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NYC Council Considers Legislation to End At-Will Employment in the Fast Food Industry

The New York City Council has proposed additional legislation that would have a major impact on businesses falling within the broad definition of "fast food establishments" and has scheduled a hearing on the bills for February 13. The legislation would require "bona fide economic reasons" as determined through arbitration or "just cause" based on a progressive disciplinary system for employment terminations in New York City. This legislation follows laws enacted in 2017 limiting work hours and requiring predictable scheduling.

Background

In 2017, the city of New York adopted three local laws that regulate the employee scheduling practices of the so-called fast food industry. Local Law 100 prohibited fast food employers from requiring employees to work "clopenings," or consecutive shifts with fewer than 11 hours between them. Local Law 106 required fast food employers with additional work hours available to offer those hours to existing employees rather than hiring new employees. Finally, Local Law 107 required fast food employers to provide employees 14 days' advance notice of their work schedule and to pay a schedule shift premium to any employee whose schedule is changed. These laws provided for enforcement by the New York City Department of Consumer and Worker Protection (DCWP) and also provided for pro-active litigation by the city's Corporation Counsel, as well as a private right of action for employees.

These laws also established which businesses would be covered. For purposes of New York City law, a "fast food establishment" is defined by a five-point test:

- Its primary purpose is the sale of food and drink;
- Patrons order and pay before eating;
- It offers limited service;
- It is part of a chain; and
- It is one of 30 or more establishments nationally.

The new proposed legislation attempts to place further restrictions on fast food establishments and also raises more questions than it answers.

Int. 1396 – "Fast Food Employee Layoffs"

The first bill, Int. 1396, would severely restrict an employer's ability to engage in layoffs, broadly defined to include any cessation of employment, including discharge, termination, constructive discharge, indefinite suspension, or reduction in hours totaling 15 percent of an employee's work week. Specifically, Int. 1396 prohibits fast food employers from conducting layoffs absent a "bona fide economic reason" that is defined as "the full or partial closing of operations or technological or organizational changes to the business, resulting in a reduction in volume of production, sales, or profit." Employers that meet this test may engage in layoffs but must be conduct them solely in reverse order of employee seniority.

The legislation provides that an employee or group of employees may bring an arbitration proceeding that will be governed by the American Arbitration Association's labor arbitration rules. The arbitrator will be selected by the parties from a list created by an eight-person committee consisting of two fast food employees, two fast food employee advocates, two fast food employers, and two fast food employer advocates. If this committee cannot convene, or cannot identify or agree to an arbitrator, the DCWP will select one. If the arbitrator finds in favor of the employee, it will award statutory relief ($500 plus back pay and possible punitive damages for each

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employee) as well as attorney's fees and costs. A private right of action is also provided for workers whose complaints are not resolved in arbitration.

Finally, Int. 1396 legislation specifically 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.

Int 1415 – "Wrongful Discharge from Employment"

This legislation would require fast food employers to establish a system of "progressive discipline" for all employees and would prohibit employers from discharging an employee without "just cause." Discharge is broadly defined to include termination, constructive termination, suspension, and reduction of hours when the reduced hours total 15 percent of an employee's work week.

Just cause is defined as the "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 if the employer has not provided and used a system of progressive discipline, 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." If an employer proceeds with termination after utilizing this system, he/she must provide the employee with a complete statement of all of the reasons for his or her decision. The statutory penalty for each violation includes $500 plus back pay and benefits, as well as punitive and other damages as applicable. The legislation provides for multiple enforcement pathways, including appeal to the DCWP, arbitration proceedings as provided in Int. 1396, or a private right of action. In any forum, the review would assess the following issues before reaching a conclusion:

- The employee knew or should have known of the fast food employer's policy, rule, or practice;
- The employer provided relevant and adequate training to the fast food 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 in any proceeding.

Like Int. 1396, Int. 1415 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.

Please reach out to one of the authors if you believe you may be impacted by these proposals.