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S.P. 525

In Senate, May 19, 2021

An Act To Enhance Enforcement of Employment Laws

Received by the Secretary of the Senate on May 17, 2021. Referred to the Committee on Labor and Housing pursuant to Joint Rule 308.2 and ordered printed.

A handwritten signature in black ink, appearing to read 'D M Grant'.

DAREK M. GRANT
Secretary of the Senate

Presented by President JACKSON of Aroostook.
Cosponsored by Representative ROEDER of Bangor and
Senators: DAUGHTRY of Cumberland, HICKMAN of Kennebec, MIRAMANT of Knox,
VITELLI of Sagadahoc, Representatives: CUDDY of Winterport, DUNPHY of Old Town,
GERE of Kennebunkport, TALBOT ROSS of Portland.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 5 MRSA §191, sub-§3**, as enacted by PL 2003, c. 510, Pt. B, §2 and affected
3 by c. 599, §11, is amended to read:

4 **3. Representation by Attorney General, deputies, assistants and staff attorneys.**
5 ~~The~~ Except as provided in Title 26, chapter 7, subchapter 5-C, the Attorney General or a
6 deputy, assistant or staff attorney shall appear for the State, the head of any state
7 department, the head of any state institution and agencies of the State in all civil actions
8 and proceedings in which the State is a party or interested, or in which the official acts and
9 doings of the officers are called into question, in all the courts of the State and in those
10 actions and proceedings before any other tribunal when requested by the Governor or by
11 the Legislature or either House of the Legislature. ~~All~~ Except as provided in Title 26,
12 chapter 7, subchapter 5-C, all such actions and proceedings must be prosecuted or defended
13 by the Attorney General or under the Attorney General's direction.

14 A. Writs, summonses or other processes served upon those officers must be transmitted
15 by them to the Attorney General.

16 B. All legal services required by those officers, boards and commissions in matters
17 relating to their official duties must be rendered by the Attorney General or under the
18 Attorney General's direction. The officers or agencies of the State may not act at the
19 expense of the State as counsel, nor employ private counsel except upon prior written
20 approval of the Attorney General. In all instances where the Legislature has authorized
21 an office or an agency of the State to employ private counsel, the Attorney General's
22 written approval is required as a condition precedent to the employment.

23 **Sec. 2. 5 MRSA §191, sub-§4, ¶B**, as enacted by PL 2003, c. 510, Pt. B, §2 and
24 affected by c. 599, §11, is amended to read:

25 B. For certificate that any corporation has ceased to transact business and is excused
26 from filing annual returns, as authorized in Title 13-C, section 1621, subsection 4, §5;
27 and

28 **Sec. 3. 5 MRSA §191, sub-§4, ¶C** is enacted to read:

29 C. For a private enforcement action brought pursuant to Title 26, chapter 7, subchapter
30 5-C, §75.

31 **Sec. 4. 5 MRSA §192**, as amended by PL 1973, c. 567, §20, is further amended to
32 read:

33 **§192. Prosecution of all claims for State**

34 ~~All~~ Except as provided in Title 26, chapter 7, subchapter 5-C, all civil actions to recover
35 money for the State ~~shall~~ must be brought by the Attorney General or by the district attorney
36 in the name of the State. The Attorney General shall appear before the departments and
37 tribunals of the United States and the committees of Congress to prosecute all claims of the
38 State against the United States.

39 **Sec. 5. 26 MRSA c. 7, sub-c. 5-C** is enacted to read:

40 **SUBCHAPTER 5-C**

1 PRIVATE ENFORCEMENT OF EMPLOYMENT LAWS

2 **§840-A. Definitions**

3 As used in this subchapter, unless the context otherwise indicates, the following terms
4 have the following meanings.

5 **1. Private enforcement action.** "Private enforcement action" means a civil action
6 brought by a whistleblower under this subchapter to enforce a provision of this chapter or
7 of Title 5, chapter 337, subchapter 3.

8 **2. Representative organization.** "Representative organization" means a nonprofit
9 corporation or union that regularly assists in enforcement of this chapter or Title 5, chapter
10 337, subchapter 3.

11 **3. Responsible state official.** "Responsible state official" means the Commissioner
12 of Labor or the Executive Director of the Maine Human Rights Commission described in
13 Title 5, chapter 337, subchapter 2.

14 **4. Whistleblower.** "Whistleblower" means a current or former employee, contractor
15 or subcontractor or employee of such a contractor or subcontractor of an alleged violator
16 of this chapter or Title 5, chapter 337, subchapter 3 and includes a representative
17 organization selected by a whistleblower under section 840-B.

