

MAINE STATE LEGISLATURE

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116th MAINE LEGISLATURE

FIRST REGULAR SESSION-1993

Legislative Document

No. 701

S.P. 230

In Senate, February 25, 1993

An Act to Require Good Cause for Employment Termination.

Reference to the Committee on Labor suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator LUTHER of Oxford.
Cosponsored by Representative TRACY of Rome and
Senator: DUTREMBLE of York, Representatives: GRAY of Sedgwick, HEESCHEN of Wilton,
JOSEPH of Waterville, PINEAU of Jay.

2 Be it enacted by the People of the State of Maine as follows:

4 Sec. 1. 26 MRSA c. 8 is enacted to read:

6 CHAPTER 8

8 EMPLOYMENT TERMINATION

10 §872. Short title

12 This chapter may be known and cited as "The Employment Termination Act of 1993."

14 §873. Definitions

16 As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

18 1. Board. "Board" means the Maine Labor Relations Board described in section 968, subsection 1.

22 2. Employee. "Employee" means a person who performs a service for wages or other remuneration under a contract of hire, express or implied, and includes an individual employed in a supervisory, managerial or confidential position but does not include an independent contractor.

28 2. Employer. "Employer" means a person who employs 5 or more individuals for each working day in each of 20 or more calendar weeks in the 2-year period immediately preceding a termination or an employer's filing of a complaint pursuant to section 876. A parent, spouse, child or other member of the employer's immediate family or of the immediate family of an individual having a controlling interest may not be counted as an employed individual for the purposes of this subsection.

36 3. Fringe benefit. "Fringe benefit" means vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, pension benefit plan or other benefit of economic value to the extent it is paid for by the employer.

42 4. Good cause. "Good cause" means:

44 A. A reasonable basis for termination of an employee's employment related to that employee in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance and employment record; or

2 B. The exercise of business judgment in good faith by the
4 employer, including setting economic or institutional goals
6 and determining methods to achieve those goals; organizing
8 or reorganizing operations; discontinuing, consolidating, or
divesting operations or positions or parts of operations or
positions; determining the size of the work force and the
nature of the positions filled by that work force; and
determining and changing standards of performance for
positions.

10 5. Good faith. "Good faith" means honesty in fact.

12
14 6. Pay. "Pay" as a noun means hourly wages or periodic
16 salary, including tips, regularly paid and nondiscretionary
commissions and bonuses and regularly paid overtime, but does not
include fringe benefits.

18 7. Person. "Person" means an individual, partnership,
20 corporation, business or other legal or commercial entity.

22 8. Termination. "Termination" means:

24 A. A dismissal of an employee by an employer, including
dismissal resulting from elimination of a position;

26 B. A layoff or suspension of an employee by an employer for
28 more than 2 consecutive months; or

30 C. A quit or retirement by an employee induced by an act or
32 omission of the employer that is so intolerable that under
34 the circumstances a reasonable individual would quit or
retire, but only if the employee gives notice to the
employer of the act or omission before quitting and does not
receive appropriate relief from the employer.

36 §874. Prohibited terminations

38 A termination of employment must conform with the
40 requirements of this section.

42 1. Good cause required. An employer may not terminate the
44 employment of an employee without good cause unless otherwise
provided in an agreement pursuant to section 875.

46 2. Employees covered. Subsection 1 applies only to an
48 employee who has been employed by the same employer for a total
50 period of one year or more and has worked for the employer for at
least 520 hours during the 26 weeks immediately preceding the
termination. A layoff or other break in service is not counted
in determining whether an employee's period of employment totals

2 one year, but the employee is considered to be employed during
4 paid vacations and other authorized leaves. The 26-week period
6 does not include any week during which the employee was absent
8 because of layoffs of one year or less, paid vacations,
authorized leaves or labor disputes. If an employee is rehired
after a break in service exceeding one year, not counting
absences due to labor disputes or authorized leaves, the employee
is considered to be newly hired.

10 3. Additional rights. A termination of employment must
12 also be in accordance with any additional rights agreed to or
granted by the employer.

14 A. An employer may provide substantive and procedural
16 rights in addition to those provided in this chapter, either
18 to one or more specific employees by express oral or written
20 agreement or to employees generally by a written personnel
22 policy or statement, and may provide that those rights are
24 enforceable under this chapter.

