

A Fast Food Employer's Guide to NYC's Recently Upheld Wrongful Discharge Law

The New York City Fair Workweek Law was initially enacted in 2017 to expand wage and hour protections for employees working at fast food businesses. On December 17, 2020, the City Council amended the Fair Workweek Law by enacting the Wrongful Discharge Law. The Wrongful Discharge Law was signed by then-Mayor Bill de Blasio and its provisions went into effect on July 4, 2021. N.Y.C. Admin. Code §§ 20-1271 to 20-1275. The Wrongful Discharge Law prohibits employers governed by the Fair Workweek Law from firing hourly wage employees in the fast food business without notice or reason in the absence of egregious misconduct and provides those employees with the option to arbitrate claims of alleged violations of the law.

So, What Is New?

As explained below, a federal court in New York has upheld the constitutionality of the law, and fast food employers need to be prepared for its requirements.

But First, What Are the Provisions of the Law?

The Just Cause Provision

The Just Cause Provision states that a “fast food employer shall not **discharge** a fast food employee who has completed such employer’s probation period (not to exceed 30 days) except for **just cause** or for a **bona fide** economic reason.” N.Y.C Admin. Code § 20-1272(a).

Discharge Defined

A discharge is defined as “any cessation of employment, including layoff, termination, constructive discharge, reduction in hours, and indefinite suspension.” N.Y.C Admin. Code § 20-1271. A reduction in hours “means a reduction in a fast food employee’s hours of work totaling at least 15 percent of the employee’s regular schedule or 15 percent of any weekly work schedule.” N.Y.C Admin. Code § 20-1272(a).

Just Cause Defined

“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.” *Id.* There are five nonexclusive factors that a fact-finder must consider when determining whether a just cause discharge occurred, N.Y.C Admin. Code §§ 20-1271 , 20-1272(b), discussed further below.

Bona Fide Economic Reason

For discharge to be based on a bona fide economic reason, the reason has to supported by a fast food employer’s business records showing that the closing, or technological or reorganizational changes are in response to a reduction in volume of production, sales, or profit. Discharges of fast food employees based on a bona fide economic reason shall be done in reverse order of seniority in the fast food establishment where the discharge is to occur, and a fast food employer shall make reasonable efforts to offer reinstatement or restoration of hours within 12 months before the fast food employer may offer or distribute shifts to other employees or hire any new fast food employees. N.Y.C Admin. Code §§ 20-1271(h).

The Just Cause Factors



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Unless a fast food employee's discharge is for an "egregious failure by the employee to perform their duties" or for "egregious misconduct," for a fast food employer to lawfully discharge a fast food employee, the fast food employer has to 1) have a written policy on progressive discipline policy in effect, 2) provide that written policy on progressive discipline to employees, and 3) employees must go through the fast food employer's progressive discipline policy (reasons for discharge may not include discipline older than one year).

While egregious is undefined, the statute does provide several factors for a fact finder 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.

The statute also states that other relevant factors may be considered.

Progressive Discipline Defined

"Progressive discipline" means 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. N.Y.C. Admin. Code § 20-1201. Except for an employee's egregious misconduct, a termination is not for just cause unless the employer utilized progressive discipline. N.Y.C. Admin. Code § 20-1272(c) .

Employer Duties Upon Discharge

An employer must supply any discharged employees with a written explanation containing "the precise reasons for their discharge" within five days of discharge. N.Y.C. Admin. Code § 20-1272(d). In any subsequent action alleging a violation of the Just Cause Provision, the employer bears the burden of establishing that the discharge was valid, and a fact-finder is limited to consideration of the employer's written reasons it provided to the employee. N.Y.C. Admin. Code § 20-1272(d)-(e). If an employee was scheduled to work and then discharged, the employee is entitled to a schedule change premium. The schedule change premium must be paid even if the discharge is for just cause or a bona fide economic reason. N.Y.C. Admin. Code § 20-1274.

Option to Arbitrate

Fast food employees can now pursue alleged unlawful discharge violations in arbitration, even absent a specific arbitration agreement with the fast-food employer. 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. N.Y.C. Admin. Code § 20-1273. 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. *Id.*

Burden of Proof

The fast food employer shall bear the burden of proving just cause or a bona fide economic reason by a preponderance of the evidence in any proceeding brought pursuant to the Just Cause

Provision, subject to the rules of evidence as set forth in the civil practice law and rules or, where applicable, the common law. N.Y.C. Admin. Code § 20-1272(e) .

Who is a Fast Food Worker?

An employee engaging in customer service, cooking, food, or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance at a fast-food establishment in exchange for an hourly rate of pay falls within the scope of this ordinance. The term “fast food employee” does not include any employee who is salaried.

Who is a Fast Food Employer?

To qualify as a fast food employer, an establishment must:

1. primarily serve food or drink items;
2. utilize a model 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;
3. offer limited service;
4. exist as part of a chain, which requires that the establishment is a member of a set of establishments sharing common brand or characterized by standardized options for décor, marketing, packaging, products, and services; and
5. qualify as either: (a) an integrated enterprise that owns or operates 30 or more such establishments in the aggregate nationally; or (b) an establishment operated pursuant to a franchise where the franchisor and franchisees combined own or operate 30 or more such establishments in the aggregate nationally.

The Southern District of New York Decision

Procedural Background

On May 28, 2021, the Restaurant Law Center and New York State Restaurant Association filed a complaint against New York City for declaratory and injunctive relief in the U.S. District Court, Southern District of New York. On July 20, 2021, The Restaurant Law Center and New York State Restaurant Association filed a Motion for Summary Judgement. After some additional briefing, the Southern District of New York issued a decision on February 11, 2022.

Arguments

The restaurant groups sought to strike down the law on several grounds, arguing that it violates the U.S. Constitution’s Commerce Clause, the National Labor Relations Act, and the Federal Arbitration Act.

Holding

The Southern District of New York rejected each of these claims and ruled that the Wrongful Discharge Law is constitutional because it minimally burdens interstate commerce; that it is consistent with federal labor law because it does not treat unionized and nonunionized employees differently, or otherwise invade the collective bargaining process; and finally, that it is consistent with federal arbitration law because it does not prohibit or impair the enforcement of private arbitration agreements. In so ruling, the court declined to exercise jurisdiction over the restaurant groups’ various state law claims.

Practical Reality

The practical reality is that the Wrongful Discharge Law may be here to stay and is likely to set the tone for other jurisdictions in adopting similar measures. Thus, if you are a fast food employer, it is best to immediately implement a progressive discipline policy, distribute it to your fast food workers, and comply with the provisions of the Wrongful Discharge Law. We also recommend you consult with counsel.
