

New York State Legislators Propose “Wrongful Discharge” Law

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A trio of New York State Senators has proposed a [bill](#) that would create a cause of action for “wrongful discharge.” If enacted, the “Safeguarding Employees and Accountability for Termination (SEAT) Act” would be codified in a new Article 20-D of the Labor Law and take effect 90 days after being signed into law. The law would effectively do away with the notion of at-will employment within the State of New York.

The SEAT Act would allow employees to sue for “wrongful discharge.” A “discharge” is defined as a constructive discharge and any other termination of employment, which includes “resignation, elimination of the job, failure to recall or rehire and any other cutback in the number of employees for a legitimate business reason.”

A discharge would be only be considered “wrongful” under the proposed bill if:

- it is not for “good cause” and the employee has completed a “probationary period” of employment; or
- the employer materially violated an express provision of its written personnel policy prior to the discharge and the violation deprived the employee of a “fair and reasonable opportunity” to remain employed.

“Good cause” is defined as “any reasonable job-related grounds” for an employee’s discharge that is based on:

- the employee’s failure to satisfactorily perform their job duties;
- the employee’s disruption of the employer’s operations, except when engaging in concerted activity;
- the employee’s material or repeated violation of an express provision of the employer’s written policies; or
- other legitimate business reasons determined by the employer while exercising their reasonable business judgment.

As it relates to the “good cause” definitions, the proposed law states that an employer “has broad discretion when making a decision to discharge any managerial or supervisory employee.”

In connection with these fundamental changes to the law around at-will employment in New York, the new bill includes a number of completely *new* concepts for New York employers:

Probationary Period

As noted above, most discharges that occur during a probationary period would not be subject to the “good cause” requirement. For employers that do not specify the length of a probationary period prior to or at the time an employee begins work—or for those employers that make clear that there is *no* probationary period—the SEAT Act would impose a one-month probationary period beginning on the day the employee begins working. Employers are able to extend a probationary period prior to its expiration, but the law caps the total probationary period (inclusive of extensions) at six months. Employers may not extend or restart an employee’s probationary period by discharging the employee during the period and then rehiring them within three months after discharge. In addition, under the proposed law, if an employee takes any leaves of absence during their original (or extended) probationary period, such leave time will not be considered part of the probationary period *unless* the employer “affirmatively elects” to include such leave time in the probationary period with the “affirmative written consent” of the employee.

Private Right of Action

Under the SEAT Act, claims for wrongful discharge for discharges without “good cause” would be subject to a six-year statute of limitations, beginning on the date of discharge.

However, if an employer maintains certain “written internal procedures” allowing an employee to appeal a discharge within the organizational structure, the employee would need to exhaust those internal procedures prior to filing a lawsuit. An employee’s failure to initiate or exhaust such procedures could be raised by the employer as an affirmative defense. If an employer’s internal procedures are not completed within 90 days from the date an employee initiates them, the employee may proceed with filing an action. The six-year statute of limitations on SEAT Act claims is tolled until an organization’s internal procedures are exhausted.

If an employer maintains such written internal procedures, it must notify the discharged employee of the existence of the procedures “in writing or electronically” within 14 days of the employee’s discharge. The time in which an employee can initiate procedures would run from the date the employer provides such written or electronic notice. An employee would be considered to have received notice if a copy of the internal procedures is sent to the employee’s last-known postal mailing address, or to the employee’s attorney.

Remedies for a Wrongful Discharge

Under the SEAT Act, an employee who is wrongfully discharged may seek lost wages and fringe benefits, with interest, for up to four years from the employee’s date of discharge.

The employee would have a duty to mitigate damages, and any lost wages award may be reduced by the employee’s interim (*i.e.*, post-discharge) earnings, including amounts the employee could have earned with “reasonable diligence.” Any “reasonable amounts” the employee spent searching for, obtaining, or relocating for new employment would be deducted from interim earnings for purposes of a damages offset.

Any other “monetary payments, compensation or benefits” the employee received as a result of being wrongfully discharged, such as unemployment compensation and benefits, would also offset any lost wages award.

Exemptions

The following two types of discharge would be exempted under the SEAT Act:

- discharges that are subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute, including statutes that prohibit discharge for filing complaints, charges, or claims with administrative bodies, or

those that prohibit unlawful discrimination based on protected categories; and

- the discharge of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

Choice to Arbitrate

The SEAT Act would provide employers and employees the option to make a written offer to arbitrate a dispute otherwise covered under the law. If a valid offer and acceptance is made, arbitration would be the exclusive remedy and the arbitrator's award would be final and binding.

The offer to arbitrate must be in writing and must contain the following provisions:

- That a neutral arbitrator shall be selected by mutual agreement or, in the absence of agreement, pursuant to Article 75 of the New York Civil Practice Law and Rules ("CPLR");
- That the arbitration be conducted pursuant to the CPLR Article 75; and
- That the arbitrator is bound by the SEAT Act (and if a conflict exists between the SEAT Act and the CPLR, the provisions of the SEAT Act would apply).

Under the proposed law, an offer to arbitrate must be made within 60 days after service of a complaint, and may be accepted in writing within 30 days after the date the offer is made. Further, if a discharged employee who made a valid offer to arbitrate that was accepted by the employer prevails in arbitration, they are entitled to the arbitrator's fee and the employer must pay all costs associated with the arbitration. If, on the other hand, the offer from a discharged employee is rejected by the employer, and the employee prevails in the civil action, the employee is entitled to reasonable attorneys' fees incurred after the date of the offer to arbitrate.

This subdivision would not apply if the employer already has in place internal arbitration procedures that the employee may use to appeal a discharge.

The Bottom Line

This proposed bill is similar to an ordinance that New York City introduced in December that would significantly limit at-will employment (which we reported on [here](#)). The City's proposal is currently in committee, but has increased to 11 sponsors since its introduction.

The SEAT Act would be groundbreaking legislation if enacted and would have wide-ranging impact on the ability of New York employers to discharge employees. Moreover, an employer's decision to discharge would also be subject to review by a court or arbitrator. We will continue to monitor the New York State and City proposals and report on their progress.

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