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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.

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

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

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

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

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

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

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

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

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

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

§192. Prosecution of all claims for State

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

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

SUBCHAPTER 5-C
§840-A. Definitions

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

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

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

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

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

§840-B. Private enforcement action

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

§840-C. Procedure

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

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

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

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

   C. If the whistleblower's identity is not confidential, the name and contact information of the whistleblower or the whistleblower's representative organization;
D. If the whistleblower has retained legal counsel, the name, address and contact information of the legal counsel; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13. Commencement of action; statute of limitations. Notwithstanding any
provision of law to the contrary, a private enforcement action must be commenced within
the same period of time that the Attorney General or the responsible state official has to
bring an action for the same set of circumstances under the applicable statute. The statute
of limitations for bringing a private enforcement action is tolled from the date a
whistleblower files a notice pursuant to subsection 1 or the date the Attorney General or
the responsible state official commences an investigation, whichever is earlier.
14. **Private action based on same injury.** This section does not limit the right for the whistleblower to pursue a private action based on the same injury.

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

§840-D. **Penalties, fees and costs**

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

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

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

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

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

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

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

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

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

   B. If a claim involves an alleged violation of this chapter and the Attorney General or the Department of Labor has intervened, the whistleblower is entitled to 20% of the civil penalty recovered, the Attorney General is entitled to 20% of the civil penalty recovered and the Department of Labor is entitled to 45% of the civil penalty recovered;
C. If a claim involves an alleged violation of Title 5, chapter 337, subchapter 3 and the
Maine Human Rights Commission described in Title 5, chapter 337, subchapter 2 has
not intervened, the whistleblower is entitled to 30% of the civil penalty recovered and
the Maine Human Rights Commission is entitled to 55% of the civil penalty recovered;
and

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

§840-E. Limitation on private enforcement actions

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

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

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

§840-F. Retaliation prohibited

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

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

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

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

§840-G. Community Outreach and Labor Education Fund

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

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

3. Expenditures. The Department of Labor shall use money from the fund to assist
workers in enforcing employment rights, including outreach, community-based education
events, training materials, technical assistance, counseling and investigative, research and referral services, which may include the use of 3rd-party contractors.

**SUMMARY**

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