New York City Council to Consider Legislation Impacting Employers

In response to the COVID-19 crisis, the New York City Council (city council or council) has introduced a package of legislation deemed the "Essential Worker Bill of Rights." The stated intent of these bills is to provide additional pay and protections for workers who have provided front-line services throughout the pandemic. However, if adopted, this legislation would create significant and lasting precedents in city law regarding the employee/employer relationship.

Two of the bills, Int. 1918 and Int. 1923, pertain specifically to "essential employers" as defined by New York state pursuant to Governor Cuomo's Executive Order 202.6. As reference, the state guidance lists more than 88 types of businesses in 14 different industries, including health care, infrastructure, essential manufacturing, critical retail, and a wide range of social and professional services. While this guidance will presumably change and expire with the governor's executive order, the proposed bills include no sunset provisions.

Additionally, Int. 1918 and Int. 1923 explicitly cover not only employees but also persons "permitted to work at or for" essential businesses. When read in conjunction with Int. 1926, a bill to extend paid sick leave to gig economy workers, it appears that the bill sponsors are seeking to redefine the employer/employee relationship post COVID-19 to ensure that certain benefits and protections are extended to workers who have not been historically covered.

A brief summary of each of the bills appears below. We anticipate that the council's Committee on Civil Service and Labor will conduct a hearing within the next two weeks.

Int. 1918 — Premiums for Essential Workers

Int. 1918 would require "large" essential employers to pay their workers a shift-based premium. The legislation defines a large essential employer as an entity that currently or, on average over the past calendar year, employs 100 or more people or pays 100 or more people to perform work on a full-time, part-time, or temporary basis. Smaller employers may be captured if they are part of a "chain business" where one owner holds at least a 30 percent interest in a group of franchised or related establishments whose total employee or worker count equals 100 or more.

Int. 1918 establishes three tiers of mandatory worker premiums: $30 for a shift of less than four hours, $60 for a shift of four to eight hours, and $75 for a shift of greater than eight hours. Unionized workplaces are exempt if the relevant collective bargaining agreement expressly waives the requirements of the legislation and provides an equal or greater benefit to workers. Large essential employers must post notices for their employees and are prohibited from retaliation.

Int. 1918 provides for administrative enforcement by the city as well as a private right of action. Violations would be subject to fines beginning at $1000 and quickly rising to $2000 per violation per employee instance. Int. 1918 also authorizes the city's corporation counsel to initiate litigation against employers, both on behalf of individual employees and in the event the city has reasonable belief that an employer has a practice of, or it is believed to have demonstrated a pattern or practice of violation.

The legislation, if adopted, would take effect immediately. There is no sunset date.

Int. 1923 — Just Cause Discharge from Employment

Int. 1923 would prohibit all essential employers from discharging an essential employee without "just cause." The legislation defines essential employee quite broadly to include anyone employed or permitted to work at or for an essential business. Discharge is also broadly defined to include

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suspension and reduction of hours as well as termination.

Just cause means “sufficient cause … such as the 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 provides that no determination of just cause can be made unless the provider has utilized “progressive discipline,” a graduated system of responses to an essential employee’s failure to satisfactorily perform on the job. If an employer proceeds with termination after utilizing this system, he/she must provide the employee with a written statement of all non-hearsay reasons for that decision.

The legislation provides for multiple enforcement pathways, including appeal to the Department of Consumer Affairs, arbitration proceedings, or a private right of action. In any forum, the review would consider the following issues before reaching a conclusion:

- The employee knew or should have known of the employer’s policy, rule, or practice;
- The employer provided relevant and adequate training to the employee;
- The employer’s policy, rule, or practice was reasonable and applied consistently; and
- The employer undertook a fair and objective investigation.

The legislation explicitly prohibits the fact-finder from considering any information that was not provided in the employer’s written statement to the employee. The legislation also provides that the employer bears the burden of proving just cause by a preponderance of non-hearsay evidence. The statutory penalty for each violation includes a fine of up to $2500 plus back pay and benefits, as well as punitive and other damages as applicable.

Int. 1923 exempts employees who are covered by a collective bargaining agreement, so long as that agreement waives the requirement and provides “comparable or superior benefits” for employees. The legislation also allows for a probation period for new employees, not to exceed 30 days, during which the anti-discharge framework would not apply.

The legislation, if adopted, would take place immediately. There is no sunset date.

Int. 1926 — Expansion of Coverage Under the Earned Safe and Sick Time Act

Int. 1926 would significantly amend the city’s Earned Safe and Sick Leave law by extending the law’s protections to so-called “gig economy workers.” This bill is not limited to essential employers. Int. 1926 creates a presumption of employee status for any worker who provides more than 80 hours of labor or services in a calendar year. The presumption of employee status may be rebutted by an employer who demonstrates all of the following:

- the person is free from the direction and control of the hiring entity
- the instant labor or services are outside the usual course of the hiring entity’s business
- the worker is customarily engaged in the profession for which he/she is being paid

Exceptions are provided for all persons working for government agencies, certain student workers, and hourly professional employees. The legislation would be effective retroactively to January 1, 2020, and would require all newly covered employers to post a notice informing employees of their rights.

Should you wish to participate in advocacy related to these proposals, the Cozen O’Connor Public Strategies team is available to assist and advise you.