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NY City Council Ends At-Will Employment for Fast Food Workers

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On December 17, 2020, New York City Council passed amendments to the Fair Work Practices chapter of the New York City Administrative Code, referred to as the "Fair Work Week Law," that will significantly alter the relationship between covered employers and employees of fast food establishments. Indeed, the employment relationship at New York City fast food restaurants will no longer be "at-will." Unless they have a bona fide economic reason to reduce headcount, fast food employers will not be able to terminate or reduce the hours of a poor-performing employee who has completed a 30-day probationary period without proving they have "just cause" to do so.

The amendments, which Mayor de Blasio has said he will sign, take effect 180 days after they become law. As we noted in a prior alert, New York City Council passed the Fair Work Week Law in 2017, requiring fast food and retail employers to provide worker schedules in advance, give current employees priority in working shifts that become available or open, and to pay certain premium payments to fast food and retail employees when their schedules are changed or they are provided with fewer than 11 hours off between shifts. These amendments, passed City Council, go further by providing fast food employees with union-style protections against discharge and layoffs. The law also provides extreme remedies for violations of its provisions.

'Just Cause' Required

Under the Fair Work Week Law, a "fast food establishment" is one: (i) that has as its primary purpose serving food or drink items; (ii) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out or delivered to the customer's location; (iii) that offers limited service; (iv) that is part of a chain; and (v) that is one of 30 or more establishments nationally (including franchisors and franchisees if they own or operate 30 or more establishments in the aggregate). The amendments only apply to those restaurants that meet this definition.

Under the amendments, after the end of the 30-day probationary period — a provision straight out of almost every collective bargaining agreement — a fast food employer can only terminate an employee if they have "just cause" to do so. The amendments define "just cause" as "failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast food employer's legitimate business interests." The burden of proving whether a termination was for "just cause" always rests with the employer. To prove "just cause," the employer must show that:

- 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;
- The fast food employer provided relevant and adequate training to the fast food employee;
- The fast food employer's policy, rule or practice, including the utilization of progressive discipline, was reasonable and applied consistently;
- The fast food employer undertook a fair and objective investigation into the job performance or misconduct; and
- The fast food employee violated the policy, rule or practice or committed the misconduct that is the basis for progressive discipline or discharge.

The amendments further explain that "[e]xcept 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 fast food employer has utilized progressive discipline [and such discipline occurred within the past 12 months], and (2) the fast food employer had a written policy on progressive discipline in effect at the fast food establishment and that was provided to the fast food employee." From the plain language of the amendments, it is unclear what conduct would constitute "egregious misconduct."

In addition, if an employee is terminated for "just cause," the employer is required to provide the employee with a written explanation of the "precise reason" for the employee's discharge within five days of the termination. It is very important that this written communication be accurate because it will impact the employer's defense of any challenge to its decision to discharge an employee. It is the employer's burden to show that an employee's discharge was supported by "just cause" and the employer is limited to defending any discharge based on the reasons provided in the written explanation provided to the employee. That is, if the reason for the termination, in whole or in part, is not set forth in the written letter to the employee, the employer cannot rely on that reason should the termination be challenged.

Moreover, the just cause requirements also apply if the employer wants to reduce an employee's hours by more than 15%. Under the Fair Work Week Law, no later than the first day of employment, a fast food employer must provide an employee with a good faith estimate of the schedule the employee can anticipate working. The employer cannot deviate from the good faith estimate by more than 15% unless the employee requests a deviation or the employer has "just cause" as set forth above. This requirement will significantly hamper a fast food employer's ability to have a flexible workforce that addresses the significant ups and downs of the hospitality industry – even in normal times.

Bona Fide Economic Reason

An employer will not have to show "just cause" for discharge if there is a bona fide economic reason for discharge. The amendments define "bona fide economic reason" as "the 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" as determined by the city. The law requires such "bona fide economic reason" to be supported by the fast food employer's business records showing that the closing, technological or reorganizational changes are in response to a reduction in volume of production, sales or profit. Essentially, fast food employers will have difficulty reducing their workforce or using technology to replace workers once this law is enacted. Further, under the amendments, it appears that an employer cannot close a restaurant or reduce operations for non-economic reasons.

Layoffs According to 'Seniority'

If the employer can prove the economic reason for the employee's discharge with business records, the law will require that fast food employees must be discharged in "reverse order of seniority" — in other words last one in, first one out. The law does not permit an employer to lay off employees within job categories of job titles; seniority is set establishment-wide. As such, if a cashier has more seniority then all of the cooks, and the employer wants to engage in layoffs, the cooks would have to be let go before the employer could lay off the cashier.

Further, the law requires that before an employer can offer to distribute shifts to other employees or new hires, the employer must make "reasonable efforts to offer reinstatement or restoration of hours, as applicable, to any fast food employee discharged based on a bona fide economic reason within the previous twelve months." This requirement will further burden employers who are attempting to recover from economic hardship because it is unclear what would be considered "reasonable efforts."

Remedies and Potential Damages

An employee will be able to bring a civil action for violations of the law or, after January 1, 2022, the employee may file an arbitration proceeding that will be administered by the city. The civil action or arbitration can be filed by an aggrieved individual, the city or any organization representing aggrieved employees, which could be a union, a so-called "social justice" group or a community group. The law will also allow for class arbitration. This means that if an employee (or its representatives) wants to arbitrate the issue, the employer cannot have its day in court, but instead must submit the matter to binding arbitration. The statute of limitations period is two years.

If arbitration is elected by the employee, the parties will select the arbitrator jointly from a list provided by the city. The list is supposed to include four individuals who are selected by the employer community and four selected by the employee community. If the parties cannot agree on an arbitrator, the city will select the arbitrator.

If an employer is found to have discharged an employee without "just cause" and without a "bona fide economic reason" after the employee's probationary period, then the employer will be ordered to pay the employee back pay, the employee's reasonable attorney's fees and costs. The employee will also be entitled to schedule change premiums, provided for under the Fair Work Week Law Section 20-1222, for shifts lost because of such discharge. In addition, the employee will be entitled to reinstatement or restoration of hours, unless waived by the employee, and $500 for each violation, rescission of any discipline issued, and any other appropriate equitable relief. If the employer is found, at arbitration, to have violated the law, in addition to these damages, the employer must pay the also pay the city for the costs of administering the arbitration.

Next Steps for Fast Food Employers

Now is the time to ensure that your fast food establishment is in compliance with the Fair Work Week Law. Additionally, fast food employers should immediately consult with legal counsel and begin drafting policies establishing a probationary period (not more than 30 days), progressive discipline procedures, and updated standards of conduct. These revised/new policies should be given to employees and acknowledged by the employees. Fast food employers should also train their management teams on how to implement and document consistent progressive discipline and how to appropriately document any and all reasons for an employee's discharge. Finally, employers should prepare a form letter to employees providing reasons for termination and ensure such letters are delivered to any discharged employee within five days of discharge. The letter should comply with the requirements under New York law for a termination notice and advise the employee of the exact date of their termination and the date of cancellation of any benefits.

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