

Potential Changes to NYC's Employment Landscape via 'Secure Jobs Act,' New York Law Journal, authors Jennifer Sherven and Caitlyn O'Neill, 8-18-2023

NYC is considering a bill to expand the “just cause” protections afforded to employees at fast-food chains with at least 30 locations nationally to all employees in NYC. Kaufman Dolowich & Voluck Labor and Employment partner Jennifer Sherven says the proposed bill will also require employers to enact and follow a progressive discipline plan for all employees.

The New York City Council will consider the Secure Jobs Act, (Int 0837-2022) which seeks to blanket most NYC employees with the protections of NYC’s “Just Cause” Law. As the law currently stands, its protections are only offered to those employees who work in the fast-food industry. If the proposed legislation is passed as drafted, the expansion will significantly impact most NYC employers’ ability to discharge employees, effectively ending “at will” employment in the city.

A Look Back: NYC’s ‘Just Cause’ Law

In late 2020, the New York City Council passed what is colloquially referred to as the “Just Cause” Law. The “Just Cause” Law, which took effect in July 2021, places limitations on a fast-food employers’ ability to discharge employees. Specifically, fast-food employers must articulate “just cause” or a “bona fide economic reason” when discharging employees. See New York City, N.Y., Code §20-1272.

In any proceeding brought by employees challenging their discharge under the “Just Cause” Law, the employer bears the burden of proving just cause or a bona fide economic reason for the discharge of employment. There is a limited exception, however, when discharge is based upon an employee’s egregious failure to perform their duties or egregious misconduct, the employer does not have the burden to prove just cause.

The “Just Cause” Law provides that in order to establish just cause, an employer must have “utilized progressive discipline” that was issued less than one year before the discharge and must also maintain and distribute the written policy on progressive discipline to all employees. If the employer proceeds to discharge an employee based on a “bona fide economic reason,” such a decision must be supported by business records “showing that the closing, or technological or reorganizational changes are in response to a reduction in volume of production, sales, or profit.” The “Just Cause” Law further provides that discharges based on a bona fide economic reason “shall be done in reverse order of seniority.”

Individuals or organizations representing employees alleging violations of the “Just Cause” Law may bring an arbitration proceeding against the employer within two years of the date of the alleged violation. See New York City, N.Y., Code §20-1273. Additionally, the Department of Consumer Affairs and Worker Protection “may serve as a representative party on behalf of all members of a class.”

On Deck: NYC’s Secure Jobs Act

Pending before the New York City Council is Int 0837-2022, or the Secure Jobs Act. The Secure Jobs Act seeks to expand the protections of the “Just Cause” Law to all employees in New York City, not just those in the fast-food industry. The proposed legislation seeks to require all New York City employers to: (1) give employees 14 days’ notice of discharge, including a “valid reason” and written explanation for the discharge; (2) implement a progressive discipline system; (3) show proof of economic hardship before discharging employment when discharge is due to economic reasons; and (4) ban discharge and discipline based on data from electronic monitoring. See Int 0837-2022; see also Secure Jobs Act (July 25, 2023), (<https://www.securejobsact.nyc/overview>).

The Secure Job Acts also provides a mandatory 30-day probationary period for every employee, during which time their employment may not be discharged. The proposed legislation does not apply to workers in the construction industry and employees who expressly waive the law pursuant to a valid collective bargaining agreement. Similar to the New York State and City Human Rights Laws, the expansion of the law prohibits retaliation against individuals who seek to enforce the protections of the Secure Job Acts.

A Look Ahead

The passage of the Secure Jobs Act would have a significant impact on the employment landscape of NYC, as most of the city's employers would be obliged to abide by its requirements. The proposed legislation, in effect, would put an end to "at will" employment in NYC.

Presently, most NYC employers may discharge employees without warning for any reason or no reason at all, barring some exceptions, including the protections afforded by various federal, state, and local anti-discrimination laws.

But if the Secure Jobs Act is passed as drafted, most NYC employers will be required to articulate either "just cause" or a "bona fide economic reason" when discharging employees. In establishing "just cause," employers must show that progressive disciplinary measures were taken before the discharge was made, barring limited exceptions.

Employers will also bear the burden of establishing that the discharge in question comports with the requirements of the proposed law. A remedial measure of the Secure Job Acts allows for possible reinstatement of employment for discharged employees who are successful in prosecuting a claim. Practically speaking, this means that NYC employers may want to begin examining their policies and procedures to determine whether they need to prepare (or update) a progressive discipline policy, and ensure proper documentation of disciplinary measures are in place and verifiable if needed to substantiate a "just cause" for an employee's termination.

The act would also limit NYC employers' ability to use electronic monitoring in their decision-making. Presently, private employers in New York State, including NYC, must provide employees with notice if they monitor employer-provided phone, email, and/or internet use. Such notice must be given to employees in writing upon hire and the employer must also post such notice in a conspicuous place. As New York is an "at will" employment state, employers are free to use information gathered during electronic monitoring when determining whether to discharge employment.

If the Secure Jobs Act is passed, private NYC employers will likely be unable to use such information in making the decision to discharge employees. The proposed legislation contains three exceptions of instances when employers may use electronic monitoring: (1) there is 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.

In the Interim

For now, the Secure Jobs Act remains before the New York City Council, and it is unclear when the council may put the pending legislation to a vote. While its passage is pending, employers should consider consulting with legal counsel to determine how the implementation of the act would impact their business and what measures may need to be taken to ensure compliance if the act passes.

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