New York City Issues Proposed Rules for Fast Food, Retail Workers Scheduling Law

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The New York City Department of Consumer Affairs (DCA) has issued proposed rules for the implementation of the Fair Workweek Law in an attempt to clarify and assist employers with compliance. The Law is intended to reform scheduling practices for fast food and retail workers in the City and will go into effect on November 26, 2017.

The Law is a collection of local laws that were signed by Mayor Bill de Blasio on May 30, 2017. (See our article, Mayor Signs Major Workplace Reforms for Fast Food & Retail Workers.) It regulates retail and fast food employer scheduling practices and provides additional workplace rights to fast food employees. For retail employers, the Law bans "on-call" scheduling and requires 72 hours' scheduling notice for retail employees. For fast food employers, the Law mandates providing fast food employees with two weeks' advance notice of work schedules and imposes detailed requirements on how and when to offer additional work shifts.

In addition to civil penalties and remedies for violations, the Law requires fast food employers to pay premiums to employees in two distinct areas. First, a $100 premium is assessed for each instance that an employee works a consecutive work shift involving both the closing and opening of the fast food restaurant (termed "clopenings" – meaning two shifts with fewer than 11 hours between the end of the first shift and the beginning of the second shift when the first shift ends the previous calendar day or spans two calendar days). Second, fast food employers will be required to pay premiums to employees for schedule changes made within certain timeframes.

The DCA's proposed rules on the Fair Workweek Law are added as a new Chapter 14 to Title 6 of the Rules of the City of New York. Unfortunately, as discussed below, the proposed rules also *add* to the Law's already strict requirements, but do not clarify certain issues employers, especially retailers, are grappling with. While the proposed rules focus mainly on fast food employer scheduling requirements, they also require detailed record retention by both fast food and retail employers.

Employer Notice of Rights Posting Specifications – All Covered Employers

All covered employers must post a notice of rights in the workplace on 11x17-inch paper and in font no smaller than 12-point. This notice has not been made available yet, but will be downloadable from the City's website.

Employee Schedule Posting Requirements – All Covered Employers

Retail and fast food employers must post work schedules conspicuously at the workplace. Retail employers must post schedules three days before work begins, and fast food employers must post schedules two weeks before work begins. However, a fast food or retail employer may not post or otherwise disclose to other employees the work schedule of an employee who has been granted an accommodation based on the employee's status as a survivor of domestic violence, stalking, or sexual assault, where such disclosure would conflict with such accommodation.

Employer Recordkeeping Requirements – All Covered Employers

Fast food and retail employers must retain records documenting their compliance for a period of three years.

The proposed rules state these records must be in an electronically accessible format and include information such as:

1. "Actual hours worked" by each employee each week;
2. An employee's written consent to any schedule changes, where required; and
3. Each written schedule provided to an employee.

"Actual hours worked" is defined as the number, dates, times, and locations of hours worked by an

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employee for an employer, whether or not such hours differ from the work schedule provided in advance.

In addition, fast food employers must maintain documents related to good faith work schedule estimates given to employees and the dates and amounts of premium pay to individual fast food employees (*e.g.,* noted on wage stubs or other form of written documentation).

Employee Schedule Requests – All Covered Employers

The proposed rules require both fast food and retail employers to provide employees with their work schedules for any previous week worked *for the past three years* within two weeks of the request. Within one week of an employee's request, employers must provide the most current version of the complete work schedule for all employees who work at the same location (excluding certain employees with accommodations under the *Employee Scheduling Posting Requirements* section above).

Private Right of Action – All Covered Employers

The Law gives fast food and retail employees the right to bring a civil action against their employer for violations under the law. The proposed rules offer procedural guidance to employees on the interplay of filing a complaint with the DCA or filing a civil action.

Definitions – Retail Employers

The Law provides that in order to be covered, a retail employer must "engage[] primarily in the sale of consumer goods at one or more stores within [New York City]."

Consumer goods are defined as "products that are primarily for personal, household, or family purposes, including but not limited to appliances, clothing, electronics, groceries, and household items." "Engaged primarily in the sale of consumer goods" means "greater than fifty percent of sale transactions in a calendar year at one or more locations in the City are to retail consumers."

