

Testimony of M. Patricia Smith

National Employment Law Project

In Support of Int. 1396 & Int. 1415 Extending “Just Cause” Employment Protections to New York’s Fast Food Workers

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Committee on Civil Service and Labor

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Thank you for the opportunity to testify today in support of Int. 1415 and Int. 1396. My name is Patricia Smith and I am a former Commissioner of Labor here in New York and was Solicitor of the U. S. Department of Labor in the Obama Administration. I am currently of counsel to the National Employment Law Project.

By way of background, in this country most employers can fire their employees for almost any reason, or for no reason at all — which means employees can be fired on a whim with no warning and no process. That’s because most workers in the U.S. are “at will” employees under the law.

The problem of unfair firings is especially common in New York’s fast-food industry—a fast-growing sector that disproportionately employs Black and Latino New Yorkers. In a recent survey, fast-food workers who lost their jobs with little notice and for no good reason reported facing food insecurity, eviction, loss of childcare, or having to drop out of school.¹ These harms hurt families and ripple across communities.

The pair of bills before you would set some minimum standards for terminations in the fast-food industry. They would modify the default “at will” employment system to require that workers be given notice of any job-performance problems and a chance to address them before losing their jobs. The bills would protect workers from being fired for arbitrary or capricious reasons. They would also require that layoffs be justified and use “reverse seniority,” meaning the most junior employees are laid off first.

Industry opponents have objected that such standards are unprecedented and would stifle business. But in fact, there is extensive precedent in both the U.S. and abroad for setting minimum

¹ National Employment Law Project, Center for Popular Democracy, SEIU 32BJ & Fast Food Justice, “Fired on a Whim: The Precarious Existence of NYC Fast-food Workers” (Feb. 2019), available at <https://populardemocracy.org/sites/default/files/Just%20Cause%20Complete%20Final%20-%20Web%20V2%20FINAL.pdf>

fair process standards, often called “just cause,” before workers can be fired. Many other industrialized economies, including some Canadian provinces,² require notice and good reasons, before a worker is fired. In the U.S., Montana³ and Puerto Rico⁴ have long had “just cause” employment standards. Last year, Philadelphia adopted legislation similar to the current New York City proposal for parking lot employees, after workers came forward with stories of arbitrary firings and abusive treatment.⁵

Under a just cause system, employers are asked to use “progressive discipline”—which simply means warning employees first about performance problems and giving them coaching and a chance to address them, before imposing discipline, including discharge. Under progressive discipline, employers retain substantial latitude to manage employees and of course can still immediately fire workers for egregious misconduct.

Moreover, in New York and across the country, there is a well-established body of human resources rules and legal standards for how “just cause” employment should operate. They’ve been developed in the context of unionized workforces—since virtually all union agreements require just cause before an employee can be fired. In fact, the standard is common in employment contracts for CEOs

² Society for Human Resources Management, “To Fire Employees in Canada, You Need a Reason and Notice - There is no at-will employment in Canada,” (May 30, 2019), available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/global-canada-termination-notice.aspx>

³ American Constitution Society, “Just Cause in Montana: Did the Big Sky Fall?,” (Sept. 2, 2008), available at https://www.acslaw.org/issue_brief/briefs-2007-2011/just-cause-in-montana-did-the-big-sky-fall/

⁴ Society for Human Resources Management, “An Overview of Puerto Rico Employment Law,” (Dec. 5, 2018), available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/overview-puerto-rico-law.aspx>

⁵ City of Philadelphia, “Why Philly’s new “Just Cause” law for parking workers is so important,” (Sept. 11, 2019), available at <https://www.phila.gov/2019-09-11-why-phillys-new-just-cause-law-for-parking-workers-is-so-important/>

and other executives, where most typically are guaranteed lavish severance packages if they are fired unless the company can show there was just cause for the firing.

What is a “just cause” standard? In 1964, professor and arbitrator Dr. Carroll Daugherty developed a seven-part standard upon which the discipline or discharge of an employee is analyzed, and this standard is still commonly accepted and used by arbitrators and courts.⁶ These principles generally correspond to the standard set forth in the just cause bills that are before the committee today.

They include:

1. NOTICE–The employee must have adequate notice of rules and expectations. Exceptions may be made for certain conduct, such as insubordination, or stealing employer property, that is so serious that the employee is expected to know it will be punishable.
2. REASONABLE RULES OR ORDERS–The employer’s rule or order must not be arbitrary, instead it must be reasonably related to efficient and safe operation of the employer’s business.
3. INVESTIGATION–The employer must make a sufficient effort to discover whether the employee did, in fact, violate or disobey a rule of management.
4. FAIR INVESTIGATION– The investigation must be fair and objective. For example, were all possible observers of the alleged rule violation interviewed or were only management witnesses interviewed.
5. PROOF– The investigation must produce substantial evidence or proof of guilt. While this standard is not as rigorous as one courts apply in civil cases, the employer must have real evidence, not guesses.
6. EQUAL TREATMENT– The rules, orders, and penalties must be applied evenhandedly and without discrimination. If enforcement has been lax in the past, management cannot suddenly reverse its course and begin to crack down without first warning employees of its intent.
7. REASONABLE PENALTY–The discipline, including discharge must be reasonably related to the seriousness of the offense and the past record.⁷

Just cause also helps mitigate treatment that is technically prohibited but goes unenforced.

Although some forms of mistreatment—like being fired for complaining about discrimination or

⁶ In re Enterprise Wire Co. and Enterprise Independent Union, 46 LA 359 (Mar. 28, 1966).

⁷ Ibid.

wage theft—are illegal, it’s hard for most workers to enforce those rights since most can’t afford to hire a lawyer. And even if they could, it’s far too easy for employers simply to say they fired the worker for any other reason, or no reason at all, and escape responsibility. But under just cause, where an employer must articulate a job-related reason for firing a worker, it becomes much more realistic for workers to assert their rights on the job.

Just cause protections also offer broader benefits for workers and our economy. One major problem facing workers today is the fact that, despite more than a decade of economic growth and record low unemployment, paychecks for most workers have not been increasing except when the minimum wage goes up.⁸ One big reason is job insecurity, which prevents workers from bargaining for better pay on the job. When workers know they can be fired for just about any reason, they understandably fear displeasing their employer by asking for more. Moreover, higher job security has been associated with higher worker productivity, which is good for businesses.

Ensuring that workers receive notice, a good reason, and fair process before losing their jobs protects families and communities and is good human resources policy. The City Council’s proposed just cause protections for fast-food workers are a good place to start.

⁸ National Employment Law Project, “Minimum Wage Increases Reverse Post-Recession Wage Declines for Workers in Lowest-Paid Jobs” (Feb. 7, 2020), available at <https://www.nelp.org/publication/minimum-wage-increases-reverse-post-recession-wage-declines-workers-lowest-paid-jobs/>