26 B. An employing person and an employee not otherwise
28 subject to this chapter may become subject to its provisions
30 to the extent provided by express written agreement, in
32 which case the employing person is deemed to be an employer.

34 C. An employer and an employee may provide by express
36 written agreement that the employee's failure to meet
38 specified business-related standards of performance or the
40 employee's commission or omission of specified
42 business-related acts constitutes good cause for termination
44 in proceedings under this chapter. Those standards or
46 prohibitions are effective only if they have been
48 consistently enforced and they have not been applied to the
50 employee in a disparate manner without justification. If
the agreement authorizes changes by the employer in the
standards or prohibitions, the changes must be clearly
communicated to the employee.

§875. Exceptions

40 A right of an employee under this chapter may not be waived
42 except as provided in this section.

44 1. Severance pay. An employer and an employee may mutually
46 waive the requirement of good cause for termination by express
48 written agreement if the employer agrees to provide severance pay
50 upon the termination of the employee for any reason other than
willful misconduct of the employee. The amount of severance pay
provided must equal at least one month's pay for each period of
employment totaling one year, up to a maximum total payment equal

2 to 30 months' pay at the employee's rate of pay in effect
4 immediately before the termination. The employer shall make the
6 payment in a lump sum or in a series of monthly installments,
8 none of which may be less than one month's pay plus interest on
10 the principal balance. The lump-sum payment must be made or
12 payment of the monthly installments must begin within 30 days
14 after the employee's termination. An agreement under this
16 subsection constitutes a waiver by the employer and the employee
18 of the right to civil trial, including jury trial, concerning
20 disputes over the nature of the termination and the employee's
22 entitlement to severance pay and constitutes a stipulation by the
24 parties that those disputes are subject to the procedures and
26 remedies in this chapter.

28 2. **Employment for a specified duration.** The requirement of
30 good cause for termination does not apply to the termination of
32 an employee at the expiration of an express oral or written
34 agreement of employment for a specified duration related to the
36 completion of a specified task, project, undertaking or
38 assignment. If the employment continues after the expiration of
40 the agreement, section 874 applies to its termination unless the
42 parties enter into a new express oral or written agreement under
44 this subsection. The period of employment under an agreement
46 described in this subsection counts toward the minimum periods of
48 employment required by section 874, subsection 2.

§876. Procedure

28 The following procedures apply to issues arising under this
30 chapter.

32 1. **Employee complaint.** An employee whose employment is
34 terminated may file with the board a complaint and demand for
36 arbitration no later than 180 days after the effective date of
38 the termination, the date of the breach of an agreement for
40 severance pay under section 875, subsection 1, or the date the
42 employee learns or should have learned of the facts forming the
44 basis of the claim, whichever is latest. The time for filing is
46 suspended while the employee is pursuing the employer's internal
48 remedies and until the employee has been notified in writing by
the employer that the internal procedures have been concluded.
Resort to an employer's internal procedures is not a condition
for filing a complaint.

28 2. **Employer complaint.** An employer may file a complaint
30 and demand for arbitration with the board to determine whether
32 there is good cause for the termination of a named employee. At
34 least 15 business days before filing, the employer shall mail or
36 deliver to the employee a written statement of the employer's

2 intention to file and the factors alleged to constitute good
3 cause for termination.

4 3. Filing fee. The employee or employer filing a complaint
5 shall pay a filing fee to the board in the amount of the filing
6 fee for a civil action in Superior Court. The board may waive or
7 defer payment of the filing fee by the employee upon a showing of
8 the employee's indigency.

10 4. Notice to the responding party. The board shall
11 promptly mail or deliver to the respondent a copy of the
12 complaint and demand for arbitration. Within 21 days after
13 receipt of a complaint, the responding party must file an answer
14 with the board and mail a copy of the answer to the complainant.
15 The answer of an employer must include a copy of the statement of
16 the reasons for the termination furnished to the employee.

18 5. Arbitration proceedings. The Uniform Arbitration Act,
19 Title 14, chapter 706 applies to proceedings under this chapter
20 as if the parties had agreed to arbitrate under that statute.
21 The parties may agree to use a different procedure in accordance
22 with this subsection. The substantive provisions of this chapter
23 apply regardless of which dispute resolution procedure is used.

