

TO: Legislative Colleagues
FROM: Representatives Ohnstad & Hesselbein
Senators Erpenbach & Wirch
DATE: March 17, 2015
RE: Co-sponsor LRB-0896/2 & LRB-1995/1, relating to: wrongful discharge for employment.

Deadline: 5pm on March 26, 2015

Please join us in co-sponsoring LRB-0896/2 and LRB-1995/1, relating to wrongful discharge for employment.

Currently, Wisconsin is an at-will employment state. That means an employer can terminate an employee at any time for any reason or for no reason at all without incurring legal liability. The only instance where an employer cannot fire an employee is blatant discrimination or when the employer commits another illegal act. Employee contracts can protect employees from being fired "at will" but many employees do not enjoy this protection. Thousands of hard-working Wisconsinites remain vulnerable to termination from their employment for reasons unrelated to their actual work performance.

To protect against the increasing vulnerability of Wisconsin workers, we are introducing legislation to require a "wrongful discharge" standard for employee terminations. Under this proposal, for an employee to be discharged, a seven-part test must be satisfied, requiring: (1) fair notice; (2) prior enforcement; (3) due process; (4) substantial proof; (5) equal treatment; (6) progressive discipline; and (7) mitigating and extenuating circumstances.

Should an employee feel his or her termination does not meet this standard, this proposal provides for a one-year period from the date of discharge for the employee to bring legal action in circuit court. In such an action, the employer would bear the burden of proving the employee's discharge met the required legal standard.

Attached is a copy of the LRB for your information.

If you would like to co-sponsor this resolution, please reply to this email or call 266-0455 by 5pm on March 26, 2015.

Analysis by the Legislative Reference Bureau

Under current law, subject to certain exceptions, the employer–employee relationship is governed by the employment–at–will doctrine, under which an employer may discharge an employee "for good cause, for no cause, or even for a cause morally wrong, without being thereby guilty of a legal wrong." *Hausman v. St. Croix Care Center*, 214 Wis. 2d 655 (1997).

This bill prohibits an employer, including the state, from discharging an employee unfairly or for any wrongful reason, except that this prohibition does not apply to: 1) a discharge that the employee has chosen to contest under any other state or federal law that provides a procedure or remedy for contesting the discharge; 2) a discharge that is covered by a written collective

bargaining agreement; 3) a discharge that is covered by a written contract of employment for a specific term; or 4) a discharge of an employee who any other state or federal law specifically provides is an employee at will or is to serve at the pleasure of a public official or other appointing authority.

The bill, however, does not preclude an employer from discharging an employee for a violation of a work rule or performance standard if the procedures used to discharge the employee are fair. Under the bill, a discharge of an employee for a violation of a work rule or performance standard is unfair if any of the following applies:

1. The work rule or performance standard was not made known to the employee prior to the discharge.
2. The employer failed to enforce the work rule or performance standard in similar situations for a prolonged period.
3. The employer did not conduct an interview with the employee, or hold a hearing, concerning the violation prior to the discharge, did not conduct that interview or hearing promptly after the violation, or did not provide the employee with a precise description of the conduct constituting the violation.
4. The employer did not prove by clear and convincing evidence that the employee committed the violation.
5. The violation is the same as or substantially similar to a violation committed by another employee who was not discharged for committing the same or a substantially similar violation.
6. Unless the violation is egregious, the employer failed to first apply a less drastic form of discipline for the violation.
7. The discharge is disproportionate to the gravity of the violation, taking into consideration any mitigating or aggravating circumstances.

Also, under the bill, a discharge is for a wrongful reason if: 1) the discharge was in retaliation for the employee's refusal to violate a public policy or reporting a violation of a public policy; 2) the employer violated the express provisions of its own written personnel policy; or 3) except during an employee's probationary period, the discharge was not for good cause, which is defined in the bill as reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or any other legitimate business reason.

The bill permits an employee to bring an action in circuit court alleging a wrongful discharge committed by an employer in violation of the bill within one year after the date of the discharge and provides that in any such action the employer has the burden of proving by clear and convincing evidence that the employee was discharged fairly and not for a wrongful reason. If the court finds that an employer has committed a wrongful discharge, the court may award the employee lost wages and lost fringe benefits for a period not to exceed four years from the date of discharge, together with interest, costs, and attorney fees, less earnings that the employee earned or with reasonable diligence could have earned during the interim.

The court may also order such other action, for example reinstatement, as will effectuate the purpose of the bill and, if the court finds that the employer acted maliciously or in intentional disregard of the employee's rights, may order punitive damages based on the amount of lost wages and lost fringe benefits awarded.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.