The proposed rules define a retail consumer as "an individual who buys or leases consumer goods and that individual's co-obligor or surety." However, this does not include "manufacturers, wholesalers, or others who purchase or lease consumer goods for resale as new to others."

Additionally, the proposed rules provide that a covered employer must deliver to each individual retail employee any changes to his or her schedule (which must be posted no later than 72 hours before the first shift on the work schedule).

Good Faith Estimate of Work Schedule – Fast Food Employers

Fast food employers must provide a good faith estimate of the number of hours a fast food employee can expect to work. If a "long-term or indefinite change" is made to the good faith estimate, the fast food employer must provide an updated good faith estimate to the affected employee as soon as possible and before such employee receives the first work schedule following the change.

The proposed rules define "good faith estimate" as the number of hours a fast food employee can expect to work per week for the duration of the employee's employment and the expected days, times, and locations of those hours.

Additionally, the rules clarify that "long-term or indefinite change" includes, but is not limited to:

1. Three work weeks out of six consecutive work weeks in which the number of actual hours worked differs by 20 percent from the good faith estimate during each of the three weeks;
2. Three work weeks out of six consecutive work weeks in which the days differ from the good faith estimate at least once per week;
3. Three work weeks out of six consecutive work weeks in which the locations differ from the good faith estimate at least once per week; or
4. Three work weeks out of six consecutive work weeks in which "morning," "afternoon," or "night" shifts (as defined in the proposed rules) differ from the good faith estimate at least once per week. Morning, afternoon, or night shifts differ from the good faith estimate when a shift that was a morning shift is changed to an afternoon or night shift; a shift that was an afternoon shift is changed to a morning or night shift; or a shift that was a night shift is changed to a morning or afternoon shift.

Minimal Changes to Shifts – Fast Food Employers

While fast food employers are required to pay schedule change premiums in certain situations, the proposed rules state that a fast food employer will be able to change a work schedule by up to 15 minutes without being obligated to pay the fast food employee a schedule change premium. Additionally, this amount of time will not be considered a "long-term or indefinite change" for purposes of providing employees with a good faith estimate of work schedules.

Additional Shifts – Fast Food Employers

Fast food employers must offer regular shifts or on call shifts that would otherwise be offered to a new fast food employee (an employee who has not worked for employer at any point in the past six months) to current fast food employees.

The proposed rules state that fast food employers must notify employees in writing of the method by which

additional shifts will be posted, either upon the start of employment or within 24 hours of any changes to such method. The notice of additional shifts must be posted for three consecutive calendar days. However, if the fast food employer has less than three days' notice of the need to fill the additional shift (*e.g.,* when an employee quits), it can post as soon as practicable after discovering the need to fill the shift and may assign someone temporarily. The fast food employer must notify all accepting employees that the additional shifts have been filled, in accordance with the method used to offer the additional shifts.

Under the proposed rules, if the fast food employer owns at least 50 fast food establishments in New York City, it may offer additional shifts, in accordance with other applicable provisions of the Law, to:

1. Fast food employees who work at all locations in the City, or
2. Only to its fast food employees who work at its fast food establishments located in the same borough as the location where the shifts will be worked.

Lastly, a fast food employee may accept one or more shifts or shift increments (portion of a shift) offered by a fast food employer. However, a fast food employer is not required to award a shift increment to an employee if, when accepted by the employee, it would create a remaining portion of three hours or less left on the shift and no other employee accepts that portion.

Overlapping/Overtime Shifts – Fast Food Employers

In addition to the onerous scheduling requirements above, the proposed rules explain that when a fast food employee accepts a shift that *overlaps* with his or her existing shift, the fast food employer must give the employee the offered shift *instead* of the existing shift before hiring a new employee. Furthermore, the employer cannot condition awarding the new shift on the employee agreeing to work both the non-overlapping hours of the existing shift and the offered shift.

Under the proposed rules, a fast food employer is not required to award a shift to an employee, if when worked by the employee, it would entitle him or her to overtime pay. However, before hiring a new employee, the fast food employer must give the employee the largest shift increment possible that would not trigger overtime pay, provided that the remaining part of the shift was accepted by another employee or is three hours or more.

The DCA is accepting written comments, questions, and concerns regarding the proposed rules and will be holding a public hearing on November 17, 2017. Contact the Jackson Lewis attorney with whom you regularly work for assistance in modifying your organization's practices to comply with the new law.