18 **§840-B. Private enforcement action**

19 A whistleblower, on behalf of the State and in the name of the State, may initiate a
20 private enforcement action pursuant to section 840-C for a violation under this chapter or
21 under Title 5, chapter 337, subchapter 3. A whistleblower may seek injunctive or
22 declaratory relief that the State would be entitled to seek. A private enforcement action
23 may be brought in any court of competent jurisdiction for any county in which the alleged
24 conduct occurred and may allege multiple violations that have affected different parties
25 aggrieved by the same defendant. A whistleblower may select a representative
26 organization to initiate a private enforcement action on the whistleblower's behalf.

27 **§840-C. Procedure**

28 **1. Required notice; filing fee.** Before filing a private enforcement action under this
29 subchapter, a whistleblower must submit written notice of the claim and a filing fee of \$75
30 to the Attorney General or the appropriate responsible state official. The time periods set
31 forth in this section begin when both the notice and filing fee have been submitted. The
32 Attorney General or the responsible state official may waive the filing fee in accordance
33 with rules adopted by the Attorney General and the responsible state official.

34 **2. Contents of notice.** The notice under subsection 1, construed in the light most
35 favorable to the whistleblower, must include:

36 A. The name, address and contact information of the alleged violator;

37 B. If the whistleblower's identity is confidential, the name and contact information of
38 the whistleblower's representative organization;

39 C. If the whistleblower's identity is not confidential, the name and contact information
40 of the whistleblower or the whistleblower's representative organization;

1 D. If the whistleblower has retained legal counsel, the name, address and contact
2 information of the legal counsel; and

3 E. A concise statement of the underlying claim reasonably calculated to apprise the
4 Attorney General or the responsible state official of the substance and nature of the
5 claim.

6 **3. Amended notice.** The Attorney General or the responsible state official has 30
7 days to determine if the notice filed in accordance with subsection 1 is in compliance with
8 this section and rules adopted pursuant to this section. If the notice is not in compliance,
9 the Attorney General or the responsible state official shall specify the deficiencies in the
10 notice and allow the whistleblower to furnish an amended notice. The whistleblower must
11 provide the amended notice within 30 days of receiving the deficiency determination from
12 the Attorney General or the responsible state official. If a deficiency determination is not
13 made within 30 days by the Attorney General or the responsible state official, the notice is
14 considered to be in compliance with this section.

15 **4. Investigation; decision regarding action.** The Attorney General or the responsible
16 state official who receives notice under subsection 1 has 180 days to investigate the alleged
17 violation and initiate a private enforcement action.

18 **5. Prefiling settlement.** If the parties reach a settlement after the whistleblower has
19 provided notice pursuant to subsection 1 but prior to the private enforcement action being
20 filed in court, the Attorney General or the responsible state official shall review the
21 proposed settlement. The Attorney General or the responsible state official shall approve
22 the settlement if the Attorney General or the responsible state official determines the
23 settlement is fair, adequate, reasonable and in the public interest. The parties shall also
24 comply with any other requirement necessary to finalize settlement.

25 **6. Commencement of private enforcement action.** At any time after receiving the
26 notice under subsection 1, the Attorney General or the responsible state official may notify
27 the whistleblower that the whistleblower may commence a private enforcement action. If
28 the Attorney General or the responsible state official does not initiate an enforcement action
29 within 180 days of receipt of the notice, the whistleblower may commence a private
30 enforcement action. If a whistleblower commences a private enforcement action under this
31 subsection, the whistleblower shall submit a copy of the complaint to the Attorney General
32 or the responsible state official.

33 **7. Intervention by State.** Within 30 days after the filing of a private enforcement
34 action under subsection 6, the Attorney General or the responsible state official may
35 intervene and proceed with any claim in the private enforcement action. After the
36 expiration of the 30-day period, the Attorney General or the responsible state official may
37 intervene in the private enforcement action for good cause shown, as determined by the
38 court.

39 A. If the Attorney General or the responsible state official intervenes in a private
40 enforcement action:

41 (1) The Attorney General or the responsible state official has primary
42 responsibility for prosecuting the private enforcement action and is not bound by
43 an act of the whistleblower bringing the private enforcement action;

44 (2) The whistleblower remains a party to the private enforcement action;

1 (3) The Attorney General or the responsible state official may move to dismiss or
2 settle the private enforcement action after the whistleblower has been notified of
3 the filing of the motion and has been provided with an opportunity to be heard and
4 the court determines that the dismissal or settlement is rationally related to
5 accomplishing a valid governmental purpose and is not fraudulent, arbitrary and
6 capricious or illegal; and

7 (4) If the Attorney General or the responsible state official substantially prevails
8 in the private enforcement action, the Attorney General or the responsible state
9 official must provide fair compensation for the attorney's fees and costs expended
10 on behalf of the whistleblower in instituting the private enforcement action.

