

VETO MESSAGE:

VETO MESSAGE - No. 5

TO THE SENATE:

I am returning herewith, without my approval, the following bill:

Senate Bill Number 1582, entitled:

"AN ACT to amend the civil service law, in relation to retaliatory actions by public employers taken against public employees"

NOT APPROVED

This bill -- which is similar to legislation that was vetoed last year -- seeks to advance the worthy goal of protecting government whistleblowers from retaliation by their employers. In particular, the bill seeks to provide a "whistleblowing" defense for employees who are subject to adverse personnel action after reporting legal violations that could reasonably be expected to lead to endangering the welfare of a minor. The bill would also provide protections for workers whose job titles are eliminated after they make reports of illegal conduct.

I fully support expanding whistleblower protections for both public and private employees, including several provisions of this bill. I cannot approve this bill, however, because it contains significant technical flaws.

Most notably, the bill creates a new and unique cause of action that may only be used by employees who are not subject to disciplinary proceedings. Employees covered by this provision (such as those whose job titles have been eliminated), and who reasonably believe that the personnel action was the result of their whistleblowing activity, may challenge that action in court. The burden of proof in that lawsuit is placed not on the employee who is making the claim, but instead on the

defendant employer, which must show "by clear and convincing evidence" that it acted independently of the employee's protected conduct. More-
over, should the plaintiff prevail, the court must, without any discretion, award the plaintiff attorneys' fees, disbursements and costs.

In short, for employees whose positions are eliminated, the bill would create a cause of action heavily weighted in their favor, while workers who are discharged or disciplined would have far lesser protections. There is no good reason why the law should be structured in this manner. The elimination or reclassification of positions is a necessary part of sensible government restructuring, yet this bill will provide employees aggrieved by such restructuring with a powerful tool for halting the process via litigation. It is unclear why these extraordinary provisions are necessary to meet the bill's important goals.

Another significant problem is that the provisions of this bill apply retroactively back to January 1, 2007. Such retroactivity is ill-advised in regard to disciplinary proceedings, because it allows for the reopening of personnel actions legitimately deemed final by all involved.

As a result of these significant flaws, the Department of Civil Service, Governor's Office of Employee Relations, New York State School Boards Association, New York State Association of Counties and the Major

of the City of New York, as well as other agencies, all recommend that this bill be vetoed.

During my tenure as Attorney General, I proposed legislation that would greatly expand whistleblower protections for both private and public employees, and that proposal passed the Assembly several times. I urge the Legislature to work with my staff on legislation that would combine the positive elements of my proposal with those contained in

this bill. By working together, we will be able to enact a fair
and
sensible expansion of whistleblower protections this session.

This bill is disapproved.

(signed) ELIOT SPITZER
