HB3530

LRB10214590JLS19943b

102ND GENERAL ASSEMBLY

State of Illinois

2021 and 2022

HB3530

Introduced 2/22/2021, by Rep. Carol Ammons

SYNOPSIS AS INTRODUCED:

New Act
30 ILCS 105/5.935 new

Creates the Illinois Employee Security Act. Establishes a framework for employee discipline and discharge. Prohibits the unjust discharge of an employee. Requires employers to utilize progressive discipline measures. Limits the use of electronic monitoring. Provides for severance pay. Directs the Department of Employment Security to adopt rules and administer the Act. Provides statutory remedies for wrongfully discharged employees and authorizes the recovery of damages. Creates the Wrongful Discharge Enforcement Fund as a special fund in the State treasury. Applies to disciplinary and discharge actions occurring one year after the Act's effective date. Effective January 1, 2022.

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CORRECTIONAL BUDGET AND IMPACT NOTE ACT MAY APPLY

FISCAL NOTE ACT MAY APPLY

A BILL FOR

AN ACT concerning employment.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Short title. This Act may be cited as the Illinois Employee Security Act.

Section 5. In this Act:

"Benefits" means the cash value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, annuity, and pension benefit plan in effect on the date of discharge.

"Casual employee" means an employee who performs work in or around a private home that is irregular, uncertain, or incidental in nature and duration.

"Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer that an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative.

"Department" means the Department of Employment Security.

"Discharge" means any cessation of employment, including constructive discharge, indefinite suspension, layoff, or reduction in hours.

"Egregious misconduct" means deliberate or grossly

negligent conduct that endangers the safety or well-being of the individual, co-workers, customers, or other persons, including discrimination against or harassment of co-workers, customers, or other persons, or that causes serious damage to the employer's or customers' property or business interests.

"Electronic monitoring" means the collection of information concerning worker activities, communications, actions, biometrics, or behaviors by electronic means including, but not limited to, video or audio surveillance, electronic work pace tracking, and other means.

"Employ" means to suffer or permit to work.

"Employee" has the meaning given that term in Section 2 of the Illinois Wage Payment and Collection Act, but does not include a casual employee who performs work of an irregular nature in or around a private home. A person may be an employee of 2 or more employers at the same time.

"Employer" has the meaning given that term in Section 2 of the Illinois Wage Payment and Collection Act. More than one entity may be the employer of an employee, including in circumstances where one entity controls, is controlled by, or is under common control with another employer, or where one entity exerts control over the operations of another employer. An employer-employee relationship is presumed to exist when an individual performs labor or services for an employer. The party asserting that an individual is not an employee must establish by a preponderance of the evidence that the

individual is an independent contractor.

"Full-time employee" means an employee who regularly works at least 35 hours each week.

"Just cause" means:

(1) an employee's failure to satisfactorily perform his or her job duties or to comply with employer policies if the employee was afforded progressive discipline;

(2) an employee's egregious misconduct; or

(3) bona fide economic reasons.

"Progressive discipline" means an employer's disciplinary system that provides a graduated range of reasonable responses to an employee's failure to satisfactorily perform his or her job duties or comply with employer policies, with the disciplinary measures ranging from mild to severe, depending on the frequency and degree of the failure, and the employee being afforded a reasonable period of time to address concerns.

"Reduction in hours" means a reduction in an employee's hours of work totaling at least 15% of the employee's weekly work hours.

"Relator" means a current or former employee, contractor, subcontractor, or employee of such a contractor or subcontractor of an alleged violator of this Act, regardless of whether that person has received full or partial relief, who seeks relief through a public enforcement action brought under this Act.

"Representative organization" means a nonprofit or labor organization selected by a relator to initiate a public enforcement action on the relator's behalf.

"Short-term position" means employment pursuant to a written contract that specifies that the position is to end after a specified period of time, not to exceed 6 months, where the employer can show that the work or need in question is expected to end, such as in the case of a seasonal job or a job to perform a specific project.

Section 10. Prohibition against unjust discharge.

(a) An employer shall not discharge an employee without just cause. Just cause may not be based on off-duty conduct unless there is a demonstrable and material nexus between the conduct and the employee's job performance or the employer's legitimate business interests.

