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NYC Council Considering Proposal To Significantly Limit At-Will Employment and Electronic Monitoring of Employees

Law and the Workplace Blog on **December 14, 2022**

A proposed ordinance has been introduced before the New York City Council to generally prohibit private employers from terminating employees without "just cause" or a "bona fide economic reason." If enacted, this proposal effectively eliminates the longstanding principle of at-will employment in New York City. The proposed ordinance also would limit the use of electronic monitoring in disciplining or discharging employees.

Most Private Employees Covered With Limited Exceptions

By way of background, presently for fast food employers only the NYC Fair Workweek Law provides, among other things, that such employers cannot terminate or reduce the hours of a fast food worker by more than 15% without "just cause" or a "bona fide economic reason." The proposed ordinance would expand these protections to employees outside of the fast industry to nearly all private employers and employees in NYC.

Certain exceptions, however, would apply. Employees within a "probation period" not to exceed 30 days from the first date of work would be excluded from the proposed law's protections. Other exclusions would include construction industry employees; employees covered by a valid collective bargaining agreement that waives rights under the ordinance and provides comparable terms and conditions for the discharge of employees; and employees in a short-term position of no longer than six months (or three years, for a short-term educational position) discharged at the end of the contract of employment, provided that the employer does not hire another employee to perform similar work for 180 days after the end of the contract.

Termination Limited to Just Cause or Bona Fide Economic Reason

Under the proposed ordinance, employers would be precluded from discharging a covered employee who has completed the employer's probation period except for "just cause" or a "bona fide economic reason." Discharge means "any cessation of employment, including layoff, termination, constructive discharge, reduction in hours [totaling at least 15% of the employee's regular schedule or 15% of any weekly work schedule] and indefinite suspension."

Just Cause

For purposes of the proposed ordinance, just cause means "the employee's failure to satisfactorily perform job duties or to misconduct that is demonstrably and materially harmful to the employer's legitimate business interests."

Except where termination is for "an egregious failure by the employee to perform their duties, or for egregious misconduct," a termination would not be considered based on just cause unless the employer (a) has utilized progressive discipline issued within one year of the termination; and (b) had a written policy on progressive discipline which was provided to the employee.

Progressive discipline means "a graduated range of reasonable responses to an employee's failure to satisfactorily perform such employee's job duties" where the disciplinary measures vary in severity depending upon the frequency and degree of the failure.

Further, employers would need to consider the following factors – as well as "any other relevant factors" – to determine if just cause exists:

1. Whether the employee knew or should have known of the employer's policy, rule, practice, or performance standard that is the basis for progressive discipline or discharge;
2. Whether the employer provided relevant and adequate training to the employee;
3. Whether the employer's policy, rule, practice, or performance standard, including the utilization of progressive discipline, was reasonable and applied consistently;
4. Whether the employer undertook a fair and objective investigation into the job performance or misconduct;
5. Whether the employee violated the policy, rule, or practice, failed to meet the performance standard, or committed the misconduct that is the basis for

progressive discipline or discharge;

6. Whether the employer impermissibly relied on electronic monitoring (discussed further below); and
7. Whether the employer disciplined or discharged the employee based on that employee's performance, irrespective of the performance of other employees.

Factors #6 and 7 above would be new additions to the just cause factors that presently must be considered when terminating fast food employees.

Bona Fide Economic Reason

The proposed ordinance defines a bona fide economic reason as "the full or partial closing of operations or technological or organizational changes to the business in response to a reduction in volume of production or sales of 15 percent or more over a period of two quarters," either at the discharged employee's work location or across all NYC establishments owned by the employer. However, it would not include job eliminations in the context of a merger or acquisition. An employer seeking to assert a bona fide economic reason would need to support their position with business records showing that the closing or reorganization was in response to a reduction in production, sales or profit.

Notice Requirements

Except where based on egregious misconduct or failure to perform duties, an employer would have to provide 14 days' notice of any discharge, whether based on just cause or bona fide economic reason. Further, within five days of giving such notice, the employer would need to provide a written explanation to the employee of the precise reason for their discharge, as well as a copy of any information used in making the discharge decision. Failure to provide a written explanation would preclude a finding that the employee's discharge was for just cause.

