

Employees in the New York City Fast Food Industry Will No Longer be Considered "At-Will"

By Mordy Yankovich

In the State of New York, an employment relationship, absent an agreement to the contrary, has always been "At-Will," which means the employer or employee can terminate the relationship at any time for any reason, with or without cause. *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329 (1987).


However, on January 5, 2021, The New York City Council enacted two bills which effectively ended "at will" employment for employees in the New York City fast food industry. The new laws, which are effective 180 days following enactment, prohibit employers in the NYC fast food industry from terminating an employee, other than for "Just Cause" or for "Bona Fide Economic Reasons" explained as follows: 1) "Just Cause:" New York City Council Bill, Int. No. 1415-A prohibits fast food industry employers in NYC from terminating an employee's employment, following a 30-day probationary period, or reduce their weekly hours by more than 15% without "Just Cause," defined as: "failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast food employer's legitimate business interests." The law details several factors used to determine whether an employee was terminated for Just Cause. Such factors include: whether the employee violated the employer's policies; the employee's knowledge of the applicable rule/policy prior to any incident occurring, training provided to the employee, whether an adequate investigation was conducted and whether progressive discipline was reasonably applied. Notably, absent

egregious conduct by the employee, a termination will not be considered to be for Just Cause unless the employer has a pre-established written policy on progressive discipline and can demonstrate that it is reasonable and was properly applied. A progressive discipline policy will be deemed unreasonable if employers rely upon discipline issued over a year prior to the termination of the employee's employment. Employers must provide the employee, within five days of termination, a written explanation of all the reasons for termination. Reasons for termination not contained in the writing will not be considered by a court or agency, if the employee challenges the legality of the employer's decision.

2) "Bona Fide Economic Reasons:" New York City Council Bill, Int. No. 1396-A permits fast food industry employers to terminate an employee or reduce their weekly hours by more than 15% for "Bona Fide Economic Reasons" which is defined as "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's decision to terminate an employee based on Bona Fide Economic Reasons must be supported by the employer's business records. If the employer does possess a Bona Fide Economic Reason for terminating employees, employees must be terminated "in reverse order of seniority." In addition, an employer may not hire a new employee or increase a current employee's hours unless the employer first makes a reasonable effort to reinstate any employees terminated for economic

reasons within the prior 12 month period.

Aggrieved employees may bring a civil action for discharges in violation of these bills or, after January 1, 2022, may bring an arbitration proceeding. Employers bare the burden of proving that the termination was for Just Cause or for Bona Fide Economic Reasons. If the employer fails to do so, the employee may be reinstated, awarded backpay, reasonable attorneys' fees and punitive damages. The employer may also be assessed civil penalties.

It is imperative that fast food industry employers in NYC consult with counsel and create/modify applicable policies. Affected employers should ensure that they closely manage employees during the first 30 days of their employment when the employment relationship is still "at-will" because terminating an employee for performance reasons becomes much more difficult following the probationary period. In addition, Employers should create/revise their progressive discipline policy and train all managers to ensure compliance with these laws. 



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