(b) In determining whether an employee has been discharged for just cause for failure to satisfactorily perform job duties or for failure to comply with employer policies, the fact finder shall consider, in addition to any other relevant factors, whether:

(1) the employee knew or should have known of his or her job duties or of the employer's policy;

(2) the employer provided relevant and adequate training to the employee;

(3) the employer's policy was reasonable and applied

consistently; and

(4) the employer undertook a thorough, fair and objective investigation.

(c) A discharge for failure to satisfactorily perform job duties or comply with employer policies shall not be deemed to be based on just cause unless the employer has used progressive discipline. In interpreting and applying progressive discipline, the principles developed in arbitral precedents shall provide guidance. The time period between a first warning or discipline and termination shall be not less than 15 days, and the employer may not rely on a warning or discipline issued more than one year in the past to justify a discharge.

(d) Under progressive discipline, an employer may discharge an employee immediately for egregious misconduct. A finding of misconduct for purposes of unemployment insurance eligibility shall not necessarily constitute serious misconduct for purposes of this Act.

(e) A discharge shall not be deemed to be based on bona fide economic reasons unless the following conditions are met:

(1) the discharge results from a reduction in production, sales, services, profit, or funding of the employer, or technological or organizational changes in the employer's operations that necessitate full or partial reduction of the employer's operations;

(2) the employees or groups of employees to be

discharged are identified using broadly applicable criteria that do not appear to target individuals; and

(3) the bona fide economic reasons justifying the discharge were specified in writing to the employee at the time of the discharge and are supported by the employer's records.

A discharge shall be presumed not to be based on bona fide economic reasons where the employer hired or hires another employee to perform substantially the same work within 90 days before or after the discharge. Elimination of staff redundancy created by a merger or acquisition shall not be deemed a bona fide economic reason for discharge of employees.

(f) The employer shall within 3 days provide a written explanation to any discharged employee of the specific reasons for the discharge. In determining whether an employer had just cause for discharge, a fact finder may not consider any reasons not included in such written explanation. Where an employer fails to provide a written explanation to a discharged employee, the discharge shall not be deemed to be based on just cause. All information and judgments that the employer considered in making the determination shall be made available to the employee or his or her representative.

(g) The employer shall bear the burden of proving just cause including, if applicable, that the employer followed progressive discipline, by a preponderance of non-hearsay evidence in any proceeding brought pursuant to this Act.

(h) In no event shall any of the following actions by an employee constitute just cause for termination:

(1) an employee's communication about workplace practices or policies, including but not limited to health or safety practices or hazards related to COVID-19, to any person, including to an employer, an employer's agent, other employees, a government agency or the public, including through print, online, social media, or any other media; or

(2) an employee's refusal to work under conditions that the employee reasonably believes would expose him or her, other employees or the public to an unreasonable health or safety risk, including but not limited to risk of illness or exposure to COVID-19.

An employer shall not retaliate against any employee or other person for such conduct. Notwithstanding any other provision of law, such conduct shall constitute protected conduct and may not be contractually prohibited, or subject to civil or criminal sanction or liability.

(i) An employer must conduct its own assessment of an employee and may not rely on worker data gathered through electronic monitoring in discharging, disciplining, or promoting an employee. Employment decisions must be made based on human-based information sources such as supervisors' assessments and documentation or consulting co-workers. An employer must disclose in advance to employees any electronic

monitoring or data collection at a workplace, disclose the purposes for which the data will be used, and provide employees meaningful opportunities to challenge any electronic monitoring or data systems. However, data gathered through electronic monitoring may be used in the following circumstances: for non-employment-related purposes; for discharging or disciplining an employee in cases of egregious misconduct or involving threats to the health or safety of other persons; or where required by State or federal law.

(j) Employment for a short-term position does not require a showing of just cause for discharge, and discharge after a short-term position does not entitle an employee to severance pay under Section 15. A position shall not be deemed to be a short-term position where the employer hires another employee to perform substantially the same work within 90 days before or after the discharge.

Section 15. Severance pay. An employee shall accrue one hour of severance pay for every 12.5 hours worked during his or her first year of employment, and for every 50 hours worked thereafter. Upon discharge, the employer shall pay the employee his or her accrued severance pay, calculated based on the number of hours accrued multiplied by the employee's rate of pay upon discharge. An employee who is discharged at the end of a short-term position shall not be entitled to severance pay. Severance pay shall be exclusive of final compensation

due an employee upon separation under the Illinois Wage Payment and Collection Act. For purposes of determining an employee's years of employment tenure or seniority, multiple periods worked for the employer and any time worked for a predecessor employer shall be aggregated.

