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H.218

Introduced by Representatives Mulvaney-Stanak of Burlington, Anthony of Barre City, Bos-Lun of Westminster, Burrows of West Windsor, Casey of Montpelier, Chesnut-Tangerman of Middletown Springs, Christie of Hartford, Cina of Burlington, Cordes of Lincoln, Elder of Starksboro, Garofano of Essex, Headrick of Burlington, Howard of Rutland City, Krasnow of South Burlington, LaBounty of Lyndon, LaMont of Morristown, Logan of Burlington, Masland of Thetford, McCann of Montpelier, McGill of Bridport, Mrowicki of Putney, Rachelson of Burlington, Small of Winooski, Troiano of Stannard, and White of Bethel

Referred to Committee on

Date:

Subject: Labor; employment practices; fair employment practices; good cause termination of employment

Statement of purpose of bill as introduced: This bill proposes to establish a good cause standard for termination of employment, require employers to provide severance pay to terminated employees, and permit employees or representative organizations to bring an enforcement action on behalf of the State for violations of the good cause termination requirement.

1 An act relating to requiring good cause for termination of employment

2 It is hereby enacted by the General Assembly of the State of Vermont:

3 Sec. 1. 21 V.S.A. § 495o is added to read:

4 § 495o. TERMINATION OF EMPLOYMENT; GOOD CAUSE;

5 REQUIREMENTS

6 (a) Definitions. As used in this section:

7 (1) “Casual employee” means an individual who performs work in or
8 around a private home that is irregular, uncertain, or incidental in nature and
9 duration.

10 (2) “Constructive discharge” means the voluntary termination of
11 employment by an employee because of a situation created by an act or
12 omission of the employer that an objective, reasonable individual would find
13 so intolerable that voluntary termination of employment was the only
14 reasonable course of action for the employee.

15 (3) “Egregious misconduct” means deliberate or grossly negligent
16 conduct by an employee that endangers the safety or well-being of the
17 employee, the employee’s coworkers, or other individuals or that causes
18 serious damage to the employer’s or a customer of the employer’s property or
19 business interests. Egregious misconduct includes discrimination against or
20 harassment of coworkers or other individuals.

1 (4) “Electronic monitoring” means the collection of information
2 concerning worker activities or communication by any means other than direct,
3 in-person observation, including through the use of a computer; telephone;
4 wire; radio; camera; or electromagnetic, photoelectronic, or photo-optical
5 system.

6 (5) “Employee” means an individual who, in consideration of direct or
7 indirect gain or profit, has been employed by an employer for at least 60
8 calendar days. The term “employee” does not include a casual employee.

9 (6) “Employee leasing company” has the same meaning as in section
10 1031 of this title.

11 (7) “Employer” means any person who employs one or more employees
12 in Vermont.

13 (8) “Relator” means a current or former employee or a representative
14 organization that brings a public enforcement action pursuant to subdivision
15 (m)(2) of this section.

16 (9) “Representative organization” means a labor organization, or a
17 mutual benefit corporation or public benefit corporation, as those terms are
18 defined pursuant to 11B V.S.A. § 1.40, that regularly advocates on behalf of
19 employees or assists employees in the enforcement of the provisions of this
20 title, selected by a current or former employee to bring a public enforcement
21 action on the employee’s behalf pursuant to subdivision (m)(2) of this section.

1 (10) “Temporary help company” has the same meaning as in section
2 1031 of this title.

3 (11) “Terminate” or “termination” means any cessation of employment,
4 including constructive discharge, indefinite suspension, layoff, or reduction in
5 hours.

6 (b) Good cause for termination required.

7 (1)(A) An employer shall not terminate an employee without good
8 cause. Good cause for termination includes:

9 (i) an employee’s continued failure to perform job duties or to
10 comply with employer policies despite the employer engaging in the steps of
11 progressive discipline required pursuant to subdivisions (c)(2)(A)–(D) of this
12 section;

13 (ii) an employee engaging in egregious misconduct; and

14 (iii) legitimate business reasons as set forth in subsection (d) of
15 this section.

16 (B) Good cause for termination shall only be determined based on an
17 employee’s on-duty conduct unless there is a demonstrable and material nexus
18 between the employee’s off-duty conduct and either the employee’s job
19 performance or the employer’s legitimate business interests.

