineteen; "employee" shall at the election of a municipal corporation  
22 made pursuant to local law duly enacted also mean a member of an auxil-  
23 iary police organization authorized by local law; and for the purposes  
24 of this chapter only a newspaper carrier under the age of eighteen years  
25 as defined in section thirty-two hundred twenty-eight of the education  
26 law, and shall not include domestic servants except as provided in  
27 section three of this chapter, and except where the employer has elected  
28 to bring such employees under the law by securing compensation in  
29 accordance with the terms of section fifty of this chapter. The term  
30 "employee" shall not include persons who are members of a supervised  
31 amateur athletic activity operated on a non-profit basis, provided that  
32 said members are not also otherwise engaged or employed by any person,  
33 firm or corporation participating in said athletic activity, nor shall  
34 it include the spouse or minor child of an employer who is a farmer  
35 unless the services of such spouse or minor child shall be engaged by  
36 said employer under an express contract of hire nor shall it include an  
37 executive officer of a corporation who at all times during the period  
38 involved owns all of the issued and outstanding stock of the corporation  
39 and holds all of the offices pursuant to paragraph (e) of section seven  
40 hundred fifteen of the business corporation law or two executive offi-  
41 cers of a corporation who at all times during the period involved  
42 between them own all of the issued and outstanding stock of such corpo-  
43 ration and hold all such offices except as provided in subdivision six  
44 of section fifty-four of this chapter provided, however, that where  
45 there are two executive officers of a corporation each officer must own  
46 at least one share of stock, nor shall it include a self-employed person  
47 or a partner of a partnership as defined in section ten of the partner-  
48 ship law who is not covered under a compensation insurance contract or a  
49 certificate of self-insurance as provided in subdivision eight of  
50 section fifty-four of this chapter, nor shall it include farm laborers  
51 except as provided in group fourteen-b of section three of this chapter.  
52 If a farm labor contractor recruits or supplies farm laborers for work  
53 on a farm, such farm laborers shall for the purposes of this chapter be  
54 deemed to be employees of the owner or lessee of such farm. The term  
55 "employee" shall not include baby sitters as defined in subdivision  
56 three of section one hundred thirty-one and subdivision three of section

1 one hundred thirty-two of the labor law or minors fourteen years of age  
2 or over engaged in casual employment consisting of yard work and house-  
3 hold chores in and about a one family owner-occupied residence or the  
4 premises of a non-profit, non-commercial organization, not involving the  
5 use of power-driven machinery. The term "employee" shall not include  
6 persons engaged by the owner in casual employment consisting of yard  
7 work, household chores and making repairs to or painting in and about a  
8 one-family owner-occupied residence. The term "employee" shall not  
9 include the services of a licensed real estate broker or sales associate  
10 if it be proven that (a) substantially all of the remuneration (whether  
11 or not paid in cash) for the services performed by such broker or sales  
12 associate is directly related to sales or other output (including the  
13 performance of services) rather than to the number of hours worked; (b)  
14 the services performed by the broker or sales associate are performed  
15 pursuant to a written contract executed between such broker or sales  
16 associate and the person for whom the services are performed within the  
17 past twelve to fifteen months; and (c) the written contract provided for  
18 in paragraph (b) of this subdivision was not executed under duress and  
19 contains the following provisions:

20 § 4. Notwithstanding any other provision of law to the contrary, the  
21 provisions of section 862-b of the labor law, as added by section one of  
22 this act, shall apply to and be utilized for all determinations of a  
23 commercial goods transportation industry individual's employment status  
24 under the labor law and the workers' compensation law, but not the tax  
25 law.

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