Section 20. Employment through day and temporary labor services agencies. Where an employee is employed by a day and temporary labor services agency, as defined under the Day and Temporary Labor Services Act, to perform work for a third-party client, as defined under that Act, both the day and temporary labor services agency and the third-party client shall be deemed to be the employer of the employee for the purposes of this Act. Both shall be jointly and severally responsible for compliance with this Act's requirements, and neither a third-party client nor a day and temporary labor services agency may discharge an employee employed through a day and temporary labor services agency without just cause, except when done at the end of a short-term position.

Section 25. Collective bargaining agreement exemption. The requirements of this Act do not apply to employees who are covered by a valid collective bargaining agreement.

Section 30. Retaliation prohibited. No employer or any other person shall threaten, intimidate, discipline,

discharge, demote, suspend, or harass an employee, reduce the hours or pay of an employee, inform another employer that an employee has alleged that the employer violated this Act or any other law, discriminate against an employee, or take any other adverse action that penalizes an employee for, or is reasonably likely to deter an employee from, exercising or attempting to exercise any right protected under this Act or any other law, including informing other employees or persons of their rights under this Act or any other law, assisting in any way with any complaint or investigation involving this Act, including another workers' case, or sharing information about workplace issues with other employees or the public, including on social media. Threats or any other adverse action related to perceived immigration status or work authorization shall constitute threats or adverse actions as those terms are used in this Section. An employee need not explicitly refer to this Act or any other law or the rights enumerated herein to be protected from retaliation. The protections afforded by this Section shall apply to any person who mistakenly but in good faith alleges violations of this Act.

Section 35. Protection of former employees from blacklisting. An employer shall not prevent or attempt to prevent, by word or writing of any kind, a former employee from obtaining employment with any other employer. An employer is not prohibited from providing by word or writing any other

employer to whom the discharged employee has applied for employment a truthful statement of the reason for discharge.

Section 40. Notice and posting of rights.

(a) The Department shall publish and make available notices informing employees of their rights protected under this Act. Employers shall post the notices in a conspicuous location in the workplace or at any job site, and shall give a notice to each employee at the time of hiring and on an annual basis. The notices shall be made available in a downloadable format on the Department's website in English, Spanish, Polish, Mandarin, and Cantonese.

(b) In accordance with the rules of the Department, an employer shall conspicuously post at any workplace or job site where any employee works the notices described in subsection (a) that apply to the particular workplace or job site. The notices shall be in English and any language spoken as a primary language by at least 5% of employees at that location if the Department has made the notice available in that language.

Section 45. Recordkeeping.

(a) Employers shall retain records documenting their compliance with the applicable requirements of this Act for a period of 3 years and shall allow the Department access to such records and other information, in accordance with applicable

law and with appropriate notice, in furtherance of an investigation conducted pursuant to this Act. Employers shall report annually to the Department, and any person who requests a copy of:

(1) the employer's total employment each year broken down by full-time employment (defined as at least 30 hours per week), part-time employment (defined as less than 30 hours per week), short-term employment, and employment through a temp or staffing agency; and

(2) the employer's total number of separations each year broken down by whether the separation was a discharge for cause, a discharge for bona fide economic reasons, a separation as a result of the end of a short-term position, an employee resignation, or an employee retirement.

(b) An employer's failure to maintain, retain, or produce a record or other information required to be maintained by this Section relevant to a material fact alleged by an employee in a complaint brought pursuant to this Section or requested by the Department pursuant to an investigation creates a rebuttable presumption that such fact is true.

Section 50. Administrative implementation and enforcement.

(a) The Department shall administer and enforce the provisions of this Act and shall, within 120 days after its effective date, adopt rules necessary to administer and

enforce this Act. The rules shall include the procedures for investigations and hearings under this Act. The adoption, amendment, or rescission of rules shall be in conformity with the requirements of the Illinois Administrative Procedure Act.

(b) An aggrieved employee or his or her duly authorized representative may file a complaint with the Department regarding violations by an employer of this Act or of any implementing rules. Upon receiving a complaint or on its own initiative, the Department shall investigate potential violations, make a determination whether a violation has occurred, and take appropriate action to enforce the provisions of this Act and any implementing rules.