20 (2) When determining whether good cause for termination exists in
21 relation to an employee’s failure to satisfactorily perform job duties or failure

1 to comply with employer policies, the following factors shall be considered in
2 addition to any other relevant facts:

3 (A) whether the employee knew or should have known of the
4 relevant job duties or employer policy;

5 (B) whether the employer provided relevant and adequate training to
6 the employee;

7 (C) if the employee failed to comply with an employer policy,
8 whether the policy was reasonable and applied consistently;

9 (D) whether the employer undertook a thorough, fair, and objective
10 investigation before determining that the employee failed to satisfactorily
11 perform job duties or violated an employer policy; and

12 (E) whether the employer provided the employee with clear notice of
13 the employee's rights and the employer's obligations pursuant to this section as
14 well as the employer's policies related to progressive discipline and
15 termination.

16 (3) Good cause shall not be required to terminate an individual who has
17 been employed by an employer for fewer than 60 calendar days.

18 (c) Progressive discipline. Except when an employee has engaged in
19 egregious misconduct or a legitimate business reason exists, an employer shall
20 utilize progressive discipline as provided pursuant to this subsection prior to
21 terminating an employee.

1 (1) An employer shall not terminate an employee for failure to
2 satisfactorily perform job duties or for violating an employer policy until the
3 employer has used progressive discipline with the employee.

4 (2) An employer's progressive discipline policy must include at least the
5 following four disciplinary steps prior to termination:

6 (A) Verbal counseling or warning. An employer shall provide an
7 employee with verbal counseling or a warning that makes the employee aware
8 that the employee is either failing to perform job duties or violating an
9 employer policy and provides the employee with notice of how to perform the
10 job duties or comply with the employer's policy.

11 (B) Written warning. If an employee fails to perform job duties or
12 violates a policy after having already received verbal counseling or a verbal
13 warning for failing to perform those job duties or violating that policy in the
14 past 12 months, the employer may provide the employee with a written
15 warning that identifies the job duties that the employee failed to perform or the
16 policy that the employee violated and provides notice of how to perform the
17 job duties or comply with the policy.

18 (C) Written reprimand. If an employee fails to perform job duties or
19 violates a policy after having already received a written warning for failing to
20 perform those job duties or violating that policy in the past 12 months, the
21 employer may provide the employee with a written reprimand that identifies

1 the job duties that the employee failed to perform or the policy that the
2 employee violated and provides notice of how to perform the job duties or
3 comply with the policy. A written reprimand shall include notice that
4 continued failure to perform the job duties or to comply with the policy may
5 result in suspension without pay and termination.

6 (D) Suspension without pay. If an employee fails to perform job
7 duties or fails to comply with an employer policy after received a written
8 reprimand for failing to perform those job duties or violating that policy in the
9 past 12 months, the employer may suspend the employee without pay for a
10 period of not more than 15 work days based on the severity of the violation.
11 At the time the employee is suspended, the employer shall notify the employee
12 that a further failure to perform the job duties or to comply with the policy may
13 result in termination.

14 (E) Termination. If an employee fails to perform job duties or fails to
15 comply with an employer policy after being suspended without pay for failing
16 to perform those job duties or violating that policy in the past 12 months, the
17 employer may terminate the employee. At the time the employee is
18 terminated, the employer shall provide the employee with a written explanation
19 setting forth the specific reasons why the employment was terminated.

20 (3) An employer shall not terminate an employee for failing to perform
21 job duties or to follow an employer policy less than 25 days after giving the

1 employee verbal counseling or a verbal warning for failing to perform those
2 job duties or to follow the employer policy.

3 (4) Nothing in this subsection shall be construed to prevent an employer
4 from establishing a progressive discipline process that provides an employee
5 with greater notice or rights than are required pursuant to this subsection.

6 (5) An employer may terminate an employee immediately for egregious
7 misconduct or may utilize some or all of the progressive discipline steps set
8 forth in subdivision (2) of this subsection. An employer that utilizes
9 progressive discipline in relation to an instance of egregious misconduct shall
10 not be required to continue progressive discipline prior to terminating an
11 employee if the employee engages in further egregious misconduct.

12 (d) Termination for legitimate business reasons.

13 (1) An employee shall not be terminated for legitimate business reasons
14 unless all of the following are satisfied:

15 (A) The termination is caused by a reduction in the employer's
16 production, sales, services, profit, or funding, or a technological or
17 organization change to the employer's operation that requires a full or partial
18 reduction of the employer's operation.