24
25 A. An employer and an employee may agree to private
26 arbitration or another alternative dispute-resolution
27 procedure by express written agreement before or after a
28 dispute or claim arises under this chapter.

30 B. An employer and an employee may agree to judicial
31 resolution of the dispute or claim by express written
32 agreement after a dispute or claim arises under this chapter.

34 6. Rules. The board shall adopt procedural rules in
35 accordance with Title 5, chapter 375, subchapter II to regulate
36 arbitration under this chapter including rules on the
37 qualifications, method of selection and appointment of
38 arbitrators.

40 7. Burden of proof. A complainant employee has the burden
41 of proving that a termination was without good cause or that an
42 employer breached an agreement for severance pay under section
43 875, subsection 1. A complainant employer has the burden of
44 proving that there is good cause for a termination. If an
45 employee establishes that a termination was motivated in part by
46 impermissible grounds, to avoid liability the employer must
47 establish by a preponderance of the evidence that the employer
48 would have terminated the employment even in the absence of the
49 impermissible grounds.

2 8. Presentation of case. In all arbitrations, the employer
shall present its case first unless the employee alleges that a
4 quit or retirement was a termination within the meaning of
section 873, subsection 8, paragraph C.

6 §877. Awards; judicial review and enforcement

8 The following provisions apply to decisions of the
arbitrator.

10 1. Timing of award. Within 30 days after the close of an
12 arbitration hearing or at a later time agreeable to the parties,
the arbitrator shall mail or deliver to the parties a written
14 award sustaining or dismissing the complaint, in whole or in
part, and specifying appropriate remedies.

16 2. Award for violation. An arbitrator who determines that
18 a termination is a violation of this chapter may make one or more
of the following awards:

20 A. Reinstatement to the position of employment the employee
22 held when employment was terminated or, if that is
impractical, reinstatement to a comparable position of
24 employment;

26 B. Full or partial back pay and reimbursement for lost
28 fringe benefits, plus interest, reduced by interim earnings
and benefits received from employment elsewhere, and amounts
30 that could have been received with reasonable diligence;

32 C. If reinstatement is not awarded, a lump-sum severance
34 payment at the employee's rate of pay in effect before the
termination, for the period from the date of termination to
36 the date of the arbitrator's decision and reimbursement for
fringe benefits lost during that period, plus interest,
38 reduced by interim earnings and benefits received from
employment elsewhere and amounts that could have been
received with reasonable diligence; and

40 D. Reasonable attorney's fees and costs.

42 3. Award for violation of severance pay agreement. An
44 arbitrator may make either or both of the following awards for a
violation of an agreement for severance pay made under section
46 875, subsection 1:

48 A. Enforcement of the severance pay and other applicable
provisions of the agreement, with interest; and

50 B. Reasonable attorney's fees and costs.

2 4. Other awards. If an arbitrator dismisses an employee's
4 complaint and finds it frivolous, unreasonable or without
6 foundation, the arbitrator may award reasonable attorney's fees
8 and costs to the employer. An arbitrator may sustain an
 employer's complaint and make an award declaring good cause for
 the termination of a named employee. If the arbitrator dismisses
 the employer's complaint, the arbitrator may award reasonable
 attorney's fees and costs to the employee.

10
12 5. Limitation on awards. An arbitrator may not make an
14 award except as provided in this section. The arbitrator may not
16 award damages for pain and suffering, emotional distress,
18 defamation, fraud or other injury under the common law; punitive
20 damages; compensatory damages; or any other monetary award. In
 making a monetary award under this section, the arbitrator shall
 reduce the award by the amount of any monetary award to the
 employee in another forum for the same conduct of the employer.
 In making an award, the arbitrator is subject to the rules of
 issue, fact and judgment preclusion applicable in courts of
 record in this State.

22
24 6. Judicial review and enforcement. Either party to an
26 arbitration may seek vacation, modification or enforcement of the
 arbitrator's award as provided in the Uniform Arbitration Act,
 Title 14, chapter 706, except that:

28 A. The motion must be made in the Superior Court for the
30 county where the termination occurred or where the employee
 resides; and

32 B. The court may award a prevailing employee reasonable
34 attorney's fees and costs. In an application by an employee
36 for vacation of an arbitrator's award, the court may award a
 prevailing employer reasonable attorney's fees and costs if
 the court finds the employee's application is frivolous,
 unreasonable or without foundation.

