STATE OF NEW YORK

8458

IN SENATE

March 3, 2022

Introduced by Sen. JACKSON -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to enacting the safeguarding employees and accountability for termination act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The labor law is amended by adding a new article 20-D to read as follows:

ARTICLE 20-D

SAFEGUARDING EMPLOYEES AND ACCOUNTABILITY FOR TERMINATION ACT

Section 745. Short title.
746. Definitions.
747. Elements of wrongful discharge.
748. Remedies.
749. Probationary period.
750. Limitation of actions.
751. Exemptions.
752. Arbitration.
753. Effect of rejection of offer to arbitrate.

§ 745. Short title. This act shall be known and may be cited as the "safeguarding employees and accountability for termination act" or "the SEAT act".

§ 746. Definitions. When used in this article, the term:

1. "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which a reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities or other terms and conditions of employment.

2. "Discharge" includes a constructive discharge as defined in subdivision one of this section and any other termination of employment, including resignation, elimination of the job, failure to recall or

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

LBD13943-04-2

rehire and any other cutback in the number of employees for a legitimate business reason.

3. "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, and life insurance plan in force on the date of the termination.

4. "Good cause" means any reasonable job-related grounds for an employee's dismissal based on:

(a) the employee's failure to satisfactorily perform job duties;

(b) the employee's disruption of the employer's operation except when engaging in concerted activity;

(c) the employee's material or repeated violation of an express provision of the employer's written policies; or

(d) other legitimate business reasons determined by the employer while exercising the employer's reasonable business judgment. The legal use of a consumable product by an employee off the employer's premises during nonworking hours is not a legitimate business reason; provided, however, that this paragraph shall not apply to:

(i) the use of a consumable product that affects in any manner an employee's ability to perform job-related employment responsibilities or the safety of other employees;

(ii) an employee who, on a personal basis, has a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products;

(iii) an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public; or

(iv) an employer that takes action based on the belief that the employer's actions are permissible under an established substance abuse or alcohol program or policy, professional contract or collective bargaining agreement.

6. "Leave of absence" means an employee's absence from work for a period of more than five consecutive working days for any reason other than holidays and vacations.

7. "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on form W-2 and includes overtime payments, any bonuses, and additional compensation deferred at the option of the employee.

§ 747. Elements of wrongful discharge. 1. A discharge is wrongful only if:

(a) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(b) the employer materially violated an express provision of its own written personnel policy prior to the discharge, and the violation deprived the employee of a fair and reasonable opportunity to remain in a position of employment with the employer.

2. During a probationary period of employment, the employment may be terminated at the will of the employer on notice to the employee for any reason or for no reason.

3. The employer has broad discretion when making a decision to discharge any managerial or supervisory employee.

§ 748. Remedies. 1. If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed four years from the date of discharge, together with interest on the lost wages and fringe benefits. The employee's interim earnings, derived from any new kind, nature, or type of work, hire,

contractor status or employment that did not exist at the time of discharge, including amounts the employee could have earned with reasonable diligence from the work, hire, contractor status or employment, shall be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there shall be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.

2. Following any verdict or award in favor of the discharged employee, a court of competent jurisdiction shall consider any monetary payments, compensation or benefits the employee received arising from or related to the discharge, including unemployment compensation or benefits, and shall deduct those payments, compensation and benefits from the amount awarded for lost wages before entering judgment.

§ 749. Probationary period. 1. If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time the employee begins work, there is a probationary period of one month commencing on the date the employee begins work.

2. An employer may extend a probationary period prior to the expiration of a probationary period, but the original probationary period together with any periods of extension shall not exceed six months. The probationary period shall not be extended or restarted by discharging an employee during the probationary period and rehiring the employee within three months after such discharge.

3. If an employee has one or more leaves of absence during the original probationary period or any extension of the probationary period, the time of each leave of absence shall not be a part of the probationary period unless the employer affirmatively elects to include each leave of absence as part of the probationary period with the affirmative written consent of the employee.

§ 750. Limitation of actions. 1. An action under this article shall be filed within six years after the date of discharge.

2. If an employer maintains written internal procedures, other than those specified in section seven hundred fifty-one of this article, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this article. The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this article. If the employer's internal procedures are not completed within ninety days from the date the employee initiates the internal procedures, the employee may file an action under this article and for purposes of this subdivision the employer's internal procedures are considered exhausted. The statute of limitations in subdivision one of this section is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subdivision one of this section more than one hundred twenty days.

3. If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within fourteen days of the date of the discharge notify the discharged employee in writing or electronically of the existence of the internal procedures. The timeframe for the employee to initiate the procedures, if any, begins to run from the date the employer sends or provides a copy of the internal procedures in writing or electronically. A copy of the procedures shall be considered provided to the employee, if the employer sends a copy of the procedures

to the employee's last-known postal mailing address and electronic mailing address, if provided, or the employee's attorney. If the employer fails to comply with this subdivision, the discharged employee need not comply with subdivision two of this section.

4. If a plaintiff commences a civil action for wrongful discharge under this article, the plaintiff shall make service of process pursuant to section three hundred six-b of the civil practice law and rules after filing the complaint. If the plaintiff fails to make service of process, the court, on motion or on its own initiative, shall dismiss the action without prejudice as to a defendant unless that defendant has made an appearance in the civil action. If the plaintiff fails to make service of process, the remaining six-year statute of limitations for a civil action under this article resumes regardless of whether the civil action is dismissed.

§ 751. Exemptions. 1. This article does not apply to a discharge:

(a) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, status as a victim of domestic violence and other similar grounds; or

(b) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

2. For the purposes of this section, a "contract of employment for a specific term" may contain a probationary period pursuant to section seven hundred forty-nine of this article and may contain an automatic renewal clause that automatically renews the contract of employment for one or more successive terms.

§ 752. Arbitration. 1. A party may make a written offer to arbitrate a dispute that otherwise could be adjudicated under this article.

2. An offer to arbitrate shall be in writing and contain the following provisions:

(a) A neutral arbitrator shall be selected by mutual agreement or, in the absence of agreement, pursuant to article seventy-five of the civil practice law and rules.

(b) The arbitration shall be conducted pursuant to article seventy-five of the civil practice law and rules. If there is a conflict between the provisions of article seventy-five of the civil practice law and rules and the provisions of this article, the provisions of this article shall apply.

(c) The arbitrator is bound by this article.

3. If a complaint is filed under this article, the offer to arbitrate shall be made within sixty days after service of the complaint and may be accepted in writing within thirty days after the date the offer is made.

4. A discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration shall be entitled to have the arbitrator's fee and all costs of arbitration paid by the employer.

5. If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under this article. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of article seventy-five of

the civil practice law and rules. However, this subdivision shall not apply if the employer maintains written internal procedures that require arbitration under subdivision two of section seven hundred fifty of this article.

§ 753. Effect of rejection of offer to arbitrate. If a discharged employee makes a valid offer to arbitrate that is not accepted by the employer and such discharged employee prevails in an action under this article such discharged employee shall be entitled to reasonable attorneys' fees incurred subsequent to the date of the offer.

§ 2. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 3. This act shall take effect on the ninetieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made on or before such date.