19 (B) The employees or groups of employees to be terminated are
20 identified using broadly applicable criteria that do not target or appear to target
21 individual employees.

1 (C) The legitimate business reason for the employee’s termination is
2 provided to the employee in writing at the time of the employee’s termination
3 and is supported by records retained by the employer pursuant to subsection (l)
4 of this section.

5 (2)(A) A termination shall be presumed to not be based on legitimate
6 business reasons if the employer hires another employee to perform
7 substantially the same work as the employee who is terminated within 90 days
8 before or after the termination date.

9 (B) Elimination of staff redundancy caused by a merger or
10 acquisition shall not be a legitimate business reason for termination.

11 (e) Notice of reasons for termination. Within not more than three days
12 after an employee is terminated, the employer shall provide the employee with
13 a written explanation of the specific reason for the employee’s termination.
14 The explanation shall notify the employee that the employee is entitled to
15 review all information and determinations that the employer considered in
16 making the determination to terminate the employee and shall provide
17 information regarding how the employee may access and review the
18 information and determinations.

19 (f) Employee actions that are not good cause for termination. The
20 following shall not constitute good cause to terminate an employee:

1 (1) communications by the employee to any person regarding working
2 conditions or workplace policies and practices; or

3 (2) the employee's refusal to work under conditions that the employee
4 reasonably believes would expose the employee or another person to an
5 unreasonable health or safety risk.

6 (g) Use of electronic monitoring restricted.

7 (1) An employer shall not terminate an employee based solely on
8 information gathered through electronic monitoring.

9 (2) An employer may consider information gathered through electronic
10 monitoring when determining whether to terminate an employee if the
11 information is corroborated by human oversight of the employee, including
12 supervisory or managerial observations and documentation of the employee's
13 work, personnel records, and consultations with the employee's coworkers.

14 (3)(A) An employer shall provide each affected employee with
15 reasonable notice of electronic monitoring that may gather information that
16 could be used in relation to the termination of the employee.

17 (B) Reasonable notice shall, at a minimum, describe:

18 (i) the means of electronic monitoring;

19 (ii) the purposes for which information gathered through the
20 electronic monitoring may be used; and

1 (iii) how the employee may review the information gathered
2 through the electronic monitoring and may challenge its accuracy.

3 (C) Prior notice of electronic monitoring shall not be required if:

4 (i) the employer has reasonable grounds to believe that the
5 employee is engaged in conduct that:

6 (I) is illegal;

7 (II) violates the legal rights of the employer or another
8 employee; or

9 (III) creates a hostile work environment; and

10 (ii) the electronic monitoring is reasonably likely to produce
11 evidence of the conduct.

12 (h) Severance pay required.

13 (1) Upon terminating an employee, an employer shall, in addition to
14 complying with the requirements of section 342 of this title, be required to pay
15 the employee for the employee's unused, accrued paid leave plus severance
16 pay calculated pursuant to the provisions of subdivision (2) of this subsection.

17 (2) An employee shall accrue one hour of severance pay for every 12
18 and one-half hours worked during the employee's first year of employment and
19 one hour for every 50 hours worked in subsequent years. Severance pay shall
20 be compensated at a rate that is equal to the greater of either:

1 (A) the normal hourly wage rate of the employee at the time of
2 termination; or

3 (B) the minimum wage rate for an employee pursuant to section 384
4 of this title.

5 (3) Nothing in this subsection shall be construed to diminish an
6 employer's obligation to comply with any collective bargaining agreement,
7 employment contract, or policy that provides greater severance pay or other
8 compensation to employees upon termination than is provided pursuant to this
9 subsection.

10 (i) Employee leasing companies and temporary help companies.

11 (1) When an employee is employed by an employee leasing company or
12 a temporary help company to perform work for a third-party employer, both
13 the employee leasing company or temporary help company and the third-party
14 employer shall be deemed to be the employer of the employee for purposes of
15 this section.

16 (2) Both the employee leasing company or temporary help company and
17 the third-party employer shall be required to comply with the provisions of this
18 section and shall be jointly and severally liable for any violation of the
19 provisions of this section.

1 (j) Retaliation prohibited. An employer shall not retaliate in any manner
2 against an employee who exercises or attempts to exercise the rights provided
3 by this section.

4 (1) The provisions of subdivision 495(a)(8) of this subchapter shall
5 apply to this section.

6 (2)(A) An employer shall not in any manner prevent or attempt to
7 prevent a former employee from obtaining employment with another
8 employer.