38 §878. Notification to employee

40 An employer must notify employees of this chapter in
42 accordance with this section.

44 1. Posted notice. An employer shall post a copy of the
46 Employment Termination Act of 1993 or a summary approved by the
48 board in a prominent place in the work area. An employer who
 violates this section commits a civil violation and is subject to
 a forfeiture of not less than \$50 nor more than \$200. The
 Attorney General may bring a civil action on behalf of the

2 State to impose and collect any forfeiture arising under this
3 subsection.

4 2. Delivered notice. Except when an employee quits or
5 retires, an employer shall mail or deliver to the terminated
6 employee, within 10 business days after a termination, a written
7 statement of the reasons for the termination and a copy of this
8 chapter or a summary provided by the board.

10 §879. Retaliation prohibited; civil action created

12 An employer or other employing person may not directly or
13 indirectly take adverse action in retaliation against an
14 individual for filing a complaint, giving testimony or otherwise
15 lawfully participating in proceedings under this chapter, whether
16 or not that individual is an employee having rights under this
17 chapter. An employer or other employing person who violates this
18 section is liable to the individual subjected to the retaliation
19 for damage caused by the action, punitive damages when
20 appropriate, and reasonable attorney's fees. A separate civil
21 action may be brought to enforce this liability. The employer is
22 also subject to applicable procedures and remedies provided by
23 sections 876 and 877.

24 §880. Application; other rights

26 The Employment Termination Act of 1993 applies to a
27 termination that occurs after the effective date of this Act but
28 does not apply to a termination at the expiration of an express
29 oral or written agreement of employment for a specified duration
30 if that agreement was in effect on the effective date of this Act.

32 1. Common law rights. Except as provided in subsection 2,
33 this Act displaces and extinguishes all common law rights and
34 claims of a terminated employee against the employer, its
35 officers, directors and employees that are based on the
36 termination or on acts taken or statements made that are
37 necessary to initiate or effect the termination if the employee's
38 termination requires good cause under section 874, is subject to
39 a severance pay agreement made pursuant to section 875,
40 subsection 1 or is permitted by the expiration of an agreement
41 for a specified duration made pursuant to section 875, subsection
42 2. An employee whose termination is not subject to those
43 sections retains all common law rights and claims.

44 2. Statutory and contractual rights. This Act does not
45 displace or extinguish rights or claims of a terminated employee
46 against an employer arising under state or federal laws or
47 administrative rules having the force of law, a collective
48 bargaining agreement between an employer and a labor organization
49 or a collective bargaining agreement between an employer and a labor organization
50 that is in effect on the effective date of this Act.

2 or an express oral or written agreement related to employment
3 that does not violate this Act. Those rights and claims may not
4 be asserted under this Act, except as otherwise provided. The
5 existence or adjudication of those rights or claims does not
6 limit the employee's rights or claims under this Act, except as
7 stated in section 877, subsection 5.

8 3. Duty of good faith. An agreement between an employer
9 and an employee entered into under this Act imposes a duty of
10 good faith in its formation, performance and enforcement.

12 STATEMENT OF FACT

13
14
15 This bill is based on the Model Employment Termination Act
16 drafted by the National Conference of Commissioners of Uniform
17 State Laws. This bill attempts to reach a compromise between
18 employees' interests in job security and employers' interests in
19 avoiding potentially large damages resulting from wrongful
20 discharge suits.

21 The bill requires good cause for the termination of an
22 employee who worked for the employer for at least one year. Good
23 cause is defined in the bill to include the employee's job
24 performance and legitimate business decisions made by an
25 employer. The requirement of good cause does not apply if the
26 employee contracted to work for a specific duration or the
27 employer agreed to provide severance pay equal to one month's pay
28 for every year of service.

29 The bill provides for all disputes concerning employment
30 terminations to be submitted to binding arbitration. If the
31 arbitrator decides that a violation has occurred, the arbitrator
32 may award reinstatement and back pay or severance pay, and
33 attorney's fees and costs. If the arbitrator finds that the
34 employee's complaint was frivolous, attorney's fees and costs may
35 be awarded to the employer. The arbitrator's decision is subject
36 to judicial review in accordance with the Uniform Arbitration
37 Act, Title 14, chapter 706.