(c) If an employer is found by the Department to have violated this Act or any rules adopted under this Act, the Department shall order the following, in addition to any other remedy provided by law:

(1) In the case of unlawful discharge, retaliation, blacklisting, or unlawful electronic monitoring, actual and liquidated damages payable to each aggrieved worker equal to the greater of $10,000 or 3 times the actual damages including, but not limited to, unpaid wages, benefits, and other remuneration from the date of discharge, unless an adjudicator finds that mitigating circumstances are present, in which case the adjudicator may order that the preceding liquidated damages amount be reduced as circumstances make appropriate, as well as

reinstatement, restoration of hours, other injunctive relief (including to rectify conditions that led to constructive discharge), punitive damages, and such other remedies as may be appropriate.

(2) In the case of discharge where severance pay was not provided, severance pay together with an additional 2 times that amount as liquidated damages, and such other remedies as may be appropriate including punitive damages.

(3) In the case of failure to provide a timely written explanation for a discharge, injunctive relief and liquidated damages in an amount equal to $5,000, unless an adjudicator finds that mitigating circumstances are present, in which case the adjudicator may order that the preceding liquidated damage amount be reduced as circumstances make appropriate, and such other remedies as may be appropriate, including punitive damages.

(4) Payment of a further sum as a civil penalty in an amount of $10,000 for unlawful discharge, retaliation, blacklisting, or unlawful electronic monitoring; in an amount of $5,000 for or failure to provide a timely written explanation for a discharge, or in an amount of $1,000 for other violations of this Act, including the Act's recordkeeping requirements or failure to produce records requested in an investigation. However, if an adjudicator finds that mitigating circumstances are present, the adjudicator may order that the preceding

civil penalty amounts be reduced as circumstances make appropriate. The civil penalties imposed pursuant to this section shall be imposed on a per employee and per instance basis for each violation.

(5) Reasonable attorney's fees, expert fees, and other costs. For the purposes of this provision, a complainant shall be deemed to have prevailed and entitled to an award of fees and costs if commencement of a complaint has acted as a catalyst to effect policy change on the part of the respondent, regardless of whether that change has been implemented voluntarily, as a result of a settlement, or as a result of a judgment in such party's favor.

(6) In assessing an appropriate remedy, due consideration shall be given to the gravity of the violation, the history of previous violations, and the good faith of the employer.

(7) All amounts specified in this Act shall be adjusted annually to keep pace with the rising cost of living as measured by the annual increase in the Consumer Price Index for All Urban Consumers (CPI-U), as calculated by the Bureau of Labor Statistics of the United States Department of Labor.

(8) Either party may bring an administrative appeal to enforce, vacate, or modify the order, determination, or other disposition of the Department.

(9) No procedure or remedy set forth in this Section

is exclusive or a prerequisite for asserting a claim for relief to enforce any rights under this Act in a court of law.

(10) An employer who has been ordered by the Department or ordered by a court to pay back pay unpaid back pay, front pay and benefits, liquidated or punitive damages, or civil penalties, and who fails to seek timely review of such a demand or order as provided for under this Act and who fails to comply within 15 calendar days after such demand or within 35 days of an administrative or court order is entered shall also be liable to pay a penalty to the Department of 20% of the amount found owing and a penalty to the employee of 1% per calendar day of the amount found owing for each day of delay in paying such wages to the employee. All moneys recovered as fees and civil penalties under this Act, except those owing to the affected employee, shall be deposited into the Wrongful Discharge Enforcement Fund, a special fund which is hereby created in the State treasury. Moneys in the Fund may be used only for enforcement of this Act.

Section 55. Civil action. Except as otherwise provided by law, any person claiming to be aggrieved by an employer's violation of this Act has a cause of action in any court and, upon prevailing, shall be awarded the relief specified in Section 50 and, if the court finds in favor of the plaintiff,

it shall award such prevailing party, in addition to other relief, his or her reasonable attorney's fees, expert fees, and other costs. As used in this Section, "prevailing" party includes a party whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented voluntarily, as a result of a settlement, or as a result of a judgment in such party's favor. Penalties and fees under this Act may be assessed by the Department and recovered in a civil action brought by the Department in any circuit court or in any administrative adjudicative proceeding under this Act. In any such civil action or administrative adjudicative proceeding under this Act, the Department shall be represented by the Attorney General.

