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Not So Fast: New York City Ordinance Ends At-Will Employment for Fast Food Workers

On January 5, New York City Mayor Bill DeBlasio signed into law Int. 1415-A and Int. 1396-A (collectively, Local Laws), barring fast food employers from terminating or substantially reducing the hours of an employee without just cause or without a "bona fide economic reason." Until now, fast food employees in New York City have been at-will employees, as they are in most of the country. The Local Laws expand the City's 2017 Fair Work Week Law for fast food employees and offer protections beyond those in other state and federal laws, regulations and rules. The Local Laws further require an employer to provide written information on discipline and discharge policies and to notify the employees of their work schedules in writing and on a regular basis. Except for misconduct or failures to perform that are egregious, employers must subject employees to progressive discipline rather than discharge. The Local Laws also require employers—before giving shifts to other employees or hiring new ones—to make reasonable efforts to offer reinstatement or restored hours to employees subjected to discharge or substantially reduced hours within the past 12 months.

Finally, the Local Laws allow for civil actions, arbitration proceedings or proceedings by the corporation counsel of the New York City Law Department (in case of a pattern of violations under the Local Laws) to be brought against the employer. The Local Laws will go into effect 180 days from January 5 – on July 4.

Definitions and Standards

Pursuant to the N.Y.C. Administrative Code § 20-1201, a "fast food employer" means any employer that employs a fast food employee at a fast food establishment, and a "fast food employee" means a non-salaried employee working at or for a fast food establishment within the city and whose duties include at least one of the following: "customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning or routine maintenance." If a fast food employer discharges an employee, the burden is on the employer to show the existence of "just cause" or a "bona fide economic reason" by a preponderance of evidence. The Local Laws define "bona fide economic reason" to mean 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. The Local Laws define "discharge" to include "layoff, termination, constructive discharge, reduction in hours and indefinite suspension." The Local Laws define "just cause" 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."

If an employer discharges an employee based on just cause, and the discharged employee brings a claim against the employer for wrongful discharge, the fact-finder will consider the following factors to determine the existence of just cause: (1) the employee's knowledge or ability to know of the employer's policies regarding discipline and discharge; (2) adequacy of the employee's training; (3) consistency and reasonableness of the employer's policies and rules regarding progressive discipline and whether the employer has "a disciplinary system that provides for a graduated range of reasonable responses to an employee's failure to satisfactorily perform job duties, with the disciplinary measures ranging from mild to severe, depending on the frequency and degree of the failure"; (4) fairness and objectivity of the employer's investigation into performance or misconduct of the employee; and (5) the employee's degree of violation of the employer's policy or rule.

For a "just cause" discharge, the decision must be based on an employee's (1) egregious conduct; (2) failure to perform job duties; or (3) receipt of progressive discipline in the past one year before the termination under a written policy on

progressive discipline that the employer provided to the employee. Further, the employer is required to provide a written explanation of the "precise" reason(s) for the discharge within five days of the discharge.

For discharge based on a "bona fide economic reason," the employer must establish that business records showing that the closing or technological or reorganizational changes in response to a reduction in volume of production, sales or profit support the decision. Such discharges must take place in reverse order of seniority so that the employer retains senior employees the longest.

The Local Laws do not protect new employees within a 30-day probation period. The Local Laws also do not limit the applicability of any right or benefit afforded to fast food employees from any other laws, regulations, rules, policies or standards.

General Proceedings

Employees must bring judicial or administrative actions within two years from the date of the alleged violation.

Generally, under any proceeding brought under the Local Laws, if the employer is found to violate any section of the Local Law, an employer may be required to reinstate the employee and to pay attorneys' fees and costs for the discharged employee. Further, the employer may be required to pay schedule change premiums for lost shifts, back pay and punitive damages and provide any other equitable relief. The Department of Consumer Affairs and Worker Protection may also fine any non-compliant employer $500.00 for each violation.

Arbitration Proceedings

Commencing January 1, 2022, a discharged employee may bring an arbitration proceeding against the employer, which may be converted to a class proceeding, if allowed by applicable law. The Local Laws lay out the process and procedure for an arbitration proceeding. The statute of limitations for bringing this proceeding is two years from the date of the alleged violation.

An arbitral finding of a violation of any section of the Local Laws may lead to an order requiring the employer to reinstate the employee and to pay: (1) attorneys' fees and costs for the discharged employee; (2) the costs to the City of conducting the arbitration; (3) the employee's back pay; and (4) compensatory damages to the employee. The employer also may be compelled to rescind the issued discipline and may be subject to other injunctive relief. Where an employee pursues arbitration, he or she may not also file a private cause of action or administrative complaint unless the arbitration has been withdrawn or dismissed without prejudice.

Employee Scheduling Requirements

Fast food employers in NYC are required to provide their employees with a regular written schedule (or a good faith estimate in writing). This schedule must provide a set of recurring weekly shifts, and set forth the number of hours the employee can expect to work. New employees must receive this schedule or a written notice of the same on or before their first day of work. The employer must notify employees at least 14 days before the first day of any new changes to their work schedule.

In the case of long-term or indefinite changes to these schedules, the employer is required to provide an updated copy of the same. Finally, an employer cannot reduce the total hours of the employee's schedule by more than 15 percent from the highest total hours in the employee's regular schedule, unless the employee consents to the same or requests such a change in writing.

Takeaways for Employers

The Local Laws provide a number of additional protections to fast food employees. Fast food employers should review the Local Laws carefully or reach out to counsel for analysis of the same and ensure their existing policies and procedures are compliant before the Local Laws take effect in July. Fast food employers should ensure that they have policies regarding progressive discipline and discharge and rules that clearly outline the types of offenses for which employees can be

terminated on the first offense. Employers should also ensure that new employees are provided with and have reviewed such written policies concerning discipline and discharge. Employers should also provide new and existing employees with their work schedules in writing, and in advance of the start date of such schedules.

Employers should carefully document stages of progressive disciplinary actions taken against the employees, conduct a thorough investigation into any rule infraction and ensure consistent application of the same. On discharging employees, employers should comply with the above procedures and provide a thorough written explanation to the employee of the reasons for the discharge, as the Local Laws allow the fact-finder to disregard any reasons not included in such written explanation. Finally, employers should retain such records for at least two years after discharge in case of a future wrongful discharge proceeding against them.

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