

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

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## New York City Fast-Food Employers Beware: Just-Cause Needed for Firing

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Effective as of July 5, 2021, New York City fast food employers may only discharge employees for just-cause. This new law effectively chips away at the American tradition of at-will employment.

### What type of employers and employees are impacted?

An employee engaging in customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning or routine maintenance at a fast-food establishment in exchange for an hourly rate of pay falls within the scope of this ordinance.

To qualify as a fast-food employer, an establishment must:

- (i) primarily serve food or drink items;
- (ii) utilize a model where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out or delivered to the customer's location;
- (iii) offer limited service;
- (iv) exist as part of a chain, which requires that the establishment is a member of a set of establishments sharing common brand or characterized by standardized options for décor, marketing, packaging, products and services; and
- (v) qualify as either: (a) an integrated enterprise that owns or operates 30 or more such establishments in the aggregate nationally; or (b) an establishment operated pursuant to a franchise where the franchisor and franchisees combined own or operate 30 or more such establishments in the aggregate nationally.

**Ordinance Overview:** Under the NYC ordinance, an employer may only discharge at-will — or for any reason without explanation — for up to the first 30 days after an employee is hired. After this time frame, just-cause discharge is required.

Just-cause discharge requires that an employee either: (1) fail to satisfactorily perform job duties; or (2) engage in demonstrably and materially harmful misconduct to the employer's legitimate business interest. Only when either of these actions are met, and progressive discipline is utilized, can an employer cease an employee's employment. The City ordinance defines discharge to include cessation of employment in the form of termination, constructive discharge, indefinite suspension and/or reduction in hours. Upon any of these discharge actions, an employer must supply the employee with a written explanation outlining the precise reason(s) for the just-cause termination.

In order to properly engage in progressive discipline under the ordinance, an employer must supply a disciplinary system with a graduated level of responses to an employee's unsatisfactory job performance. The system must implicate a range of disciplinary measures that correspond with the severity of an employee's frequency and degree of failure. Immediate termination may occur under this system if an

employee displays sufficiently egregious failure or misconduct constituting just-cause. When utilizing progressive discipline, an employer cannot rely on discipline issued more than one year before a just cause termination.

The following five factors will assist in determining whether a fast-food employee was subjected to an act of discharge without just-cause:

- (1) if the employee knew or should have known of the employer's policy, rule or practice;
- (2) if the employer provided relevant and adequate training to the employee;
- (3) if the employer's policy, rule or practice was reasonable and applied consistently;
- (4) the employer undertook a fair and objective investigation; and
- (5) the employee violated the policy, rule or practice or committed the misconduct that is the basis for progressive discipline or discharge.

The employer bears the burden of proving just cause discharge by a preponderance of non-hearsay evidence. Enforcement of these mandates begins on September 3, 2021. Violating the just cause ordinance could result in payment of compensatory damages and other relief required to make an injured employee whole.

**Impact on NYC Business Owners:** The upshot for New York City business owners is that this ordinance will thicken the barrier to employment in the New York City fast-food sector. Fast-food employers may increasingly filter candidates out of their hiring pools. Consequently, service industry workers returning to New York City after the pandemic may find difficulty obtaining jobs in the fast-food sector due to increased hiring standards.

For fast-food franchise owners, it is important to note that this ordinance will increase worker security. Under this ordinance, employees hired in the fast-food sector may gain bargaining power for better pay and working conditions. Fast-food establishments will also find themselves under a more scrutinous microscope when it comes to workplace discrimination and retaliation. While this shift will likely increase the number of lawsuits filed against fast-food employers, it may also decrease the high rate of turnover in fast-food establishments.

**Future Forecast:** This City ordinance is a scaled version of broader reforms for which the Service Employees International Union is lobbying. Given New York City's recent increase in minimum wage and labor protections, it is possible that just-cause employment measures will spread across the New York City service industry as a whole. All employers should keep a pulse on the issue of just-cause and seek experienced legal guidance to become familiar with the best practices of just-cause discharge.

Please contact Bond, Schoeneck & King's [labor and employment attorneys](#) if you have any questions or would like additional information regarding the potential scope of exposure, mitigation, and/or other legal developments arising in employment law.

