

# STATE OF NEW YORK

8997

## IN ASSEMBLY

January 13, 2012

Introduced by M. of A. WRIGHT -- read once and referred to the Committee on Labor

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

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  
22 state who compensates commercial vehicle drivers who possesses a state-  
23 issued commercial driver's license to transport goods in the state of  
24 New York.

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

LBD11981-03-2

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1 2. "Commercial goods transportation contractor" includes a general  
2 commercial goods transportation contractor or a commercial goods trans-  
3 portation subcontractor.

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

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

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

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

13 § 862-b. Presumption of employment in the commercial goods transporta-  
14 tion industry. 1. Any person performing commercial goods transportation  
15 services for a commercial goods transportation contractor shall be clas-  
16 sified as an employee unless the person is a separate business entity  
17 under subdivision two of this section or all of the following criteria  
18 are met, in which case the person shall be an independent contractor:

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

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

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

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

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

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

39 (c) the business entity has a substantial investment of capital in the  
40 business entity beyond ordinary tools and equipment and a personal vehi-  
41 cle;

42 (d) the business entity owns the capital goods and gains the profits  
43 and bears the losses of the business entity;

44 (e) the business entity makes its services available to the general  
45 public or the business community on a continuing basis;

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

48 (g) the business entity performs services for the commercial goods  
49 transportation contractor under the business entity's name;

50 (h) when the services being provided require a license or permit, the  
51 business entity obtains and pays for the license or permit in the busi-  
52 ness entity's name;

53 (i) the business entity furnishes the tools and equipment necessary to

54 provide the service;  
55 (j) if necessary, the business entity hires its own employees without  
56 the commercial goods transportation contractor's approval, pays the

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1 employees without reimbursement from the commercial goods transportation  
2 contractor and reports the employees' income to the Internal Revenue  
3 Service;

4 (k) the commercial goods transportation contractor does not represent  
5 the business entity as an employee of the commercial goods transporta-  
6 tion contractor to its customers; and

7 (l) the business entity has the right to perform similar services for  
8 others on whatever basis and whenever it chooses.

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

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

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

22 § 862-c. Notice to persons receiving remuneration from commercial  
23 goods transportation contractors and commercial goods transportation  
24 subcontractors. 1. Every commercial goods transportation contractor  
25 shall post in a prominent and accessible place on the site where commer-  
26 cial goods transportation activity is conducted a legible statement,  
27 provided by the commissioner, that describes the responsibility of inde-  
28 pendent contractors to pay taxes required by state and federal law, the  
29 rights of employees to workers' compensation, unemployment benefits,  
30 minimum wage, overtime and other federal and state workplace  
31 protections, and the protections against retaliation and the penalties  
32 in this article if the contractor fails to properly classify an individ-  
33 ual as an employee. This notice shall also contain contact information  
34 for individuals to file complaints or inquire with the commissioner  
35 about employment classification status. This information shall be  
36 provided in English, Spanish or other languages required by the commis-  
37 sioner. The posted statement shall be constructed of materials capable  
38 of withstanding adverse weather conditions.

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

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

47 § 862-d. Violations and penalties. 1. Any commercial goods transporta-  
48 tion contractor who willfully fails to properly classify an individual  
49 as an employee as provided under section eight hundred sixty-two-b of  
50 this article shall be subject to the civil and criminal penalties  
51 provided under this section. The civil penalties set forth in this  
52 section shall be imposed as follows: by the commissioner where such  
53 penalty is based on a violation of this chapter; by the chair of the

54 workers' compensation board where such penalty is based on a violation  
55 of the workers' compensation law; and by the commissioner of taxation  
56 and finance when such penalty is based on a violation of the tax law,

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1 provided that no more than one civil penalty under this section may be  
2 imposed per employee per incident of misclassification.

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

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

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

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

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

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

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

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

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

52 (b) for intentional and material understatement or concealment of  
53 payroll or failure to secure workers' compensation insurance, the penal-

54 ties imposed by paragraph (d) of subdivision one of section fifty-two of  
55 the workers' compensation law, and for failure to keep a true and accu-  
56 rate record pursuant to section one hundred thirty-one of the workers'

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1 compensation law, the penalties of section one hundred thirty-one of the  
2 workers' compensation law.

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

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

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

20 9. Any penalties imposed under this section by the commissioner shall  
21 be appealed to the industrial board of appeals in accordance with arti-  
22 cle three of this chapter. Any penalties imposed under this section by  
23 the workers' compensation board or commissioner of taxation and finance  
24 shall be appealed in the same manner as the underlying violation.

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

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

29 § 862-e. Retaliation. 1. It is a violation of this article for an  
30 employer or any agent of any employer, to retaliate through discharge or  
31 in any other manner against any person in the terms of conditions of his  
32 or her employment for exercising any rights granted under this article  
33 for:

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

37 (b) causing to be instituted any proceeding under or related to this  
38 article; or

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

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

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

49 (1-c) as an employee in the commercial goods transportation industry  
50 unless the presumption of employment can be overcome, as provided under  
51 section eight hundred sixty-two-b of this chapter; or

52 § 3. The opening paragraph of subdivision 4 of section 2 of the work-  
53 ers' compensation law, as amended by chapter 418 of the laws of 2010, is

54 amended to read as follows:

55 "Employee" means a person engaged in one of the occupations enumerated  
56 in section three of this article or who is in the service of an employer

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

54 hold chores in and about a one family owner-occupied residence or the  
55 premises of a non-profit, non-commercial organization, not involving the  
56 use of power-driven machinery. The term "employee" shall not include

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

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

21 § 5. This act shall take effect immediately.

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**NEW YORK STATE ASSEMBLY  
MEMORANDUM IN SUPPORT OF LEGISLATION  
submitted in accordance with Assembly Rule III, Sec 1(f)**

**BILL NUMBER:** A8997

**SPONSOR:** Wright

**TITLE OF BILL:** 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

**PURPOSE OR GENERAL IDEA OF BILL:** To prevent misclassification of commercial goods transportation services employees.

**SUMMARY OF SPECIFIC PROVISIONS:** This legislation (1) defines presumption of employment in the commercial goods transportation industry; (2) outlines commercial goods transportation contractors' obligation to correctly classify employees and to inform subcontractors, of their obligations regarding employee classification; (3) defines penalties for contractors and sub-contractors who violate and willfully violate the provisions of the law; and (6) protects against-employer retaliation.

**JUSTIFICATION:** A study conducted by Cornell University's School of Industrial and Labor Relations found that in New York State between 2002 and 2005, nearly 40,000 employers misclassified more than 700,000 workers - more than 100 of the state's private sector workforce.

Misclassification rates are disproportionately high in the trucking industry. Port truck drivers and delivery truck drivers (e.g. FedEx and UPS drivers) are often improperly classified as independent contractors.

Unlike real independent contractors, these workers are subject to stringent behavioral controls and are financially dependent on the company. Such drivers who functionally operate as employees are classified as independent contractors and therefore deprived of proper social security benefits, healthcare, workers' compensation, unemployment benefits, minimum wage protections rights to join a union, and the right to a safe and healthful workplace.

Additionally, as pressures increase to improve environmental conditions at ports across the United States, truck drivers are being asked to purchase new, more environmentally friendly trucks. However, with salaries averaging around \$29,000, truck drivers cannot afford this ask. By correctly classifying truck drivers as employees, the burden of purchasing new trucks would be put on the companies; employees would enjoy their proper rights as intended by the law, and environmental conditions at ports would improve.

LEGISLATIVE HISTORY: New Legislation.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS: None.

EFFECTIVE DATE: 60 days following enactment.

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