File #: Int 1923-2020, **Version:** *

Int. No. 1923

By Council Members Kallos, the Speaker (Council Member Johnson), Lander, Van Bramer, Chin, Louis and Cabán

A Local Law to amend the administrative code of the city of New York, in relation to just cause employment protections for essential workers

Be it enacted by the Council as follows:

Section 1. Chapter 12 of title 20 of the administrative code of the city of New York is amended by adding a new subchapter 7 to read as follows:

SUBCHAPTER 7

JUST CAUSE DISCHARGE FROM EMPLOYMENT

§ 20-1271 Definitions. As used in this subchapter, the following terms have the following meanings:

Discharge. The term "discharge" means any cessation of employment, including termination, constructive discharge, reduction in hours and indefinite suspension.

Essential business. The term "essential business" means any person or entity so defined by the New York state department of economic development in accordance with executive order 202.6 as issued by the governor on March 18, 2020 and extended thereafter.

Essential employee. The term "essential employee" means any person employed or permitted to work at or for an essential business.

Essential employer. The term "essential employer" means any employer that employs a person or permits a person to work at or for an essential business.

Just cause. The term "just cause" means sufficient cause for discharging an essential employee, such as the employee's failure to satisfactorily perform job duties or employee misconduct that is demonstrably and materially harmful to the essential employer's business interests.

Probation period. The term "probation period" means a period of time set by an essential employer, not to exceed 30 days from the time of hire of an essential employee, in which the essential employer and essential employee are free, at any time, with or without notice and with or without just cause, to end the employment relationship.

Progressive discipline. The term "progressive discipline" means a disciplinary system that provides a graduated range of reasonable responses to an essential employee's failure to satisfactorily perform such employee's job duties, with the disciplinary measures ranging from mild to severe, depending on the frequency and degree of the failure. Nothing herein shall preclude an essential employer from terminating an essential employee immediately for a failure or misconduct constituting just cause.

Reduction in hours. The term "reduction in hours" means a reduction in an essential employee's hours of work totaling at least 15 percent of the employee's weekly work schedule.

§ 20-1272 Prohibition of wrongful discharge. An essential employer shall not discharge an essential employee who has completed such essential employer's probation period without just cause.

§ 20-1273 Administrative enforcement. a. In addition to section 20-1207, in determining whether an essential employee has been terminated for just cause, the office shall consider, in addition to any other relevant factors, whether:

1. The essential employee knew or should have known of the essential employer's policy, rule or practice;

2. The essential employer provided relevant and adequate training to the essential employee;

3. The essential employer's policy, rule or practice was reasonable and applied consistently; and

4. The essential employer undertook a fair and objective investigation.

b. A termination shall not be considered based on just cause unless the essential employer has utilized progressive discipline; provided, however, that the employer may not rely on discipline issued more than one year before the purported just cause termination.

c. The essential employer shall provide a written explanation, including any non-hearsay evidence to support the decision, to any terminated essential employee of the precise reasons for the just cause termination within one week of termination. In determining whether an essential employer had just cause for termination, the office may not consider any reasons not included in such written explanation.

d. The essential employer shall bear the burden of proving just cause by a preponderance of non-hearsay evidence in any proceeding brought pursuant to this chapter.

§ 20-1274 Private cause of action. a. An essential employee covered by this subchapter may bring a civil action, in accordance with applicable law, in any court of competent jurisdiction pursuant to section 20-1211.

b. In addition to section 20-1211, in determining whether an employee has been terminated for just cause, a court of competent jurisdiction shall consider, in addition to any other relevant factors, whether:

1. The essential employee knew or should have known of the essential employer's policy, rule or practice;

2. The essential employer provided relevant and adequate training to the employee;

3. The essential employer's policy, rule or practice was reasonable and applied consistently; and

4. The essential employer undertook a fair and objective investigation.

c. A termination shall not be considered based on just cause unless the essential employer has utilized

progressive discipline; provided, however, that the essential employer may not rely on discipline issued more than one year before the purported just cause termination.

d. The essential employer shall provide a written explanation, including any non-hearsay evidence to support the decision, to any terminated essential employee of the precise reasons for the just cause termination within one week of termination. In determining whether an essential employer had just cause for termination, a fact finder may not consider any reasons not included in such written explanation.

e. The essential employer shall bear the burden of proving just cause by a preponderance of non-hearsay evidence in any proceeding brought pursuant to this chapter.

f. In addition to remedies that may be ordered pursuant to section 20-1211, a court of competent jurisdiction shall also order reasonable attorney's fees and costs for violations of this subchapter.

