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ACT NOW ADVISORY

New York City Enacts Sweeping Changes to Fast-Food Industry—Progressive Discipline Rules, "Just Cause" Discharge, Predictive Scheduling, and More

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Mayor Bill de Blasio recently signed two bills, Int. No. 1415-A and Int. No. 1396-A, into law (collectively, the "Laws" or "Law") that will have a dramatic impact on fast-food employment. Effective July 4, 2021, the Laws will subject covered[1] New York City fast-food restaurant employers to sweeping new obligations that will grant their employees rights and protections typically possessed only by employees covered by a collective bargaining agreement with a union.

In effect, the Laws, which were championed by the Service Employees International Union, grant union-style protections to fast-food employees, prohibiting fast-food employers from terminating or cutting employees' hours without just cause, and will require employers that lay off employees due to bona fide economic reasons to do so in order of seniority. Such seniority rights are a hallmark of collective bargaining agreements. The Laws will also require fast-food employers to adopt written progressive discipline policies, in addition to providing employees with regular, predicable schedules and weekly shifts across each workweek. Further, the Laws will allow employees to pursue alleged unlawful discharge violations in arbitration, even absent a specific arbitration agreement with the fast-food employer. Notably, the Laws apply even where fast-food employees are covered by an existing collective bargaining agreement.

"Just Cause" Discharge

Under Int. No. 1415-A, fast-food employers will not be able to terminate, constructively discharge, reduce hours by more than 15 percent, or indefinitely suspend employees who have completed their probationary period, without just cause. The Law limits such probationary periods to no more than 30 days from an employee's first day of work. The Law narrowly defines "just cause" as the "employee's failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast-food

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[1] To be covered by the Laws, a fast-food restaurant employer is one: (i) with a primary purpose of serving food or drink items; (ii) where patrons order select items and pay before eating and such items may be consumed on premises, taken out, or delivered; (iii) that offers limited service; (iv) that is part of a chain; and (v) that is one of 30 or more establishments nationally.

employer's legitimate business interests." An employer will bear the burden of proving just cause, under a *preponderance of the evidence* standard, in any proceeding brought pursuant to Int. No. 1415-A. Collectively, these changes materially cut back on the general standard of "employment at will" with respect to such employment.

When determining whether a fast-food employee has been discharged for just cause, the fact-finder will be required to consider, among other relevant factors, whether:

- the employee knew or should have known of the employer's policy, rule, or practice that is the basis for the progressive discipline or discharge;

- the employer provided relevant and adequate training to the employee;

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

- the employer undertook a fair and objective investigation into the alleged job performance or misconduct issue; and

- the employee in fact violated the policy, rule, or practice or committed the misconduct that is the basis for progressive discipline or discharge.

Progressive Discipline Required Prior to Termination for Just Cause

The Laws will require employers to engage in progressive discipline before terminating an employee's employment, except in connection with the most serious types of misconduct. Specifically, except where the termination is because of "an egregious failure by the employee to perform their duties, or for egregious misconduct," an employer's decision to terminate an employee will not be deemed one for just cause unless:

- the employer initiated a progressive discipline process against the employee less than one year before the purported "just cause" termination, and

- the employer had a written progressive discipline policy that was in effect at the fast-food establishment, which was provided to the employee. "Progressive discipline" is defined for purposes of the Laws 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."

Importantly, an employer must also provide a written explanation to a terminated employee explaining the specific reasons for their discharge, within five days of the employee's discharge. The written explanation mandate is significant because the Law directs that the fact-finder who is determining whether just cause existed for the discharge may not consider any reasons offered by the employer unless they were included in the written explanation provided to the employee. Notably, this requirement is more restrictive than is the case under the grievance and arbitration provisions of most collective bargaining agreements, which generally afford arbitrators far greater latitude both in

evidentiary rulings and in determining whether a termination was for just cause. Thus, employers will be well served to provide a carefully considered, comprehensive, and timely written explanation to employees who have been terminated for just cause.

"Bona Fide Economic Reasons" Discharge

Int. No. 1396-A provides that employers may discharge employees for a "bona fide economic reason," which is defined 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." However, an employer cannot claim a discharge was for bona fide economic reasons unless the decision is supported by the employer's business records demonstrating the existence of the claimed bona fide economic reason. Here, too, the burden of persuasion will rest with the employer.

