HOUSE DOCKET, NO. 974 FILED ON: 1/17/2023

HOUSE . . . . . No. 3597

The Commonwealth of Massachusetts

PRESENTED BY:

David Henry Argosky LeBoeuf

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to guarantee just cause job security.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
David Henry Argosky LeBoeuf	*17th Worcester*	*1/17/2023*

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By Representative LeBoeuf of Worcester, a petition (accompanied by bill, House, No. 3597) of David Henry Argosky LeBoeuf relative to protecting employees from discharges from employment except for just cause. Labor and Workforce Development.

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Third General Court
(2023-2024)

An Act to guarantee just cause job security.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 1 of chapter 149 of the General Laws, as appearing in the 2020 Official Edition, is hereby amended by striking out, in lines 32 and 40, each time it appears, the word “shall” and inserting in place thereof, in each instance, the following words:- and section 105E shall.

SECTION 2. Said chapter 149 is hereby further amended by inserting after section 105D the following section:-

Section 105E. (a) As used in this section the following words, unless a different meaning is required by the context or is specifically prescribed, shall have the following meanings:

“Biometric data”, a physiological, biological or behavioral characteristic, including but not limited to an iris scan, fingerprint, a hand scan, voiceprint and thermal or facial characteristics that can be used alone or in combination with each other, or with other information, to establish individual identity.

"Biometric technology" either or both of the following: (i) a process or system that captures biometric data of an individual or individuals; (ii) a process or system that can assist in verifying or identifying an individual or individuals based on biometric data.

"Bona fide economic reason" the full or partial closing of operations or technological or organizational changes to the business in response to a reduction in volume of production, sales or profit of 15 per cent or more over a period of 2 quarters either at the establishment where the discharge is to occur or across all establishments owned by the employer in within the commonwealth, but shall not include elimination of staff redundancy created by a merger or acquisition.

"Bona fide labor organization" a labor union (i) in which officers have been elected by secret ballot or otherwise in a manner consistent with federal law; and (ii) that is free of domination or interference by any employer and has received no improper assistance or support from any employer.

"Designated community group" a not-for-profit organization or bona fide labor organization that has the capacity to conduct worker outreach, engagement, education and information provision, as determined by the commissioner.

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

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

"Employee work speed data" information an employer collects, stores, analyzes or interprets relating to an individual employee's or group of employees' pace of work, including, but not limited to, quantities of tasks performed, quantities of items or materials handled or produced, rates or speeds of tasks performed, measurements or metrics of employee performance in relation to a quota and time categorized as performing tasks or not performing tasks. Notwithstanding the preceding sentence, it does not include qualitative performance assessments, personnel records or itemized wage statements, except for any content of those records that includes employee work speed data.

"Employer" shall have the meaning ascribed to it by section 1 except that where an employee is employed by a staffing services agency to perform work for a third party client within the third party client's usual course of business, both the staffing services agency and the third party client shall be jointly and severally responsible for compliance with the requirements of this subchapter.

"Geofencing technologies" the use of global positioning system or radio frequency identification technology to create a virtual geographic boundary, enabling software to trigger a response when a device enters or leaves a particular area.

"Just cause" the employee's failure to satisfactorily perform job duties or to misconduct that is demonstrably and materially harmful to the employer's legitimate business interests.

"Probation period" a defined period of time, not to exceed 30 days from the first date of work of an employee, within which employers and employees are not subject to the prohibition on wrongful discharge set forth in this section.

"Progressive discipline" a disciplinary system that provides for a graduated range of reasonable responses to an employee's failure to satisfactorily perform such employee's job duties, with the disciplinary measures ranging from mild to severe, depending on the frequency and degree of the failure.

"Reduction in hours" a reduction in an employee's hours of work totaling at least 15 per cent of the employee's regular schedule or 15 per cent of any weekly work schedule.

"Seniority" a ranking of employees based on length of service, computed from the first date of work, including any probationary period, unless such service has been interrupted by more than 6 months, in which case length of service shall be computed from the date that service resumed. An absence shall not be deemed an interruption of service if such absence was the result of military service, illness, educational leave, leave protected or afforded by law, or any discharge based on a bona fide economic reason or that is in violation of any local, state or federal law, including this section.

"Short-term position" 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.