§ 20-1275 Arbitration. a. Except as otherwise provided by law, any person claiming to be aggrieved by an essential employer's violation of this chapter may bring an arbitration proceeding, including on a class or collective basis, for back pay and benefits and other damages, including punitive damages, for reinstatement, restoration of hours, and other injunctive relief, and for such other remedies as may be appropriate. In an arbitration proceeding brought pursuant to this section, if the arbitrator finds in favor of the plaintiff, it shall award such person, in addition to other relief, reasonable attorneys' fees and costs.

b. An arbitration demand, and any amendments thereto, must be served on the essential employer at any of the essential employer's business addresses by regular mail, electronic mail, or private mail service, and must include a general description of the alleged violation(s) but need not reference the precise section(s) alleged to have been violated.

c. The parties to an arbitration proceeding shall jointly select the arbitrator from a panel of arbitrators, the number of which shall be determined by the office, chosen by a committee of eight participants established by the office comprised of:

1. Two essential employees;

2. Two essential employee advocates;

3. Two essential employers; and

4. Two essential employer advocates.

d. If an insufficient number of essential employees, essential employee advocates, essential employers or essential employer advocates agree to participate in the committee pursuant to subdivision c of this section, the office shall consult with those that have agreed to participate and select individuals to fill the requisite number of openings on the committee.

e. If the committee pursuant to subdivision c of this section is unable to select a sufficient number of arbitrators for the panel as determined by the office, the office shall select the remaining arbitrators.

f. If the parties are unable to agree on an arbitrator, the office shall select an arbitrator from the panel.

g. The office shall provide translation services to any party requiring such services for the arbitration hearing.

h. The arbitration hearing shall be held at a location designated by the office. Such arbitration shall be subject to the labor arbitration rules established by the American arbitration association.

i. If an essential employee brings an arbitration proceeding, arbitration shall be the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a private cause of action or administrative complaint under this chapter, unless such arbitration proceeding has been withdrawn or dismissed without prejudice.

j. In determining whether an essential employee has been terminated for just cause, an arbitrator shall consider, in addition to any other relevant factors, whether:

1. The essential employee knew or should have known of the essential employer's policy, rule or

practice;

2. The essential employer provided relevant and adequate training to the essential employee;

3. The essential employer's policy, rule or practice was reasonable and applied consistently; and

4. The essential employer undertook a fair and objective investigation.

k. A termination shall not be considered based on just cause unless the essential employer has utilized progressive discipline; provided, however, that the essential employer may not rely on discipline issued more than one year before the purported just cause termination.

l. In determining whether a essential employer had just cause for termination, an arbiter may not consider any reasons not included in the written explanation provided pursuant to subdivision c of section 21-1273.

m. The essential employer shall bear the burden of proving just cause by a preponderance of non-hearsay evidence in any arbitration proceeding brought pursuant to this chapter.

§ 20-1276 Applicability of schedule change premiums. An essential employee terminated for just cause shall be entitled to schedule pay premiums pursuant to section 20-1222, as applicable.

§ 20-1277 Exemptions. a. This subchapter does not apply to any essential employee who (i) is covered by a collective bargaining agreement if such agreement expressly waives the provisions of this subchapter and provides comparable or superior benefits for said employees or (ii) is currently employed within a probation period.

b. This subchapter does not preempt, limit or otherwise affect the applicability of any provisions of any other law, regulation, requirement, policy or standard.

§ 2. Subdivision a of section 20-1208 of the administrative code of the city of New York, as amended by local law number 69 for the year 2018, is amended to read as follows:

a. For violations of this chapter, the office may grant the following relief to employees or former employees;

1. All compensatory damages and other relief required to make the employee or former employee whole;

2. An order directing compliance with the notice and posting of rights and recordkeeping requirements set forth in sections 20-1205 and 20-1206; and

3. For each violation of:

(a) Section 20-1204,

(1) Rescission of any discipline issued, reinstatement of any employee terminated and payment of back pay for any loss of pay or benefits resulting from discipline or other action taken in violation of section 20-1204;

(2) $500 for each violation not involving termination; and

(3) $2,500 for each violation involving termination;

(b) Section 20-1221, $200 and an order directing compliance with section 20-1221;

(c) Section 20-1222, payment of schedule change premiums withheld in violation of section 20-1222 and $300;

(d) Section 20-1231, payment as required under section 20-1231, $500 and an order directing compliance with section 20-1231;

(e) Section 20-1241, $300 and an order directing compliance with section 20-1241;

(f) Subdivision a of section 20-1251, the greater of $500 or such employee’s actual damages; [and]

(g) Subdivisions a and b of section 20-1252, $300; [and]

(h) Subdivision a or b of section 20-1262, $500 and an order directing compliance with such

subdivision, provided, however, that an employer who fails to provide an employee with the written response required by subdivision a of section 20-1262 may cure the violation without a penalty being imposed by presenting proof to the satisfaction of the office that it provided the employee with the required written response within seven days of the office notifying the employer of the opportunity to cure[.]; and

(i) Section 20-1272, $500 for each violation, an order directing compliance with section 20-1272 and reinstatement of any essential employee terminated and payment of back pay for any loss of pay or benefits resulting from the wrongful discharge.

§ 3. Subdivision a of section 20-1211 of the administrative code of the city of New York, as added by local law number 107 for the year 2017, is amended to read as follows:

a. Claims. Any person, including any organization, alleging a violation of the following provisions of this chapter may bring a civil action, in accordance with applicable law, in any court of competent jurisdiction:

1. Section 20-1204;

2. Section 20-1221;

3. Subdivisions a and b of section 20-1222;

4. Section 20-1231;

5. Subdivisions a, b, d, f and g of section 20-1241;

6. Section 20-1251; [and]

7. Subdivisions a and b of section 20-1252[.]; and

8. Section 20-1272.

§ 4. This local law takes effect immediately.

NJC

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