New York City Passes "Just Cause" Legislation For The Fast Food Industry, Greatly Increasing Workplace Protections For Employees

Insights
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The New York City Council just passed two bills (Int. 1396-A and 1415-A) that limit when a fast food employer can discharge fast food employees, only permitting terminations for "just cause" or for a "bona fide economic reason" – both of which the employer must prove if challenged. The new law, passed on December 17 and taking effect on July 4, 2021, turns fast food workplaces into de facto unionized environments, with "fast food employees" in New York City having workplace protections equal to – and in some ways, greater than – employees who are represented by a union. This should not be surprising given one of the major proponents of this legislation was 32BJ SEIU, one of New York City's largest service unions. The new law tacks on and add new sections to the previously passed Fair Workweek Law (the FWW), utilizing the same definitions under the FWW and building upon the enforcement mechanisms provided to New York City's Department of Workplace and Consumer Protection (DCWP). In addition, the new law allows for discharged employees to take their case to arbitration, using a framework set up by the DCWP. What do fast food employers need to know about the new law?

The Basics – "Just Cause" Or "Bona Fide Economic Reason" Required For Discharge

The new law restricts an employer's ability to discharge its fast food employees, allowing employers to discharge fast food employees for only two reasons: (1) for "just cause;" or (2) for a "bona fide economic reason." First, the statute cribs from long-standing labor law principles in setting a framework for what constitutes just cause. The statute explicitly requires employers to use progressive discipline before discharging a fast food employee for just cause, unless the discharge is for an "egregious failure by the employee to perform their duties" or for "egregious misconduct."

The statute does not otherwise define what constitutes "egregious" conduct or delineate how many steps of progressive discipline an employer must undertake before it can discharge an employee for just cause. The only explicit requirements are that the employer maintain a written policy on progressive discipline that is provided to fast food employees, and that the employer not rely on any progressive discipline that is more than a year old to justify a discharge. However, the statute does provide several factors to determine whether just cause exists:

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

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

Second, the new law limits when an employer can layoff or reduce the hours of fast food employees to instances when the employer has a bona fide economic reason to do so. The statute defines "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." Any layoff done for a bona fide economic reason must be done in reverse order of seniority in the establishment where the discharge is to take place.

Tying this requirement into the FWW, any reduction in hours by more than 15% from the highest total hours contained in an employee's regular schedule at any time within the previous 12 months must be justified by a bona fide economic reason (or have the employee's consent). Moreover, if shifts become open, employers must offer additional hours to fast food employees laid off within the previous 12 months before offering additional hours to current employees or subsequently hiring new employees.

Moreover, within five days of discharging a fast food employee, the employer must provide a written explanation of the "precise reasons" for the discharge. Employers will only be able to justify a discharge based on reasons included in this written explanation. Additionally, a discharged fast food employee who loses a shift that is already on the employee's 14-day work schedule is entitled to a schedule change premium under the FWW (since the shift is essentially being cancelled), which amounts to the following:

- With less than 24 hours' notice: $75;
- With more than 24 hours' notice but less than seven days' notice: $45;
- With more than seven days' notice, but less than 14 days' notice: $20.

The schedule change premium must be paid even if the discharge is for just cause or a bona fide economic reason.

However, the statute allows employers to establish a probationary period not to exceed 30 days, during which these restrictions do not apply, and a fast food employee can be discharged for any lawful (e.g. non-discriminatory) reason.

Practical Implications – How To Manage A Workforce With These Restrictions

When it comes to managing its fast food employees in the new world created by this law, it is of the utmost importance for employers to ensure they have written policies and procedures in place, and managers trained in how to correctly and consistently follow those policies and procedures. As a start, the law requires that employers create a written policy specifically laying out the levels of progressive discipline and how that can lead to discharge – e.g. verbal warning, followed by written warning, followed by final written warning, followed by discharge. Additionally, the policy should clearly set forth the employee's "probationary" period, which cannot exceed 30 days.

