



**New York State Office of the Attorney General
Letitia James**

Testimony Before the

New York State Senate

Standing Committee on Labor, Chair: Senator Jessica Ramos

Standing Committee on Banks, Chair: Senator James Sanders

Standing Committee on Investigations and Government Operations, Chair: Senator James Skoufis

&

New York State Assembly

Standing Committee on Labor

Standing Committee on Banks, Chair: Assembly Member Thomas Abinanti

Standing Committee on Oversight, Analysis & Investigation, Chair: Assembly Member John McDonald III

**Impact of COVID-19 on the Workforce
August 13, 2020**

Good morning committee chairs and members. My name is Karen Cacace, and I am the Bureau Chief for the New York State Attorney General's Labor Bureau.

I want to thank you for convening this important hearing at such a vital time for workers of all levels and in all industries throughout New York and for giving our office an opportunity to share our recent experiences, feedback, and insight. Today's hearing offers many of us working on labor issues in New York State a chance to report back on how the state's systems and laws are faring under the extreme stress of the coronavirus and resulting economic tumult and to discuss possible legislative and policy changes to address any such issues.

At the outset, I want to note that Attorney General James, and the rest of our office, continues to appreciate the strong and constructive relationship between our office and the legislature. As with other issues we've worked on together, we offer our time and any relevant expertise we may have to assist with the legislative objectives of these committees, legislative leadership, or other individual legislators.

Following the Governor's Executive Order 202.8 that required businesses deemed non-essential to reduce by 100%, their in-person workforces, our office began responding to workers throughout the state who were unsure if their employer could legally require them to report to work on Monday, March 23. Over the past nearly-five months, our office has received over 12,000 inquiries from workers regarding: whether they should be allowed to telecommute, health and safety requirements for workplaces that remained open, employer obligations under the new state and federal paid sick leave laws, and, most concerning to our Office, allegations of retaliation against workers who complained about unsafe working conditions in workplaces that remained open.

We created a comprehensive Know Your Rights brochure, which we published on our website and sent to all workers who contacted us by email. The brochure is attached to our written testimony.

In collaboration with the New York State Department of Labor, we have responded to these workers' inquiries and concerns, provided information about the constantly-changing workplace health and safety requirements, and contacted employers to discuss a resolution of the employees' concerns. Our office has directly contacted over 850 employers and in most cases these conversations resulted in employers voluntarily agreeing to comply with the applicable laws without need for further action by this Office – by allowing employees to telecommute, improving safety standards, agreeing to compensate employees for sick leave, and reinstating workers who had been fired in retaliation for complaining about health and safety conditions.

In some cases, however, employers did not initially agree to comply with the Executive Orders, health and safety requirements, anti-retaliation laws, and new sick leave and emergency quarantine laws. In those cases, we sent formal demand letters (to date we have sent 80), which resulted in most employers complying. For those employers who appear to have failed to remedy or correct their unlawful practices, we have opened formal investigations, including one into the practices at Amazon's fulfillment center on Staten Island.

This crisis has demonstrated that many employees in low-wage jobs are absolutely essential to the functioning of our economy and society, even in a pandemic – but unfortunately, are not adequately protected by existing laws. Protecting these workers requires, among other things, stronger safety standards, increased protection from retaliation, elimination of non-compete requirements, and updates to the unemployment insurance laws. Our office also welcomes the opportunity to share our input on any ideas that the legislature is exploring to strengthen worker protections.

Regarding safety standards, because OSHA has failed to create standards to protect workers from COVID-19 specifically and airborne illnesses generally, the state can and should create specific enforceable standards for all industries. These standards should also cover employer provided housing. It is imperative that employers be required to provide safe working conditions for their employees. This is true at any time, but particularly during this pandemic. The legislature can mandate that the Department of Labor and Department of Health create these standards and empower our office to enforce them.

As I mentioned, employer retaliation against employees who speak up about health and safety concerns is one of the chief concerns of this Office in recent months. We have seen several situations where employees raised concerns about safety issues at their workplaces and were fired soon after raising those concerns. This has a chilling effect on other workers. Workers should not have to choose between keeping their jobs and advocating for safe working conditions.

New York's current whistleblower law (NYLL 740) is limited in both the type of activity it protects and the remedies it provides. In order for worker conduct to be protected, the worker must oppose action by the employer that violates a "law, rule, or regulation" and the action must create a "substantial and specific danger to public health and safety." This restrictive definition should be broadened. In addition, currently, employees may only obtain backpay, reinstatement, and attorneys' fees as a remedy. For employers of low-wage workers, the financial risk of retaliation is much too low to deter them from taking action against employees who complain. In order to sufficiently deter employers, and to adequately compensate whistleblowers who risk their jobs, employers should also be liable for additional damages.

Another area that I would like to highlight is non-compete clauses in labor contracts. Non-competes, signed by employees and usually required to start or continue a job, prevent employees from working for that employer's competitors, or starting a competing business, after they leave that job for a certain amount of time in a certain geographic area. Historically, non-competes were used sparingly for executives with trade secrets or confidential business information, and these executives were typically represented by lawyers who negotiated the terms of the agreement with the employer.

In recent years, however, it has become increasingly common for employees even in low-wage jobs to be required to sign non-competes often with little or no negotiation allowed. A recent survey by the Economic Policy Institute found that over 40% of workplaces in New York require some or all of their employees to sign non-competes, and an ever-growing number of these agreements bear no relation to their historic purpose. Two particularly problematic examples that have become exponentially more harmful in the COVID-19 crisis are the increasing prevalence of non-negotiable non-competes as a basic condition of employment among low-wage workers and medical professionals.

Beyond these two clear examples, non-competes are generally problematic. At a time when the safety of each individual workplace can be a literal matter of life and death, it is unnecessarily dangerous to prohibit employees from leaving workplaces that may be unsafe, and at a time when the overall economy is so precarious, it is unnecessarily damaging to the economy to permit artificial barriers to economic mobility.

We think that suspending the enforceability of non-compete agreements for the duration of the current emergency – either through legislation or executive order – allows us to mitigate the most extreme harms during the crisis while we figure out a more permanent solution to the overuse of non-compete clauses that makes sense for New York's economy long-term.

The pandemic has also exposed weaknesses with existing unemployment insurance laws. One area that should be updated is the system for providing unemployment insurance benefits to workers who have obtained part-time employment. The current system is confusing and discourages part-time work. If the law was updated to discount the wages earned, rather than penalize workers for the days they were engaged in work, it would be easier for workers to understand and for the Department of Labor to administer. Another area that would benefit from an update is to clarify that workers may be eligible for unemployment insurance benefits if they refuse to work in unsafe conditions or refuse to work because they are in a high risk group and susceptible to contracting COVID-19.

As I noted earlier, there are a variety of other labor-related issues that we would be happy to discuss and share input on should it be helpful to the legislature.

I will conclude by saying that these committees, and the legislature more broadly, has the power and opportunity to address some of the most problematic labor issues we have observed over the last five months – and beyond. We very much appreciate the opportunity to share our input with you here today and welcome the chance to continue this conversation moving forward.

Thank you.