9 (B) Nothing in subdivision (A) of this subdivision (j)(2) shall be
10 construed to prevent an employer from providing a person to whom a former
11 employee has applied for employment with a truthful statement of the reason
12 the former employee was terminated.

13 (k) Notice.

14 (1) An employer shall provide to all employees within 30 days after
15 beginning employment and shall post and maintain in a conspicuous place in
16 each of its places of business a notice of the provisions of this section on a
17 form provided by the Commissioner of Labor.

18 (2) Notice shall be provided to each employee in the employee's
19 primary language. The Commissioner of labor shall translate the notice
20 created pursuant to subdivision (1) of this subsection into the five most
21 commonly spoken languages in Vermont after English.

1 (l) Record keeping.

2 (1) Employers shall retain all records documenting compliance with the
3 provisions of this section for three years following each termination of
4 employment. An employer shall make the records available for inspection by
5 the Attorney General upon request.

6 (2) An employer's failure to maintain, retain, or produce a record as
7 required by this subsection that is relevant to a material fact alleged by an
8 employee in a complaint brought pursuant to section 495b of this subchapter
9 shall create a rebuttable presumption that the alleged fact is true.

10 (m) Enforcement.

11 (1) Enforcement by Attorney General or private right of action. The
12 penalty and enforcement provision of section 495b of this subchapter shall
13 apply to this section. In addition to any penalties and other amounts that may
14 be recovered pursuant to section 495b of this title, a court may impose an
15 additional civil penalty of not more than \$5,000.00 for each violation of this
16 section, which shall be deposited into the Wrongful Termination Enforcement
17 Fund created pursuant to subsection (o) of this section.

18 (2) Public enforcement.

19 (A)(i) In addition to the enforcement provisions of section 495b of
20 this title, a relator may bring a public enforcement action seeking penalties and

1 relief on behalf of the Attorney General pursuant to subdivision (1) of this
2 subsection (m).

3 (ii) A court shall be permitted to assess the same penalties and
4 grant the same relief in a public enforcement action as in an action brought by
5 the Attorney General pursuant to subdivision (1) of this subsection (m).

6 (iii) Civil penalties assessed pursuant to a public enforcement
7 action shall be distributed as follows:

8 (I) if the Attorney General does not intervene in the action, 60
9 percent to the Attorney General and 40 percent to the relator to be distributed
10 to the employees affected by the violations; or

11 (II) if the Attorney General intervenes in the action, 70 percent
12 to the Attorney General and 30 percent to the relator to be distributed to the
13 employees affected by the violations.

14 (B)(i) A relator may bring a public enforcement action on behalf of
15 one or more current employees in relation to one or more violations of the
16 provisions of this section. A public enforcement action shall not be subject to
17 the requirements of Rule 23(a) of the Vermont Rules of Civil Procedure.

18 (ii)(I) Before commencing a public enforcement action, a relator
19 shall submit to the Attorney General a notice of the claim.

1 (II) The Attorney General shall, not later than 60 days after the
2 notice of the claim is submitted, review the claim and provide the relator with
3 notice of whether the Attorney General intends to investigate the claim.

4 (III) If the Attorney General decides not to investigate the
5 claim or fails to notify the relator within 60 days, the relator may commence a
6 public enforcement action in relation to the claim.

7 (IV) If the Attorney General decides to investigate the claim,
8 the Attorney General shall complete the investigation within not more than 120
9 calendar days. At the conclusion of the investigation, the Attorney General
10 shall notify the relator of whether or not the Attorney General intends to seek
11 remedies related to the claim pursuant to subdivision (1) of this subsection (m).

12 (V) The relator may commence a public enforcement action if
13 the Attorney General determines not to seek remedies related to the claim or
14 fails to notify the relator of the outcome of the investigation within the time
15 period set forth in subdivision (IV) of this subdivision (m)(2)(B)(ii).

16 (C)(i) A relator shall not bring a public enforcement action if the
17 Attorney General, based on the same facts alleged by the relator, is pursuing or
18 has pursued remedies pursuant to subdivision (1) of this subsection (m) or has
19 notified the relator that it intends to pursue such remedies.

1 (ii) A public enforcement action shall not be permitted in relation
2 to an alleged violation of requirements related to posting or providing notice of
3 the provisions of this section.