The listed just cause factors focus heavily on ensuring that fast food employees are aware of and trained on workplace standards. Although it is of course difficult for an employer to anticipate every type of possible workplace misconduct, employers should make their policies as to what constitutes disciplinable offenses much more specific, and ensure those policies are in writing. Employers should also keep track of all training and ensure that no fast food employees fall through the cracks, which could also include notes to file of when a fast food employee receives coaching.

Similarly, employers should take extra care to ensure fast food employees receive and sign off on all workplace policies. If employees can claim that they were not made aware of or trained on a certain policy or procedure before being disciplined for violating it, and the employer cannot point to written proof (not just oral instruction or training, or even what a reasonable person would consider common sense), the employer will make it much more difficult to justify a discharge for just cause. And it is of the utmost importance that employers examine and investigate the circumstances of any discipline or discharge and keep written documentation of the factual occurrences and reasons for the discipline or discharge, including witness statements.

Moreover, the new law specifically sets forth an expectation that employers "consistently" apply their discipline standards. This means that all levels of management must be trained on what constitutes certain levels of discipline so that they are on the same page. This becomes more complicated when dealing with on-the-ground management across numerous locations, who are all dealing with different workforces in different locations and different circumstances. Management will also want to keep track as best it can the reasons for and severity of discipline for certain types of infractions, so that it can track how it has previously acted to inform future discipline decisions. Additionally, management will want be able to easily pull comparator information that employees challenging their discharges will inevitably seek. Ultimately, the more objective an employer's policies are (for example, the use of an attendance points system), the easier it may be for the employer to be consistent in applying them.

In complying with the layoff provisions of the new law, employers must keep in mind that they cannot simply "right size" their workforce at any given time. There first must be a reduction of production, sales, or profit – efficiency, in and of itself, is not a sufficient reason. However, reduction in staff via attrition is still acceptable, so before employers hire replacement for staff who leave, they may want to examine whether their staffing levels are appropriate. Moreover, employers will have to be careful about scheduling fast food employees for additional hours – if an employer begins scheduling an

employee for additional hours, they will not be able to unilaterally reduce those hours by more than 15% for 12 months without justification. Logistically, employers will need to maintain a seniority list that complies with the new law and will need to adjust its FWW policy and practice to first offer additional hours to recently laid off employees.

Lastly, it is important for employers to remember that the definition of "fast food employee" was set in the FWW and applies to this law. "Fast food employee" does not include those exempt from overtime requirements, so, at the very least, employers can still manage their managerial workforce as they see fit.

Employees (And Possibly Unions) Can Now Go To Arbitration In Addition To Court And The DCWP

Under any enforcement mechanism, the employer has the burden of proving that a fast food employee was discharged for just cause or for a bona fide economic reason. When it comes to proving a bona fide economic reason, a new law explicitly requires that an employer support its decision with business records showing that the closing, or technological reorganizational changes are in response to a reduction in volume of production, sales or profit.

Because the new law tacks on to the FWW, the same enforcement mechanisms apply to this part of the statute, as well, including a private right of action to sue in court. In addition, any individual or organization (including a union) can file a complaint with DCWP to investigate the employer, or DCWP can open an investigation on its own initiative. If DCWP finds merit to the complaint, it can proceed with the case before an administrative law judge (ALJ) with New York City's Office of Administrative Trials and Hearings (OATH). In addition, New York City's corporation counsel can seek injunctive relief in court to stop an employer from violating the law, or, where the corporation counsel has reasonable cause to believe that an employer is engaging in a pattern or practice of violations, it can proceed in court to seek relief for the pattern and practice violation.

In addition, beginning on January 1, 2022, fast food employees alleging there was no just cause or bona fide economic reason for their discharge can bring an arbitration proceeding. The statute sets up a framework for the DCWP to create a panel of arbitrators to handle these cases and from which the parties to an arbitration must mutually select. While DCWP will determine the number of arbitrators on the panel, the arbitrators on the panel will be chosen by an eight-person committee created by DCWP, with four members being "employee-side" representatives and four members being "employer-side" representatives. It remains to be seen over the next year who DCWP will choose for its committee, and how the process by which arbitrators are chosen plays out (and whether and how often that panel gets updated).

