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NYC Fast Food Worker Protections May Portend 'At Will' Shift

Law360 on **April 22, 2021**

Earlier this year, New York City passed two laws that will fundamentally alter the bedrock of U.S. employment law. Taking effect on July 4, these new laws will effectively eliminate employment-at-will in the fast food industry by requiring employers to have either a bonafide economic reason or just cause following progressive discipline before terminating any employee.

These laws grant fast food workers safeguards traditionally unavailable in the private sector absent a union contract and may foreshadow additional restrictions on employers' ability to manage their workforce.

Employment-At-Will: The Bedrock of U.S. Employment Law

Employment-at-will is a hallmark of American employment law. In every state except Montana, absent a contractual agreement, employees are presumed to be employed at will, meaning either the employer or the employee may terminate the employment relationship at any time and for any reason.

Federal, state and local legislatures have enacted laws creating various exceptions to the at-will employment doctrine, such as laws prohibiting employers from discriminating or retaliating against employees. In addition, some courts have recognized limited breach of contract and public policy exceptions.

For example, in New York, employers are prohibited from terminating attorneys for reporting the professional misconduct of a co-worker, based on attorneys' implied obligation to uphold the ethical standards of the profession. Other states, such as California, Massachusetts and New Jersey, have also recognized limited public policy exceptions to the at-will employment doctrine.

Despite these existing exceptions to the at-will employment presumption, some have advocated for legislation that would eliminate the presumption altogether, thereby stifling employers' ability to restructure their workforces. A key question is whether New York City's most recent law is a harbinger of additional challenges to employment at will.

New York City's Just Cause Law

New York City's two new laws, Introduction 1415-A[1] and Introduction 1396-A,[2] effectively eliminate fast food employers' discretion to discharge employees. The legislation largely parallels the types of provisions that are central to most collective bargaining agreements, thus bridging a gap between the protections afforded to unionized and nonunionized workers.

Under the new city law, fast food employers include any establishment that (1) has its primary purpose serving food or drink items; (2) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out or delivered; (3) that offers limited service; (4) that is part of a chain; and (5) that is one of 30 or more establishments nationally.

Beginning in July, fast food employers will only be permitted to discharge employees for just cause or a bona f ide economic reason. Notably, discharge includes both termination and a significant reduction in an employee's hours.

Under the just cause provision, after the expiration of a 30-day probationary period, a fast food employer may only terminate an employee for failure to satisfactorily perform their job duties or for misconduct that is demonstrably and materially harmful to the employer's business. The just cause determination is fact-sensitive and requires consideration of factors such as whether:

- The employee knew or should have known of the employer's policy, rule or practice that is the basis for progressive discipline or discharge;
- The employer provided relevant and adequate training to the employee;
- The employer's policy, rule or practice, including the use of progressive discipline, was reasonable and applied consistently;
- The employer undertook a fair and objective investigation into the employee's job performance or misconduct; and

- The employee committed the misconduct or violation that is the basis for progressive discipline or

Absent egregious misconduct or an egregious failure by the employee to perform their duties, fast food employers are required to impose progressive discipline before discharging employees. To this end, employers must provide employees with a written progressive discipline policy that provides for a graduated range of reasonable responses to an employee's failure to satisfactorily perform their job duties.

Such disciplinary measures must range from mild to severe, depending on the frequency and degree of the performance deficiency. Employers are prohibited from relying on discipline that was issued more than one year before the discharge. And employers must — within f ive days of the discharge — provide discharged employees with written explanation of the precise reasons for their discharge.

Fast food employers may also discharge employees for a bona f ide economic reason. A bona f ide economic reason is limited to "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."

An employer who discharges an employee for a bona f ide economic reason must (1) support the discharge decision with business records and (2) discharge employees in reverse order of seniority. Employers must also make reasonable efforts to offer discharged employees reinstatement or restoration of hours before hiring new employees or distributing shifts to other employees.

These new laws will require fast food employers to adopt radical changes in their business practices and may hamper their ability to swiftly respond to changing workplace and industry conditions. At a minimum, fast food employers must vigilantly screen new hires and closely monitor their performance during the 30-day probationary period. They should also ensure that:

- Policies, rules and practices — including their progressive discipline policies — are reasonable, known by employees and enforced
- Fair and objective procedures are implemented to investigate employee misconduct and job performance

- Employees are well trained and sufficiently aware of their job duties and responsibilities.
- Personnel decisions are supported by documentation and other demonstrable evidence.

Supporters of these new laws have championed them as "setting an example for the entire country on how to step up and protect low-wage workers."[3] No doubt, starting in July, fast food employees will be afforded new protections. But these laws may do employees more harm than good.

For example, as opposed to coaching and training employees with performance issues, employers will now be more likely to terminate employees with performance issues during their 30-day probationary period. Employers may also hire fewer new employees or seek out ways to utilize independent contractors.

What remains to be seen is whether these new laws foreshadow additional legislative developments limiting the at-will employment doctrine.

The Beginning of the End of At-Will Employment

While it is unlikely that Congress or any other state or local legislature will abolish the at-will employment doctrine anytime soon, all employers — particularly those with large populations of low-wage workers — should be on the lookout for similar laws affecting their industries, particularly at the state and local level.

New York City's just cause legislation is not the f irst of its kind, and other states have showed a similar interest in shifting away from employment-at-will. For example, Philadelphia adopted a wrongful termination law that requires parking employer s to discharge parking employees only for a bona f ide economic reason or for just cause after progressive discipline. New York City's legislation largely mirrors Philadelphia's law, and other states may similarly adopt these laws as models for future just cause legislation.

In April 2020 — at the outset of the pandemic — the New York City Council considered a new law that would have prohibited employers from terminating essential workers without just cause. Ultimately that bill was never passed, but it is yet another example of New York City's Legislature contemplating radical steps toward restraining employers' long-standing discretion to modify their workforce.

It is most likely that any future just cause laws will continue to target historically low-wage industries with a high rate of turnover, such as retail and hospitality. Regardless, all employers should be vigilantly monitoring these developments, which could have a radical impact on their businesses.

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[1] https://legistar.council. gov/LegislationDetail.aspx?ID=3860317&GUID=F97F44AA-CCC8-470B-998E-C3C35A5C0717&Options=&Search.

[2] https://legistar.council. gov/LegislationDetail.aspx?ID=3860321&GUID=76C5427B-7B33-4E55-AA73-37345B8ABEEF&Options=&Search=.

[3] See Mayor de Blasio Signs "Just Cause" Worker Protection Bills for Fast Food Workers, The Official Website of New York City, https://www1.nyc.gov/office-of-the-mayor/news/005-21/mayor-de-blasio-signs-just-cause-worker-protection-bills-f ast-food-employees (Jan. 5, 2021).

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