Employer Update

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NYC Bans At-Will Employment for Fast Food Workers

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On January 5, 2021, New York City Mayor Bill de Blasio signed into law two bills mandating that fast food employers in the city cannot discharge fast food employees without "just cause" or a "bona fide economic reason," once they have completed their probationary period. Int. 1415-A (2019) and Int. 1396-A (2019). The legislation prevents fast food employers from discharging such employees pursuant to the employment-at-will doctrine, which traditionally has defined the employer-employee relationship in New York. These safeguards provide fast food workers with job security similar to protections traditionally available only to union or governmental workers. The legislation takes effect on July 4, 2021, giving fast food employers six months to bring their policies and practices into compliance.

This new legislation expands New York City's 2017 Fair Work Week Law, which the City Council passed in response to fast food workers' advocacy for higher wages and greater workplace conditions and protections in the city.[1] The Fair Work Week Law improved the predictability, stability, and transparency of fast food and retail employees' working hours in New York City. The COVID-19 pandemic motivated the City Council to build on these protections for fast food workers by enacting this legislation. In recognition of the fact that fast food workers were designated as "essential workers" not subject to the Governor's stay-at-home orders, the City Council sought to eliminate their fears of job loss and to increase safeguards for raising health and safety concerns in the workplace. *See* Press Release, New York City Council, Council Votes to Prevent Fast-Food Workers From Being Fired Without "Just Cause" (Dec. 17, 2020).

New York is not the only city or state to pass legislation eroding the at-will doctrine, and it is too early to tell whether the new legislation is a precursor to further erosion of at-will employment in other industries in New York City.[2] The City Council already has considered limitations to additional categories of employers. For example, in April 2020, in response to the COVID-19 crisis, the City Council introduced - but failed to enact - legislation that would impose "just cause" requirements on all employers hiring essential workers in New York City.

In this month's article, we review the recent discharge protections for New York City's fast food workers and offer some practical considerations New York City fast food employers should undertake in light of these protections.

** Associate Nicole J. Jibrine assisted in the preparation of this article.*

New Discharge Protections for Fast Food Workers

The legislation precludes fast food employers from discharging fast food employees except for "just cause" or a "bona fide economic reason." N.Y.C. Admin. Code §20-1272(a).[3] The term "discharge" refers to any employment cessation, including termination, layoff, constructive discharge, reduction of an employee's hours of work by 15% of the employee's regular schedule, reduction of any weekly work schedule by 15%, and indefinite suspension. *Id.* at §20-1271. "Just cause" prevents employers from taking such actions unless the employee failed "to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast food employer's legitimate business interest." *Id.* A "bona fide economic reason" protects employees from discharge unless the employer experiences a "full or partial closing of operations or technological or organizational changes to the business in response to the reduction in volume of production, sales, or profit." *Id.* The protections afforded under this ordinance apply to such employees who have completed a probationary period, which cannot surpass 30 days. *Id.* at §20-1271.

"Just Cause"

The City Council adopted a standard for determining whether "just cause" exists. To determine whether an employer had "just cause" to discharge an employee, fact-finders must use this non-exhaustive list of factors:

1. The fast food employee knew or should have known of the fast food employer's policy, rule or practice that is the basis for progressive discipline or discharge;
2. The fast food employer provided relevant and adequate training to the fast food employee;
3. Such employer's policy, rule or practice, including the utilization of progressive discipline, was reasonable and applied consistently;
4. Such employer undertook a fair and objective investigation into the job performance or misconduct; and
5. Such employee violated the policy, rule or practice or committed the misconduct that is the basis for progressive discipline or discharge. *Id.* at §20-1272(b)(1)-(5).

Employers must maintain a written progressive discipline policy and use such progressive discipline before terminating employees for "just cause." *Id.* at §20-1272(c). The law defines progressive discipline as 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 in a satisfactory manner, with discipline ranging from mild to severe, dependent on the frequency and degree of the failure. *Id.* at §20-1271. Employers cannot rely on discipline issued more than one year before the termination. *Id.* at §20-1272(c). The only exception to these requirements is where the termination is for egregious misconduct or an egregious failure to perform duties. *Id.*

Within five days following discharge of the employee, the employer must provide the employee with a written explanation of the precise reasons for discharge. *Id.* at §20-1272(d). This explanation serves as the employer's sole basis for justifying a "just cause" discharge in a wrongful discharge dispute. *Id.*

"Bona Fide Economic Reason"

The ordinance specifies how fast food employers must handle employee layoffs. Discharges based on a "bona fide economic reason" must be in reverse order of seniority so that employees with the greatest seniority will be retained the longest, reinstated first or restored hours first. *Id.* at §20-1272(h). Should employers' economic performance improve within 12 months after laying off employees, employers must make reasonable efforts to offer reinstatement or restoration of hours to such employees before offering or distributing shifts to other employees or new hires. *Id.* Employers must also provide business records to support discharges based on a "bona fide economic reason." *Id.* at §20-1272(g).