"Short-term educational position" employment with a specific educational purpose, pursuant to written contract that specifies that the position is to end after a specified period of time, not to exceed 3 years, where the employer can show that the position in question is expected to end.

"Staffing services agency" any employer engaged in the business of contracting employees to provide services, for a fee, to or for any third party client.

"Third party client" any person that contracts with a staffing services agency for obtaining employees.

(b) An employer shall not discharge an employee who has completed such employer's probation period except for just cause or a bona fide economic reason.

(c) In determining whether an employee has been discharged for just cause, the fact-finder shall consider, in addition to any other relevant factors, whether:

1. The employee knew or should have known of the employer's policy, rule, practice or performance standard that is the basis for progressive discipline or discharge;

2. The employer provided relevant and adequate training to the employee;

3. The employer's policy, rule, practice or performance standard, including the utilization of progressive discipline, was reasonable and applied consistently;

4. The employer impermissibly relied on electronic monitoring;

5. The employer disciplined or discharged the employee based on that employee's individual performance, irrespective of the performance of other employees;

6. The employer undertook a fair and objective investigation into the job performance or misconduct; and

7.The employee violated the policy, rule or practice, failed to meet the performance standard or committed the misconduct that is the basis for progressive discipline or discharge.

(d) Except where termination is for an egregious failure by the employee to perform their duties, or for egregious misconduct, a termination shall not be considered based on just cause

unless (1) the employer has utilized progressive discipline; provided, however, that the employer may not rely on discipline issued more than one year before the purported just cause termination, and (2) the employer had a written policy on progressive discipline in effect at the workplace or job site and that was provided to the employee. Except where termination is for an egregious failure by the employee to perform their duties, or for egregious misconduct, an employer shall provide 14 days' notice of any discharge for just cause or bona fide economic reason. Within 5 days of such notice, the employer shall provide a written explanation to the employee of the precise reasons for their discharge including a copy of any materials, personnel records, data or assessments that the employer used to make the discharge decision. If the employer is relying on data collected through electronic monitoring to make the discharge decision, the employer shall also provide any aggregated data collected on employees performing the same or similar functions at the same establishment for the 6 months prior to the discharge in question. In determining whether an employer had just cause for discharge, the fact-finder may not consider any reasons proffered by the employer but not included in such written explanation provided to the employee. Where an employer fails to timely provide a written explanation to an employee, the discharge shall not be deemed to be based on just cause.

(e) The employer shall bear the burden of proving just cause or a bona fide economic reason by a preponderance of the evidence in any proceeding brought pursuant to this subchapter, subject to the rules of evidence as set forth in the civil practice law and rules or, where applicable, the common law.

(f) In any action or proceeding brought pursuant to this section, if an employer is found to have unlawfully discharged an employee in violation of this section the relief shall include an order to reinstate or restore the hours of the employee, unless waived by the employee, and, in

any such proceeding where an employer is found to have unlawfully discharged an employee in violation of this section, the employer shall be ordered to pay the reasonable attorneys' fees and costs of the employee.

(g) A discharge shall not be considered based on a bona fide economic reason unless supported by an employer's business records showing that the closing, or technological or reorganizational changes are in response to a reduction in volume of production, sales or profit.

(h) Discharges of fast food employees based on bona fide economic reason shall be conducted in reverse order of seniority in the fast food establishment where the discharge is to occur, so that employees with the greatest seniority shall be retained the longest and reinstated or restored hours first. In accordance with this section, an employer shall make reasonable efforts to offer reinstatement or restoration of hours, as applicable, to any employee discharged based on a bona fide economic reason within the previous twelve months, if any, before the employer may offer or distribute shifts to other employees or hire any new employees. In accordance with this section, an employer shall make reasonable efforts to offer reinstatement or restoration of hours, as applicable, to any employee discharged based on a bona fide economic reason within the previous 12 months, if any, before the employer may offer or distribute shifts to other employees or hire any new employees.