In addition, Int. No. 1396-A specifies that a discharge for bona fide economic reasons must be done in reverse order of seniority as is typical under collective bargaining agreements. "Seniority" is defined for this purpose as:

> 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 six 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 subchapter.

Employees with the greatest seniority must be retained the longest and have their hours reinstated or restored first. Additionally, before an employer offers or distributes shifts to any other employees or hires any new employees, a covered employer is required to make reasonable efforts to offer reinstatement or restoration of hours to any employee discharged based on a bona fide economic reason within the previous 12 months.

Predictive Scheduling Practices and Reduction of Hours

Under current City law, covered fast-food employers must provide newly hired fast-food employees with a good faith estimate of the employees' workdays and hours, on or before their first day of work. Thereafter, schedules must be provided at least 14 days in advance of the beginning of the relevant workweek. In addition, employers must give employees a revised good faith estimate if the schedule significantly changes. Int. No. 1415-A amends existing law by mandating that each employee be provided with a written schedule that is "a predictable, regular set of recurring weekly shifts the employee will work each week." If an employer adds shifts to the regular schedule of a new or current employee, the employer must provide a copy of the schedule to the employee in writing.

Further, a fast-food employer may not reduce the total number of hours in a fast-food employee's regular schedule by more than 15 percent from the highest total hours contained in such employee's regular schedule at any time within the previous 12 months. A reduction can be effectuated only if the employee has previously consented to or

requested such reduction in writing, or the reduction is consistent with the aforementioned rules on “just cause” discharges.

Arbitration

Int. No. 1396-A extends additional protections to fast-food employees by allowing them to bring claims for unlawful discharge under the Laws to arbitration, even absent an arbitration agreement. Employees must initiate such claims within a two-year statute of limitations period, and employees can begin to file arbitration demands starting January 1, 2022. Importantly, if an employee demands arbitration, they will be deemed to have waived their right to bring a private cause of action.

The arbitrators on the panel are to be chosen by a committee of eight participants comprised of four employee-side representatives (including fast-food employees or advocates) and four employer-side representatives (including fast-food employers or advocates). If the parties are unable to agree on an arbitrator, New York City’s Department of Consumer Affairs will select an arbitrator from the panel. The arbitrations will be governed by the American Arbitration Association’s rules, as well as rules to be promulgated by New York City’s Department of Consumer Affairs.

Remedies Available

Potential remedies available to a fast-food employee under the Laws include:

- mandatory reinstatement or restoration of hours, unless waived by the employee;
- mandatory imposition of reasonable attorneys’ fees and costs incurred by the employee;
- back pay for any loss of pay or benefit;
- rescission of any discipline issued; and
- an order directing compliance with the Laws.

Additionally, for fast-food employees bringing a private right of action, the potential remedies available also include:

- an award of $500 for each violation, and
- an award of punitive damages, and any other appropriate and equitable relief.

However, if a fast-food employee brings an arbitration proceeding, the potential remedies available include:

- payment by the employer to New York City for the costs of the arbitration proceeding, and

- all other appropriate equitable relief, and such other appropriate compensatory damages or injunctive relief.

Here, too, the Laws go further than most collective bargaining agreements, which generally do not allow for impositions of fines or penalties, the award of attorneys' fees, and costs or punitive damages.

What Fast-Food Employers Should Do Now

The Laws, which will prohibit New York City fast-food employers from terminating or cutting employees' hours without just cause or bona fide economic reasons, are certainly a departure from the previous framework. Coupled with the new scheduling and documentation requirements, as well as access to arbitration, fast-food employees are now subject to protections not typically seen in an "at-will employment" environment.

Therefore, New York City fast-food employers should:

- adopt a written progressive discipline policy to utilize prior to "just cause" terminations, and provide the policy to employees;

- train employees on these policies/procedures, and train managers on the effective and consistent application of discipline;

- adopt a detailed recordkeeping system to be in a position to sufficiently notify employees of the precise reasons for discharge in a written explanation;

- update scheduling practices so as to provide employees with a written regular, predictable schedule of weekly shifts each employee will work;

- create a system to conduct layoffs in reverse order of seniority for "bona fide economic reason" layoffs or terminations; and

- assess the merits of potential actions, whether discipline, discharge, reductions in hours, or other changes in schedules, and the employer's likelihood of success on the merits in the event of arbitration.

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