Rights of Action and Remedies

Beginning on July 4, 2021, fast food employees allegedly subjected to wrongful discharge may file a

civil action in court. Int. 1415-A §3 (to be codified at N.Y.C. Admin. Code §20-1211(a)(8)). Relief for prevailing employees includes an order to reinstate or restore the employee's hours, unless waived by the employee, and an order to pay the employee's reasonable attorney fees and costs. N.Y.C. Admin. Code §20-1272(f). Relief may also include $500 per violation, an order directing compliance with §20-1272, rescission of issued discipline, payment of back pay for loss of pay or benefits resulting from the action, and any other appropriate equitable relief. Int. 1415-A §4 (to be codified at N.Y.C. Admin. Code §20-1211(c)).

Employees may file a wrongful discharge complaint with the Department of Consumer Affairs and Worker Protection, however, this agency cannot enforce this new law until Sept. 2, 2021. *Id.* at §7. Except for reasonable attorney fees and costs, administrative proceedings afford the same remedies as judicial proceedings. *Id.* at §2 (to be codified at N.Y.C. Admin. Code §20-1208(b)).

Employees have two years from the date they knew or should have known of the alleged violation to raise judicial or administrative proceedings. N.Y.C. Admin. Code §20-1207(b)(1), §20-1211(c) (to be codified at §20-1211(d)).

On or after Jan. 1, 2022, aggrieved fast food employees may elect to file an arbitration proceeding. *Id.* at §20-1273(a). Employees have two years from the date of the alleged violation to bring such a proceeding. *Id.* Arbitrators must require employers in violation of this ordinance to pay the employee's reasonable attorney fees and costs, reinstate or restore the employee's hours, unless the employee waived, pay the city for the costs of the proceeding, and award other appropriate equitable relief and compensatory damages. *Id.* Once an arbitrator determines an award, both parties can request a court to confirm, modify, or vacate such award. *Id.* at §20-1273(j).

Discharged employees who lose shifts as a result of discharge are entitled to schedule change premiums. *Id.* at §20-1274.

Practice Pointers

New York City fast food industry employers should review existing workplace policies to ensure that they include a mandatory progressive discipline policy. A compliant progressive disciplinary system must contain multiple stages of discipline, with each stage increasing in severity, such as verbal warning, written warning, suspension, and termination. When implementing progressive discipline, employers should seek to avoid generalized evaluations such as "poor work habits" or "performance problems." The evaluation should specifically identify the employee's unsatisfactory conduct, failure to demonstrate required skills, and history of the behavior. Such specific descriptions will more effectively support an employer's position that the discharge was taken for "just cause." Employers also should train supervisors and Human Resources managers on best practices in employing progressive discipline and applying it consistently to all employees.

Covered fast food industry employers should document, and retain for their records, for all stages of the progressive discipline process, including oral discipline. Recording steps taken during the process will provide evidence that progressive discipline was taken and that the employer provided the employee an opportunity to improve. Employers must deliver training to managers and Human Resources managers to ensure proper documentation is created and maintained in record keeping information systems.

Covered employers should have a process in place that ensures that all employees have notice of employer policies, such as requiring employees to receive a copy of the employer's policies and requiring them to sign and acknowledge that the employee has reviewed and understands such policies. Employers should preserve these acknowledgements, as the employer may be asked to provide proof of notice in a contested discharge action.

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[1] In 2012, the advocacy movement began in the city with the "Fight for $15" protest to increase minimum wage from $7.25 to $15.00

[2] For example, Montana enacted its Wrongful Discharge From Employment Act in 1987, requiring "good cause" to discharge employees. In 2019, Philadelphia mandated that parking employers cannot discharge parking employees without "just cause" or a "bona fide economic reason."

[3] "Fast food employee" means any non-salaried person employed or permitted to work at a "fast food establishment" in the city whose duties include customer service, cooking, food or drink preparation, delivery, security, stocking items or maintenance. *Id*. at §20-1201. "Fast food establishments" serve food and drinks as their primary purpose, are part of a chain, are one of 30 or more establishments nationally, offer limited service and allow patrons to order items and pay before consuming on the premises, taking out or delivery. *Id*.

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