(i) Employers may not rely on data collected through electronic monitoring in discharging or disciplining an employee unless the employer can establish before each use that (i) there is no other practical means of tracking or assessing employee performance; (ii) the employer is using the least invasive form of electronic monitoring available; and (iii) the employer previously provided notice to the employee of that monitoring as required by this

section. Employers cannot establish the practical necessity for electronic monitoring without previously filing with the department an impartial evaluation from an independent auditor that said electronic monitoring is effective in undertaking its designated task. Employers who have established practical necessity for using data from electronic monitoring for tracking and assessing employee performance may not rely solely on such data but must also use other means of assessment such as manager observation or interviewing clients, customers or other employees to solicit feedback. Employers may use data gathered through electronic monitoring:

1. To record the beginning or end of a work shift, meal break or rest break;

2. For non-employment-related purposes;

3. To discharge or discipline an employee in cases of egregious misconduct or involving threats to the health or safety of other persons; or

4. Where required by state or federal law.

Employers may not use data for discipline or discharge if such data is gathered using biometric technologies, video or audio recordings within the private home of an employee, apps or software installed on personal devices or geofencing technologies.

When discharging or disciplining employees, employers may rely on electronic employee work speed data to determine whether an employee has met a quota, so long as it measures total output over an increment of time that is no shorter than one day.

Employers may not discipline or discharge an employee based on failure to meet a daily quota if the employee did not complete their entire shift.

Employers using electronic monitoring to measure increments of time within a day during which an employee is or is not meeting performance standards may not record or rely on such data in discharging

or disciplining an employee unless it is gathered during a periodic performance review and so long as the employee subject to the performance review has been given at least seven days advance notice of the exact timing of such review.

Such reviews can occur not more than once a quarter and can occur for a duration of time not longer than 3 hours.

An employer or agent thereof that is planning to electronically monitor an employee for the purposes of discipline or discharge shall provide the employee with notice that electronic monitoring will occur prior to conducting each specific form of electronic monitoring. Notice shall include, at a minimum, the following elements:

1. Whether the data gathered through electronic monitoring will be used to make or inform disciplinary or discharge decisions, and if so, the nature of that decision, including any associated benchmarks or performance standards;

2. Whether the data gathered through electronic monitoring will be used to assess employees' productivity performance or to set productivity standards, and if so, how;

3. The names of any vendors conducting electronic monitoring on the employer's behalf;

4. A description of the dates, times, and frequency that electronic monitoring will occur;

5. An explanation for why there is no other practical means of tracking or assessing employee performance and how the specific monitoring practice is the least invasive means available;

6. Notice of the employees' right to access or correct the data; and

7. Notice of the administrative and judicial mechanisms available to challenge the use of electronic monitoring.

Notice of the specific form of electronic monitoring shall be clear and conspicuous. A notice that states electronic monitoring "may" take place or that the employer "reserves the right" to monitor shall not be considered clear and conspicuous.

An employer who engages in periodic electronic monitoring of employees for the purposes of discipline or discharge shall inform the affected employees of the specific events which are being monitored at the time the monitoring takes place.

Notice of periodic electronic monitoring may be given after electronic monitoring has occurred only if necessary to preserve the integrity of an investigation of illegal activity or protect the immediate safety of employees, customers or the public.

An employer shall provide additional notice to employees when an update or change is made to the electronic monitoring or in how the employer is using it.

Employers shall provide a copy of the disclosures required by this section to the department at the time they are required to be disseminated to employees.

(j) An employer shall ensure that any data collected through electronic monitoring that may be used for the purposes of discipline or discharge is accurate and, where relevant, kept up to date.

A current employee shall have the right to request a copy of employee work speed data that may be used for the purposes of discipline and termination at least once every seven days.

Employers using electronic monitoring to collect employee work speed data for the purposes of discipline or discharge must provide employees the opportunity to supplement that data to record any increments of time during which they are not performing work-related tasks and to record the reason that they are not performing work-related tasks during that time. Such opportunity must be made available to employees both at the time of data collection and after.

Employers must give employees the option to record reasons for not performing tasks that include, at a minimum, the following: using the bathroom, taking meal breaks, responding to an emergency, injury, illness, fear of injury, disability, complying with local, state or federal laws or exercising workplace rights under local, state or federal laws.

Employers using electronic monitoring to collect employee work speed data for the purposes of discipline or discharge must provide employees with the opportunity to review and request correction of such data both at the time of its collection and after. An employer that receives an employee request to correct inaccurate data that collected through electronic monitoring shall investigate and determine whether such data is inaccurate.

If an employer, upon investigation, determines that such data is inaccurate, the employer shall:

(i) Promptly correct the inaccurate data and inform the employee of the employer's decision and action.

(ii) Review and adjust, as appropriate, any disciplinary or discharge decisions that were partially or solely based on the inaccurate data and inform the employee of the adjustment.

