Legal Update Article

# New York City Enacts Legislation Expanding New York City's Fair Workweek Law

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On January 5, 2021, New York City Mayor Bill de Blasio signed into law two pieces of legislation passed by the New York City Council, Int. No. 1415-A and Int. No 1396-A, that, when effective in early July 2021, will impose significant obligations on covered New York City fast food industry employers and potentially will pave the way for a great overhaul of the at-will employment system that has long-defined the employer-employee relationship in New York State and New York City.

As detailed below, these bills, which have been pushed by organized labor, expand New York City's Fair Workweek Law to provide "Just Cause" protection from discharge and significant reductions in hours for fast food employees, require employers to engage in seniority-based reductions and rehiring if staff reductions are due to bona fide economic reasons, and provide for a private right of action. "A strong, fair recovery starts with protecting working people," Mayor de Blasio said. "These bills will provide crucial job stability and protections for fast food workers on the front lines. I thank Council Members Adams and Lander for sponsoring these bills and 32BJ SEIU for their advocacy."

### "Just Cause" Protections

Under this legislation, following completion of a probationary period of up to 30 days, covered fast food employers may not discharge, reduce the hours of employees by 15% of their regular schedule or by 15% of any weekly work schedule, or indefinitely suspend employees (absent "Bona Fide Economic Concerns") without "Just Cause."

"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." The bill also lays out a stringent set of factors that will be used to determine whether a fast food employee's discharge or reduction in hours was indeed based on "Just Cause." Factors include:

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

"Progressive Discipline" is defined as 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." The bill expressly provides: "unless termination is for an egregious failure by the employee to perform their duties, or for egregious misconduct, a termination shall not be considered based on just cause unless (1) the fast food employer has utilized progressive discipline; provided, however, that the fast food employer may not rely on discipline issued more than one year before the purported just cause termination, and (2) the fast food employer had a written policy on progressive discipline in effect at the fast food establishment and that was provided to the fast food employee."

Further, the legislation requires that within five days of discharging a fast food employee, the employer must provide a written explanation of the "precise reasons" for the action and this explanation will be the employer's sole basis to support its termination decision if challenged.

## Seniority-Based Economic Reductions

This legislation also requires covered fast food employers discharging, reducing hours by 15% or more, or indefinitely suspending employees on economic grounds to articulate a "Bona Fide Economic Reason" for the discharge.

The legislation defines "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, sales, or profit." The bill further provides that where a covered fast food employer's workforce reduction is based on a "Bona Fide Economic Reason," covered employers must lay off employees in reverse Seniority order. "Seniority" is defined as: "a ranking of employees based on length of service, computed from the first date of work, including any probationary period, unless such service has been interrupted by more than six months, in which case length of service shall be computed from the date that service resumed. An absence shall not be deemed an interruption of service if such absence was the result of military service, illness, educational leave, leave protected or afforded by law, or any discharge based on a bona fide economic reason or that is in violation of any local, state or federal law, including this subchapter." A covered employer's business records must show that the closing, or technological or reorganizational changes, are in response to a reduction in volume of production, sales, or profit.

In other words, the more senior employees will be at the bottom of an employer's list when it comes to deciding who gets laid off first. For those employees who get laid off on economic grounds, the bill attempts to protect them by imposing rehiring obligations on covered fast food employers. It requires covered fast food employers to make "reasonable efforts to offer reinstatement or restore hours to any fast food employee discharged based on a bona fide economic reason within the previous 12 months." Covered fast food employers must attempt to accommodate the laid off employees before they distribute shifts among existing employees or hire new fast food employees. Furthermore, covered fast food employers must reinstate or restore the hours of employees with the greatest seniority first.

## Recourse for Aggrieved Fast Food Employees

Aggrieved fast food employees who were allegedly subjected to a prohibited job action without "Just Cause" or a properly implemented seniority-based action for a "Bona Fide Economic Reason" appear to have the right to bring a civil action in court or, after January 1, 2022, file an arbitration proceeding.

On or after January 1, 2022, fast food workers alleging wrongful discharge or violations of the law's seniority-based reduction and rehiring provisions may bring an arbitration proceeding. A party can bring an arbitration proceeding within two years of the date of the alleged violation. The New York City Department of Consumer Affairs and Workplace Protection will be responsible for appointing a committee to select a panel of arbitrators from which the parties could choose arbitrators. The selected arbitrator will be tasked with determining whether the employer made an unlawful termination decision or made economic layoffs (or subsequently rehired laid off employees) without considering seniority.

If a violation is found, the court or arbitrator may order the employer to: (i) reinstate or restore the hours of the fast food employee; (ii) pay the city for the costs of the arbitration proceeding; (iii) pay the reasonable attorneys' fees and costs of the fast food employee; or (iv) pay back pay, compensatory damages, and any other equitable relief, including penalties for missed shifts under the Fair Workweek Law and civil fines.

### Modification to Existing Obligation to Provide Good Faith Estimates

Currently, covered fast food employers are required to provide newly hired fast food employees with a good faith estimate of the employee's workdays and hours on or before their first day of work. They also must issue a revised good faith estimate if the schedule significantly changes. Further, a covered employer is required to provide a copy of the schedule prior to the first day worked and all subsequent schedules at least 14 days in advance of the beginning of the relevant workweek.

The bill modifies these requirements and requires that fast food employers adopt "scheduling practices that provide each fast food employee with a regular schedule that is a predictable, regular set of recurring weekly shifts the employee will work each week." A covered fast food employer "may not reduce the total hours in a fast food employee's regular schedule by more than 15% from the highest total hours contained in such employee's regular schedule at any time within the previous 12 months, unless the employee has previously consented to or requested such reduction in writing, or the reduction was consistent with the restrictions on discharges." This modification likely will limit covered industry employers' ability to adjust worker schedules according to seasonal demand.

Covered employers remain obligated to provide a copy of any revised regular schedule before work is performed and permitted scheduling changes are subject to existing notice obligations.

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Covered employers should prepare for the effective date of these amendments by reviewing scheduling practices and enhancing employment policies to support the basis for discharges and reductions in hours.

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