11 B. If the Attorney General or the responsible state official does not intervene in a
12 private enforcement action, the whistleblower may prosecute the private enforcement
13 action subject to the following limitations.

14 (1) The court must review and approve any settlement of the private enforcement
15 action. The proposed settlement must be submitted to the Attorney General and
16 the responsible state official at the same time that the proposed settlement is
17 submitted to the court. The court may approve a settlement or dismissal of the
18 private enforcement action only upon a determination that the settlement or
19 voluntary dismissal is fair, adequate, reasonable and in the public interest.

20 (2) The Attorney General or the responsible state official may attend to the
21 interests of the State in the private enforcement action or to any other interest of
22 the State.

23 **8. Prompt trial.** Concurrent adjudication of another private claim may not delay a
24 private enforcement action.

25 **9. Not subject to rules governing class action suits.** A private enforcement action is
26 not required to meet the requirements governing class action suits in the Maine Rules of
27 Civil Procedure, Rule 23.

28 **10. Pretrial discovery.** The court rules governing pretrial discovery in a private
29 enforcement action are the same as the rules applicable in other civil actions. A special
30 showing of merit or other additional requirement may not be imposed on a whistleblower's
31 discovery rights in a private enforcement action.

32 **11. Action based on same facts.** If a whistleblower brings a private enforcement
33 action, another person may not bring a related private enforcement action based on the
34 same facts unless the court determines that the previously filed private enforcement action
35 was not diligently prosecuted.

36 **12. Private agreement may not impair right.** The right to bring a private
37 enforcement action under this section may not be impaired by any private agreement.

38 **13. Commencement of action; statute of limitations.** Notwithstanding any
39 provision of law to the contrary, a private enforcement action must be commenced within
40 the same period of time that the Attorney General or the responsible state official has to
41 bring an action for the same set of circumstances under the applicable statute. The statute
42 of limitations for bringing a private enforcement action is tolled from the date a
43 whistleblower files a notice pursuant to subsection 1 or the date the Attorney General or
44 the responsible state official commences an investigation, whichever is earlier.

1 14. Private action based on same injury. This section does not limit the right for the
2 whistleblower to pursue a private action based on the same injury.

3 15. Rules. The Attorney General and the responsible state official shall adopt rules to
4 implement this section. Rules adopted pursuant to this subsection are routine technical
5 rules as defined in Title 5, chapter 375, subchapter 2-A.

6 **§840-D. Penalties, fees and costs**

7 **1. Penalties.** For a private enforcement action brought pursuant to this subchapter:

8 A. If the Attorney General or the responsible state official has intervened in the private
9 enforcement action under section 840-C, subsection 7, the Attorney General or the
10 responsible state official may assess penalties on the defendant as authorized by law;

11 B. If the Attorney General or the responsible state official has not intervened in the
12 private enforcement action but the Attorney General or the responsible state official is
13 authorized by law to assess a civil penalty, the court shall assess an equivalent civil
14 penalty;

15 C. If state law provides for a penalty, the court shall award the penalty for each person
16 aggrieved by each violation during the relevant time period;

17 D. If state law does not provide for a penalty, the court shall assess and award a civil
18 penalty of \$250 for each person aggrieved for each 2-week period in which the
19 violation occurred; and

20 E. The court may award a lesser amount of civil penalty than the amounts specified in
21 this subsection if, based on the facts and circumstances of the particular case, to do
22 otherwise would result in an award that is unjust, arbitrary and oppressive or
23 confiscatory.

24 **2. Attorney's fees; costs.** A whistleblower that prevails in a private enforcement
25 action, including by recovering a civil penalty or obtaining declaratory or injunctive relief
26 pursuant to a court decision or settlement, must be awarded reasonable attorney's fees and
27 costs.