(iii) Inform any third parties with which the employer shared the inaccurate data, or from which the employer received the inaccurate data, and direct them to correct it, and provide the employee with a copy of such action.

If an employer, upon investigation, determines that the data is accurate, the employer shall inform the employee of the following:

(i) The decision not to amend the data.

(ii) The steps taken to verify the accuracy of the data and the evidence supporting the decision not to amend the data.

(k) On or after January 1, 2022, any person or organization representing persons alleging a violation of this subchapter by an employer may bring an arbitration proceeding. In addition, the department may, to the extent permitted by any applicable law including the civil practice law and rules, provide by rule for persons bringing such a proceeding to serve as a representative party on behalf of all members of a class. Such a proceeding must be brought within 2 years of the date of the alleged violation. If the arbitrator finds that the employer violated the provisions of this subchapter, it shall (i) require the [fast food] employer to pay the reasonable attorneys' fees and costs of the employee, (ii) require the employer to reinstate or restore the hours of the fast food employee, unless the employee waives reinstatement, (iii) require the employer to pay

the city for the costs of the arbitration proceeding, and (iv) award all other appropriate equitable relief, which may include back pay, rescission of discipline, in addition to other relief, and such other compensatory damages or injunctive relief as may be appropriate.

A person or organization bringing an arbitration proceeding under subdivision a must serve the arbitration demand, and any amendments thereto, on the employer either in person or via certified mail at the current or most recent workplace or job site where each employee named in the arbitration demand is or was employed, or pursuant to the rules of civil procedure. Such arbitration demand must include a general description of each alleged violation but need not reference the precise section alleged to have been violated.

The parties to an arbitration proceeding shall jointly select the arbitrator from a panel of arbitrators. The number of arbitrators on the panel shall be determined by the department. The arbitrators on the panel shall be chosen by a committee of eight participants established by the department and comprised of:

1. Four employee-side representatives, including employees or advocates; and

2. Four employer-side representatives, including employers or advocates.

If an insufficient number of employee-side and employer-side representatives agree to participate in the committee pursuant to this section, the department shall consult with those that have agreed to participate and select individuals to fill the requisite number of openings on the committee.

If the committee established pursuant to this section is unable to select a sufficient number of arbitrators for the panel as determined by the department, the department shall select

the remaining arbitrators. If the parties are unable to agree on an arbitrator, the department shall select an arbitrator from the panel. The department shall provide interpretation services to any party requiring such services for the arbitration hearing.

The arbitration hearing shall be held at a location designated by the department or a location agreed to by the parties and the arbitrator. Except as otherwise provided in this chapter, such arbitration shall be subject to the labor arbitration rules established by the American Arbitration Association and the rules promulgated by the department to implement this section. In case of a conflict between the rules of the American Arbitration Association and the rules of the department, the rules of the department shall govern. Any rules promulgated by the department implementing this section shall be consistent with the requirement that in any arbitration conducted pursuant to this section, the arbitrator shall have appropriate qualifications and maintain personal objectivity, and each party shall have the right to present its case, which shall include the right to be in attendance during any presentation made by the other party and the opportunity to rebut or refute such presentation.

If an employee brings an arbitration proceeding, arbitration shall be the exclusive remedy for the wrongful discharge dispute and there shall be no right to bring or continue a private cause of action or administrative complaint under this subchapter, unless such arbitration proceeding has been withdrawn or dismissed without prejudice.

Each party shall have the right to apply to a court of competent jurisdiction for the confirmation, modification or vacatur of an award, pursuant to applicable case law, to review of legally mandated arbitration proceedings in accordance with standards of due process.

(l) A discharged fast food employee who loses a shift on a work schedule as a result of discharge, including employees whose employment is terminated for any reason, shall be entitled to schedule change premiums for each such lost shift pursuant to this section.

(m) This section shall not apply to any employee:

1. Who is currently employed within a probation period;

2. In a short-term position discharged at the end of the contract of employment provided that the employer does not hire another employee to perform similar work for 180 days after the end of the short-term contract or in a short-term educational position at the end of the contract of employment;

3. Who is employed in the construction industry; or

4. Who is covered by a valid collective bargaining agreement if such agreement (a) expressly waives the provisions of this subchapter and (b) provides comparable terms and conditions for the discharge or laying off of employees, including, but not limited to, provisions to challenge the justification for a discharge or layoff.