4 (D)(i) The Attorney General may intervene in any public
5 enforcement action:

6 (I) by right within 30 days after the action is filed; or

7 (II) more than 30 days after the action is filed in the Superior
8 Court for good cause shown, as determined by the court.

9 (ii)(I) If the Attorney General intervenes in a public enforcement
10 action, the Attorney General shall have primary responsibility for prosecuting
11 the action and shall not be bound by the actions of the relator.

12 (II) A relator shall remain a party to any action that the
13 Attorney General elects to intervene in.

14 (III)(aa) If, after intervening, the Attorney General wishes to
15 dismiss or settle the action, the Attorney General shall ensure that the relator is
16 given notice of the motion to dismiss or settle and the proposed settlement, if
17 any.

18 (bb) The court shall not grant the Attorney General's motion
19 to dismiss or approve a proposed settlement until the relator has been afforded
20 an opportunity to be heard on the motion or proposed settlement and the court
21 has determined that either granting the motion would be fair and in the public

1 interest or that the proposed settlement is fair, adequate, reasonable, and in the
2 public interest.

3 (n) Reporting.

4 (1) An employer shall, on or before February 15 of each year, submit to
5 the Attorney General an anonymized summary of the total number of
6 employees terminated by the employer and the reasons for those terminations.

7 (2) The summaries submitted pursuant to this subsection shall be
8 maintained by the Attorney General in a public database that is accessible
9 through the website for the Office of the Attorney General and is searchable by
10 employer, county, and year.

11 (o) Wrongful Termination Enforcement Fund. The Wrongful Termination
12 Enforcement Fund is established pursuant to 32 V.S.A. chapter 7, subchapter
13 5. Civil fines collected in the enforcement of this section shall be deposited
14 into the Treasury and credited to this Fund, except that necessary costs
15 incurred for the administration of the Fund shall be withheld and credited to
16 the General Fund. The Office of the Attorney General shall use the monies in
17 the Fund for the costs of enforcing the provisions of this section.

18 (p) Exception; collective bargaining agreements. The provisions of this
19 section shall not apply to employees who are covered by a valid collective
20 bargaining agreement unless the terms of the agreement expressly provide that
21 the provisions of this section shall apply to the covered employees.

1 Sec. 2. 21 V.S.A. § 495 is amended to read:

2 § 495. UNLAWFUL EMPLOYMENT PRACTICE

3 (a) It shall be unlawful employment practice, except where a bona fide
4 occupational qualification requires persons of a particular race, color, religion,
5 national origin, sex, sexual orientation, gender identity, ancestry, place of birth,
6 age, crime victim status, or physical or mental condition:

7 * * *

8 (7) For any employer, employment agency, labor organization, or
9 person seeking employees to discriminate between employees on the basis of
10 sex by paying wages to employees of one sex at a rate less than the rate paid to
11 employees of the other sex for equal work that requires equal skill, effort, and
12 responsibility and is performed under similar working conditions. An
13 employer who is paying wages in violation of this section shall not reduce the
14 wage rate of any other employee in order to comply with this subsection.

15 * * *

16 (B)(i) No employer may do any of the following:

17 (I) Require, as a condition of employment, that an employee
18 refrain from disclosing the amount of ~~his or her~~ the employee's wages or from
19 inquiring about or discussing the wages of other employees.

20 (II) Require an employee to sign a waiver or other document
21 that purports to deny the employee the right to disclose the amount of ~~his or~~

1 ~~her~~ the employee's wages or to inquire about or discuss the wages of other
2 employees.

3 * * *

4 (8) Retaliation prohibited. An employer, employment agency, or labor
5 organization shall not discharge or in any other manner discriminate against
6 any employee because the employee:

7 * * *

8 (D) has disclosed ~~his or her~~ the employee's wages or has inquired
9 about or discussed the wages of other employees; or

10 * * *

11 (b) The provisions of this section shall not be construed to ~~limit~~ alter the
12 rights of employers to discharge employees for good cause shown pursuant to
13 the provisions of section 495o of this subchapter.

14 * * *

15 (h) Nothing in this section shall require an employer to disclose the wages
16 of an employee in response to an inquiry by another employee, unless the
17 failure to do so would otherwise constitute unlawful employment
18 discrimination. Unless otherwise required by law, nothing in this section shall
19 require an employee to disclose ~~his or her~~ the employee's own wages in
20 response to an inquiry by another employee.

1 Sec. 3. EFFECTIVE DATE

2 This act shall take effect on July 1, 2023.