Limits on Electronic Monitoring of Employees for Disciplinary Purposes

The proposed ordinance also would essentially prohibit employers from relying on data collected through electronic monitoring in discharging or disciplining an employee unless the employer can establish before each use of electronic monitoring that:

1. there are no other practical means of tracking or assessing employee performance;
2. the employer is using the least invasive form of electronic monitoring available; and
3. the employer previously provided notice to the employee of that monitoring as required by this section.

Electronic monitoring is defined as "the collection of information concerning employee activities, communications, actions, biometrics or behaviors by electronic means including, but not limited to, video or audio surveillance, electronic employee work speed data and other means." The proposal excludes any processes covered by New York State Civil Rights Law § 52-c addressing employer notice of phone, email, and internet monitoring.

Notwithstanding the above, the proposed ordinance would disallow employers from using any of the following to make disciplinary or discharge decisions *at any time*: any biometric data (e.g., fingerprints, hand or iris scans, voiceprints); apps or software installed on an employee's personal device; geofencing technologies (i.e., technologies that track a device's location, such as GPS); or video or audio recordings within an employee's private home.

To establish the first prong of practical necessity of the electronic monitoring process discussed above, employers must have filed with the Department of Consumer and Worker Protection an "impartial evaluation from an independent auditor" stating that electronic monitoring is effective in undertaking its designated task. However, even if employers can establish practical necessity, electronic monitoring must not be the sole means of assessing an employee's performance. Qualitative measures such as manager observation or feedback solicited from other employees, customers, etc., must supplement any monitoring.

Notice Requirements

An employer planning to use electronic monitoring for disciplinary or discharge purposes would need to provide employees with clear and conspicuous notice for each specific form of electronic monitoring used. The notice would need to include several elements, including whether the data will be used to make disciplinary or discharge decisions and, if so, any associated benchmarks or performance standards; the names of vendors conducting electronic monitoring on behalf of the employer; a description of the dates, times and frequency the monitoring would occur; and information regarding the administrative and judicial mechanisms available to challenge the use of such monitoring. Employers would also have to provide additional notice to employees when an update or change is made to the electronic monitoring or how the employer uses it.

An employer who engages in periodic electronic monitoring of employees for discipline or discharge would be required to inform the affected employees of the specific events being monitored when the monitoring occurs. Employers could delay providing notice until after such monitoring has occurred only if necessary to preserve the integrity of an investigation of illegal activity or to protect the immediate safety of employees, customers, or the public.

Exceptions

The proposed ordinance enumerates certain exceptions where employers may use information gathered through electronic monitoring without having to meet the three-prong test laid out above, namely: (1) to record the beginning or end of a work shift, meal break, or rest break; (2) for non-employment related purposes; (3) to discharge or discipline an employee in cases of egregious misconduct or where there is a threat to the health or safety of other persons; or (4) where required by state or federal law.

Additionally, employers would be permitted to rely on electronic employee work speed data to determine whether an employee has met a quota, so long as it measures total output over an increment of time that is no shorter than one day, the discipline or discharge being imposed is not based on failure to meet a daily quote where an employee did not complete their entire shift, and employees are afforded the opportunity to supplement that data to record any increments of time during which they are not performing work-related tasks, to record the reason that they are not performing work-related tasks during that time, and to request to correct any inaccurate data.

The Bottom Line

The proposed ordinance is still in its early stages, and we will continue to monitor and report on its progress. However, NYC fast food employers are reminded that many of the above-noted limitations on terminating employees are currently in effect.

Further, NYC employers presently utilizing certain automated employment decision tools are reminded about a new law (the "AEDT Law") prohibiting the use of certain such tools to screen applicants for hiring and employees for promotion unless the tool has been subject to a bias audit and the employer satisfies certain notice requirements. The AEDT Law was initially set to take effect on January 1, 2023. However, the NYC Dept. of Consumer and Worker Protection has announced that due to the pendency of proposed rules, the AEDT Law will not be enforced until April 15, 2023.

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