Limit or otherwise affect the applicability of any right or benefit conferred upon or afforded to an employee by the provisions of any other law, regulation, rule, requirement, policy or standard including but not limited to any federal, state or local law providing for protections against retaliation or discrimination.

(m) Any person, including any organization, alleging a violation of this section may bring a civil action, in accordance with applicable law, in any court of competent jurisdiction.

Such court may, in the case of a public enforcement action, order payment of the civil penalties, and in any action may order compensatory, injunctive and declaratory relief, including the following remedies for violations of this chapter:

1. Payment of schedule change premiums withheld;

2. An order directing compliance with the recordkeeping, information, posting and consent requirements;

3. Rescission of any discipline issued;

4. Reinstatement of any employee terminated;

5. Payment of back pay for any loss of pay or benefits resulting from discipline or other action taken;

6. An order directing compliance with the requirements of this section;

7. Other compensatory damages and any other relief required to make the employee whole; and

8. Reasonable attorney's fees.

For each violation of this section, the court shall order reinstatement or restoration of hours of the employee, unless waived by the employee, and shall order the employer to pay the reasonable attorneys' fees and costs of the employee. The court may, in addition, grant the following relief: $500 for each violation, an order directing compliance with this section, rescission of any discipline issued, payment of back pay for any loss of pay or benefits resulting

from the wrongful discharge, punitive damages, and any other equitable relief as may be appropriate.

(n) A civil action under this section shall be commenced within 2 years of the date the person knew or should have known of the alleged violation.

(o) Except where the action seeks the imposition of civil penalties, any person filing a civil action shall simultaneously serve notice of such action and a copy of the complaint upon the department. Failure to serve a notice does not adversely affect any plaintiff's cause of action.

An employee need not file a complaint with the department; however, no person shall file a civil action after filing a complaint with the department unless such complaint has been withdrawn or dismissed without prejudice to further action.

No person shall file a complaint with the department after filing a civil action unless such action has been withdrawn or dismissed without prejudice to further action.

The commencement or pendency of a civil action by an employee does not preclude the department from investigating the employer or commencing, prosecuting or settling a case against the employer based on some or all of the same violations.

Notwithstanding the foregoing subdivisions, the comptroller or any current or former employer may initiate a public enforcement action seeking to recover civil penalties and injunctive and declaratory relief as a relator on behalf of the department for a violation affecting current or former employees by giving written notice to the department, in such manner as the department may prescribe by rule, of the provisions of this title alleged to have been violated, including the facts and theories to support the alleged violation. Notwithstanding the preceding

sentence, where a current or former employee is represented by a bona fide labor organization, no organization other than such labor organization may initiate a public enforcement action in relation to any violation by which they were affected. Within 65 calendar days of the postmark date of the notice, the department shall notify the relator if it intends to open an investigation. 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 of the extension. If the department determines that no enforcement action will be taken, does not respond to the notice, or if no enforcement action is taken by the department within the time limits prescribed, a public enforcement action for civil penalties may be commenced in court. The department may intervene in a public enforcement action for civil penalties brought under this subdivision and proceed with any and all claims in the action as of right within thirty days after the filing of the public enforcement action, or for good cause, as determined by the court, at any time after the 30 day period after the filing of the public enforcement action.

Any civil penalties imposed as a result of an enforcement action described in this section shall be distributed 65 per cent to the department, and 35 per cent to the relator to be distributed to the employees affected by the violation, except that if the department intervenes in the action, 75 per cent of the penalties shall be distributed to the department and 25 per cent to the relator, including a service award that reflects the burdens and risks assumed by the relator in prosecuting the action. The share of penalties recovered for the department under this subsection shall budgeted into a separate account. Such account shall be used solely to support the department’s worker protection education and enforcement activities, with 25 per cent of these

penalties reserved for grants to designated community groups for outreach and education about rights under the commonwealth's labor standards.

The right to bring an action as a relator under this section shall not be contravened by any private agreement. If any part of an employee relator's claim under this part is ordered or submitted to arbitration, or is resolved by way of final judgment, settlement or arbitration in favor of the employee, the employee relator retains standing to maintain an action for violations suffered by other employees in any forum having jurisdiction over the claim.

SECTION 3.This act shall take effect 180 days after passage.