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Alert | Labor & Employment

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NYC Council Approves Legislation Redefining Key Aspects of Fast Food Employer-Employee Relationship

On Dec. 17, 2020, the New York City Council voted to approve Int. No. 1415-A and Int. No. 1396-A, which will prohibit fast food employers from terminating or cutting workers' hours without just cause and, additionally, require fast food employers who need to lay off employees due to legitimate economic reasons to do so in order of seniority. These bills significantly expand upon worker protection laws passed in 2017 and continue to redefine key aspects of the employer-employee relationship for fast food employers. Mayor Bill de Blasio is publicly supportive of the legislation and is expected to sign both bills.

Intro 1415-A: Just Cause Requirements

The legislation directs that covered fast food employers may not terminate employees, reduce the hours of employees by more than 15% of their regular schedule or any weekly work schedule, or indefinitely suspend employees (absent "Bona Fide Economic Reason") without "Just Cause." The legislation also requires that each employer have at each location a written policy providing for use of "progressive discipline," which policy must be provided to all employees.

"Just Cause" is defined as "the fast food employee's failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast food employer's legitimate business interests." The legislation enumerates five factors that should be used to determine if the termination or reduction in hours was based on "Just Cause." These factors are:

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

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

5. The fast food employee violated the policy, rule, or practice, or committed the misconduct that is the basis for progressive discipline or discharge.

"Progressive Discipline" is defined as a "disciplinary system that provides for a graduated range of reasonable responses to a fast food employee's failure to satisfactorily perform such fast food employee's job duties, with the disciplinary measures ranging from mild to severe, depending on the frequency and degree of the failure." The fast food employer may not rely on discipline issued more than one year before the purported just-cause termination. The requirement to utilize progressive discipline does not preclude a fast food employer from immediately terminating a fast food employee for a sufficiently egregious failure or misconduct.

Further, the legislation requires that the employer provide a written explanation of the "precise reasons" for the action within five days of discharge. The employer is bound by the reasoning in the termination letter, and no other factors may be considered if the termination is challenged.

The "Just Cause" requirement does not apply to any employee who is within a 30-day probationary period.

Intro 1415-A: Modification and Expansion of Fair Workweek

The legislation also provides a modification to the existing Fair Workweek Law. Presently, fast food employers are required to provide new fast food employees with a schedule, and a good-faith estimate of the days, times, locations, and total number of hours that a fast food worker can expect to work each week, on or before their first day of work. Employers now must implement "scheduling practices that provide each fast food employee with a regular schedule that is a predictable, regular set of recurring weekly shifts the employee will work each week." The legislation also provides that a "fast food employer may not reduce the total hours in a fast food employee's regular schedule by more than 15% from the highest total hours contained in such employee's regular schedule at any time within the previous 12 months, unless the employee has previously consented to or requested such reduction in writing, or the reduction was consistent with the restrictions on discharges." This amendment effectively prohibits employers from making significant adjustments to schedules to reflect seasonal changes in demand unless disclosed and scheduled in a compliant manner at the time of hiring.

Intro 1396-A: Bona Fide Economic Reason

The legislation also defines a "Bona Fide Economic Reason" for the purposes of layoff or termination of employment. A "Bona Fide Economic Reason" is "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."

The legislation mandates how layoffs are to be handled by an employer. The layoff must be done in reverse order of seniority. Employees with the greatest seniority must be retained the longest and reinstated or have their hours restored first. The bill computes the length of service from the first date of employment, including the probationary period, unless such service has been interrupted by an absence from the payroll of more than six months, in which case length of service is computed from the date of restoration to the payroll. The legislation carves out the following exemptions: military service, illness, educational leave, leave authorized by law, and discharge without just cause or in violation of any local, state or federal law, none of which count as an "absence" under the bill.

The legislation also lays out the process for rehiring staff if economic conditions improve in the 12 months following the layoff. The employer must offer reinstatement or restoration of hours to the laid-off fast food workers in order of seniority before hiring any new fast food workers.

Remedies, Penalties, and Next Steps

The legislation allows any employee to challenge any termination decision by either filing a claim in court or by filing an arbitration, even if there is no arbitration agreement between the fast food employer and fast food employee.

The New York City Department of Consumer Affairs and Workplace Protection is tasked in the legislation with appointing a committee to select a panel of arbitrators from which the parties may choose. The selected arbitrator would be tasked with determining whether the employer (a) made an unlawful termination decision, or (b) implemented an economic layoff (or subsequently rehired a laid off employee) without considering seniority.

If a violation is found, the court or arbitrator may order the employer to: (i) reinstate or restore the hours of the fast food employee; (ii) pay the city for the costs of the arbitration proceeding; (iii) pay the reasonable attorneys' fees and costs of the fast food employee; or (iv) pay back pay, compensatory damages, and any other equitable relief, including penalties for missed shifts under the Fair Workweek Law and civil fines.

The New York City Department of Consumer Affairs and Workplace Protection needs to have the committee process in place by Jan. 1, 2022. A party can bring an arbitration proceeding within two years of the date of the alleged violation.

The above changes take effect 180 days after the legislation is signed by the Mayor, or in absence of a signature, 30 days from the New York City Council vote.

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