In any arbitration proceeding, if the parties are unable to agree on an arbitrator, DCWP will choose the arbitrator for the case, and the arbitration will be governed by AAA's labor arbitration rules and any other rules the DCWP enacts. The statute also specifically calls for the possibility of class arbitrations governed by the principles of New York Civil Practice and Rules Article 9 (the New York

equivalent to Federal Rule of Civil Procedure 23), with an individual serving as the representative party for absent class members

Interestingly, the statute provides standing to file an arbitration for "any person or organization representing persons" alleging an employer discharged a fast food employee without just cause or a bona fide economic reason. This is similar to the language already used in the FWW (and which applies to the new law) for initiating a complaint with DCWP, which states that "[a]ny person, including any organization, alleging a violation of this chapter may file a complaint…." Unions have utilized this procedure to initiate complaints before DCWP against employers, even against employers for whom the union does not represent any employees.

The use of similar language in the new arbitration provision seems to indicate that the City Council, almost assuredly at the behest of organized labor, gave unions standing to bring arbitration claims on behalf of discharged fast food employees. Significantly, unions may even have standing under this language where they are not the certified collective bargaining representative of the discharged fast food employee, allowing organized labor to involve itself in an employer's workplace without following the process set forth under the National Labor Relations Act (NLRA). Whether this runs afoul of the NLRA may be an area for challenging the law down the road.

The statute does include an election of remedies provision, meaning a fast food employee must choose between proceeding with arbitration, filing a private right of action, or filing a complaint with DCWP. However, it should be noted that the statute specifically allows for employees to challenge whether their discharge was for just cause or a bona fide economic reason in any of the ways provided for under this law, while simultaneously bringing a discrimination claim in court or before another administrative agency (such as the NYCCHR, NYSDHR, or EEOC).

Remedies Available

The remedies available to a fast food employee under the new law are similar to standard employment laws but include some potential additional penalties when an employer discharges a fast food employee not for just cause or a bona fide economic reason. Potential remedies include:

- Mandatory reinstatement or restoration of hours (unless the employee waives reinstatement or restoration);
- Mandatory imposition of reasonable attorneys' and cost in court or arbitration;
- The court, OATH ALJ, or arbitrator may award back pay for any loss of pay or benefit;
- The court, OATH ALJ, or arbitrator may order the rescission of any discipline issued;
- The employer must pay New York City for the costs of the arbitration proceeding (although the law is silent, presumably New York City pays the costs if the employer prevails in arbitration);
- The court, OATH ALJ, or arbitrator may issue an order directing compliance with the law;
- The court and OATH ALJ may award up to $500 per employee for each violation

- The court and OATH ALJ may award a $500 penalty for each violation;
- The court may award punitive damages;
- The court and OATH ALJ may issue an order directing compliance with the law and all other equitable relief as may be appropriate, while an arbitrator may issue injunctive relief; and
- An arbitrator may award "all other appropriate equitable relief," which, in addition to what has already been listed, can include "such compensatory damages" as may be appropriate.

What's Next

The statute's provisions will take effect 180 after it is signed into law, which means it will become law on July 4, 2021. Before then, employers should examine their policy and practices to ensure they are prepared to justify the discharge of any fast food employees. Moreover, employers should examine their staffing levels, because they will be limited in their ability to conduct layoffs once the new law goes into effect.

It should be noted that the DCWP's ability to enforce the law will not take effect until 240 days after it is signed into law, and the arbitration mechanism will not go into place until January 1, 2022, at the earliest. Until then, employees can only file a private right of action in court to challenge their discharge. In the meantime, we will be keeping an eye on any rules promulgated by DCWP regarding the arbitration provision, and the committee DCWP puts together to choose the panel of arbitrators. With any hope, the committee chosen will truly represent employer interests and create a panel of neutral, fair, and experienced arbitrators that provide a level playing field.

We will continue to monitor developments relating to this new law, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our New York City office.

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