PHILLIPS LYTLE LLP CLIENT ALERT
LABOR & EMPLOYMENT
FEBRUARY 2021

Attack on the Citadel of the New York State Employment-at-Will Doctrine

Since the 19th century, New York State has been known as the "citadel" of the employment-at-will doctrine. *See Martin v. N.Y. Life Ins. Co.*, 148 N.Y. 117 (1895) ("A hiring at so much a year, no time being specified, is an indefinite hiring; and such a hiring is a hiring at will, and may be terminated at any time by either party.").

In the intervening decades, statutory exceptions have been created, including federal and state anti-discrimination laws, the National Labor Relations Act, the New York State Taylor Law, and federal and state whistleblower statutes. Nonetheless, New York State courts have continued to enforce the at-will employment doctrine in most other contexts. *See, e.g., Murphy v. Amer. Home Prods. Corp.*, 58 N.Y.2d 293 (1983) (rejecting effort to create the tort of wrongful discharge in New York).

New York City has now created the first significant chink in the at-will doctrine armor by establishing a fast food worker exception. While significant in and of itself, this legislation may also serve as a blueprint in other employment sectors in New York City and, if past is prologue, as a model for future legislation in New York State impacting all employers.

The New York City legislation, which is effective July 4, 2021, specifies that "[a] fast food employer shall not discharge a fast food employee who has completed [his/her] probation period except for just cause."[1] The probation period may not exceed 30 days. "Discharge" is broadly defined as "any cessation of employment, including termination, constructive discharge, reduction in hours and indefinite suspension."

To determine if the employer has shown that termination is for "just cause," the fact-finder must consider whether:

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

Except where the termination is for an "egregious failure … to perform [the employee's] duties, or for egregious misconduct," the discharge must be preceded by progressive discipline, but "may not rely on discipline issued more than one year before the … termination."

Additionally, the legislation mandates the employer to provide a detailed written explanation for the discharge

1 New York City Council, Wrongful discharge of fast food employees, Int. 1415-2019 at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3860317&GUID=F97F44AA-CCC8-470B-998E-C3C35A5C0717 (last viewed Feb. 22, 2021).

within five days. It also limits the employer's defense to the stated reasons (effectively barring subsequent clarification of the termination grounds, or reliance on any after-acquired evidence).

Remedies are comprehensive, including back pay (consisting of any lost salary wages and benefits), reinstatement (unless waived by the employee), rescission of discipline imposed, punitive damages, a $500 fine for each violation, and reimbursement of the employee's attorney fees and costs.

Given these developments, all New York State employers – and in particular, New York City fast food employers – should:

1. Promptly review their employee handbook and other policies to ensure they are comprehensive and current;
2. Implement a detailed written progressive discipline protocol;
3. Create a written protocol for investigation of all workplace misconduct; and
4. Thoroughly train all supervisors regarding consistent and effective enforcement of rules and policies, documentation of performance deficiencies and effective use of progressive discipline.

In addition, it is recommended that New York City employers consult with labor and employment counsel prior to termination of any fast food employees to ensure that they have complied with all of the requirements of the New York City legislation. There are simply too many trip wires to go it alone.

All New York State employers should proceed with the expectation that similar legislation may follow in the New York State Assembly and Senate, and make productive use of the interim time period to prepare.

Phillips Lytle's Labor & Employment attorneys are well versed in advising on compliance issues and have a depth of experience in defending employment discharge claims, both in court and before government agencies.

Additional Assistance

For questions regarding the New York City legislation, please contact any of the attorneys on our Labor & Employment Practice Team or the Phillips Lytle attorney with whom you have a relationship. ■

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