28 **3. Distribution of civil penalty recovered.** Fifteen percent of any civil penalty
29 recovered under this section pursuant to a court decision or settlement must be deposited
30 in the Community Outreach and Labor Education Fund established under section 840-G
31 and:

32 A. If a claim involves an alleged violation of this chapter and the Attorney General or
33 the Department of Labor has not intervened, the whistleblower is entitled to 30% of
34 the civil penalty recovered, the Attorney General is entitled to 15% of the civil penalty
35 recovered and the Department of Labor is entitled to 40% of the civil penalty
36 recovered;

37 B. If a claim involves an alleged violation of this chapter and the Attorney General or
38 the Department of Labor has intervened, the whistleblower is entitled to 20% of the
39 civil penalty recovered, the Attorney General is entitled to 20% of the civil penalty
40 recovered and the Department of Labor is entitled to 45% of the civil penalty
41 recovered;

1 C. If a claim involves an alleged violation of Title 5, chapter 337, subchapter 3 and the
2 Maine Human Rights Commission described in Title 5, chapter 337, subchapter 2 has
3 not intervened, the whistleblower is entitled to 30% of the civil penalty recovered and
4 the Maine Human Rights Commission is entitled to 55% of the civil penalty recovered;
5 and

6 D. If a claim involves an alleged violation of Title 5, chapter 337, subchapter 3 and
7 the Maine Human Rights Commission described in Title 5, chapter 337, subchapter 2
8 has intervened, the whistleblower is entitled to 20% of the civil penalty recovered and
9 the Maine Human Rights Commission is entitled to 65% of the civil penalty recovered.

10 **§840-E. Limitation on private enforcement actions**

11 Notwithstanding section 840-C, a whistleblower may not bring a private enforcement
12 action under this section:

13 **1. Violation of a posting, notice, agency reporting or filing requirement.** For an
14 alleged violation of a posting, notice, agency reporting or filing requirement, except when
15 the filing or reporting requirement involves mandatory payroll or injury reporting; or

16 **2. Minor variation in a wage statement.** If the alleged violation is for a minor
17 variation in the legal name or address of the employer in a wage statement required under
18 section 665 and the variation does not impair an employee's ability to promptly and easily
19 identify the employer.

20 **§840-F. Retaliation prohibited**

21 **1. Prohibition.** A person may not retaliate, or threaten to retaliate, in any manner
22 against a whistleblower because:

23 A. The whistleblower has brought a private enforcement action or cooperated with a
24 private enforcement action; or

25 B. The person believes that the whistleblower may bring a private enforcement action
26 or cooperate with a private enforcement action.

27 **2. Remedy.** A person aggrieved by a violation of this section may bring a private
28 enforcement action seeking compensatory and punitive damages or equitable relief,
29 including restraint of prohibited acts, restitution of past and future wages or benefits,
30 reinstatement, costs, reasonable attorney's fees and other appropriate relief.

31 **§840-G. Community Outreach and Labor Education Fund**

32 **1. Establishment.** The Community Outreach and Labor Education Fund, referred to
33 in this section as "the fund," is established as a nonlapsing fund administered by the
34 Department of Labor. Funds in the fund not spent in any fiscal year remain in the fund to
35 be used for the purposes of this subchapter. Any interest earned by the fund must be
36 credited to the fund. All money in the fund is appropriated continuously for the purposes
37 provided in subsection 3.

38 **2. Deposits.** Pursuant to section 840-D, subsection 3, 15% of any civil penalty
39 recovered must be deposited in the fund.

40 **3. Expenditures.** The Department of Labor shall use money from the fund to assist
41 workers in enforcing employment rights, including outreach, community-based education

1 events, training materials, technical assistance, counseling and investigative, research and
2 referral services, which may include the use of 3rd-party contractors.

3 **SUMMARY**

4 This bill provides for a right of a whistleblower alleging a violation of certain labor
5 laws to bring a private enforcement action on behalf of the State and in the name of the
6 State after providing notice to the Attorney General, the Department of Labor or the Maine
7 Human Rights Commission, depending on which law has been claimed to be violated. The
8 Attorney General, the Department of Labor or the Maine Human Rights Commission may
9 choose to intervene, in which case the State takes primary responsibility for the private
10 enforcement action. If the State declines to intervene, the whistleblower is allowed to
11 proceed with the private enforcement action. Any settlement or voluntary dismissal of the
12 private enforcement action must be reviewed and approved by the state agencies involved
13 and, after the settlement or dismissal occurs after the filing of the private enforcement
14 action, the court. The bill provides for penalties if the private enforcement action succeeds,
15 which vary depending on whether the State has intervened, and for distribution of the
16 penalties, including 15% of any penalty received to be deposited into the Community
17 Outreach and Labor Education Fund, created by the bill to assist workers enforcing
18 employment rights, including outreach, community-based education events, training
19 materials, technical assistance, counseling and investigative, research and referral services.