Section 60. Public enforcement action. A relator or representative organization may initiate a public enforcement action in any court to pursue civil penalties, injunctive relief, and declaratory relief, as specified in Section 50, on behalf of the Department, for a violation of the provisions of this Act affecting the relator and other current or former employees, according to the following procedures:

(a) The relator or representative organization shall give written notice to the Department of the specific provisions of this Act alleged to have been violated, including the facts and theories to support the alleged

violation. The notice shall be given in such a manner as the Department may prescribe by rule.

(b) If the Department intends to investigate the alleged violation, it shall notify the relator or representative organization of its decision within 65 calendar days of the postmark date of the notice. Within 60 calendar days of that decision, the Department may investigate the alleged violation and take any enforcement action authorized by law. If the Department determines that additional time is necessary to complete the investigation, it may extend the time by not more than 60 additional calendar days and shall notify the relator or representative organization of the extension.

(c) Notwithstanding any other provision of law, a public enforcement action brought under this Act must be commenced within the limitations period specified in Section 65. The statute of limitations for bringing a public enforcement action under this Act shall be tolled from the date a relator or representative organization files a notice under Section 55 with the Department, or the Department commences an investigation, whichever is earlier.

(d) The relator or representative organization may commence a civil action under this Act if the Department determines that no enforcement action will be taken, or if no enforcement action is taken by the Department within

the time limits prescribed.

(e) The Department may intervene in an action brought under this Act and proceed with any and all claims in the action as of right within 30 days after the filing of the action, or for good cause, as determined by the court, at any time after the 30-day period after the filing of the action.

(f) Civil penalties recovered in a public enforcement action brought under this Act shall be distributed as follows:

(1) If the Department does not intervene in the action, 60% to the Department, and 40% to the relator or representative organization, to be distributed to the employees affected by the violation, including a service award that reflects the burdens and risks assumed by the employee or representative organization in prosecuting the action.

(2) If the Department does intervene in the action, 70% to the Department, and 30% to the relator or representative organization, to be distributed to the employees affected by the violation, including a service award that reflects the burdens and risks assumed by the employee or representative organization in prosecuting the action.

(3) The share of penalties recovered for the Department under this Act shall be used solely to

support the Department's education and enforcement activities, with approximately 25% of these penalties reserved for grants to community organizations for outreach and education about employee rights under this Act.

(g) In any public enforcement action commenced under this Act, the court shall allow a prevailing relator or representative organization to recover all reasonable attorneys' fees, expert fees, and other costs. As used in this provision, a "prevailing" relator or representative organization includes a relator or representative organization whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented voluntarily, as a result of a settlement, or as a result of a judgment in such relator or representative organization's favor.

(h) No public enforcement action brought under this Act shall be required to meet class action certification requirements under Part 8 of Article II of the Code of Civil Procedure or Rule 23(a) of the Federal Rules of Civil Procedure.

(i) The relator or representative organization may not recover compensatory damages or back pay, or seek reinstatement, in a public enforcement action. But the filing of a public enforcement action does not preclude an

employee from pursuing these remedies in another forum.

(j) The right to bring a public enforcement action under this Act shall not be impaired by any private contract.

Section 65. Limitation of actions. Notwithstanding any other provision of law, an action under this Act must be filed within 3 years after the complainant knew or should have known of the alleged violation. This limitation period shall be tolled for the duration of any state of emergency declared by the State or by any city or county in which the action is commenced.

Section 70. Exemptions and non-preemption. This Act does not:

(1) Apply to any employee who is covered by a valid collective bargaining agreement if such agreement expressly waives the provisions of this Act and provides comparable or superior protections for employees.

(2) Preempt, limit, or otherwise affect the applicability of any provisions of any other law, rule, requirement, policy, or standard, other than a collective bargaining agreement, that provides comparable or superior protections for employees to those provided in this Act.

Section 75. Violations. An employer that violates this Act

is guilty of a Class A misdemeanor.

Section 80. Applicability. This Act applies to disciplinary and discharge actions one year after the effective date of this Act.

Section 95. Severability. The provisions of this Act are severable under Section 1.31 of the Statute on Statutes.

Section 97. The State Finance Act is amended by adding Section 5.935 as follows:

(30 ILCS 105/5.935 new)

Sec. 5.935. The Wrongful Discharge Enforcement Fund.

Section 99. Effective date. This Act takes effect January 1, 2022.