NYC Set to Finalize New Regulations to Further Complicate Fast Food Workplaces

Insights
2.01.22

New York City regulators recently proposed new rules that will further burden fast food employers, revealing a mixed bag of employer-unfriendly interpretations of existing city law while introducing potentially immense penalties for violations. Fast food employers had already felt under pressure due to New York City's implementation of its Fair Workweek law (FWW) in November 2017 and just cause law in July 2021, each creating onerous and impractical requirements and punitive penalties for technical violations. And while the New York City Department of Consumer and Worker Protection (DCWP) previously issued regulations and FAQs, those often leave employers with more questions and gray area to navigate. The good news is that the recently proposed rules provide some (if minimal) clarity to aid employers in their compliance efforts. The bad news is that the new regulations will ratchet up the pressure on employers even more. Here are the highlights of what fast food employers need to know about these preliminary regulations.

Just Cause Regulations

The "just cause" legislation is a relatively new law that just took effect in July 2021. The proposed regulations to address this legislation includes three significant items of which you should take note.

1. Progressive Discipline and Egregious Conduct

The just cause law requires that employers only discharge employees (or reduce their hours by more than 15% for disciplinary purposes) if there is just cause to do so. The lynchpin of just cause is the requirement that the employer maintain and apply a progressive disciplinary policy except in cases of employees' egregious failure to perform their duties or egregious misconduct. The preliminary regulations impose requirements on the substance of the progressive discipline policy (e.g. requiring a system of graduated discipline) and on the form of the discipline (e.g. the discipline must inform employees of the "consequences" of the discipline, although "consequences" are not defined).

In addition, the preliminary regulations state that if an employer issues a regular schedule or work schedule that violates the FWW, the employer may not discipline the employee based on noncompliance with that regular schedule or work schedule. This provision sets up a perverse "two wrongs make a right" scenario where a technical violation of the FWW allows an employee violate

their employer's attendance policy with impunity. This provision will also require employers to demonstrate FWW compliance in any investigation or in any litigation regarding an employee who was terminated for attendance reasons.

Lastly, the preliminary regulations define "egregious failure by the employee to perform their duties" and "egregious misconduct" for which progressive discipline need not be applied. Curiously, the definitions proposed by DCWP in the preliminary regulations do not match up with the definition DCWP puts forth in its FAQs, which seem to be broader in scope and encompass food safety issues.

The preliminary regulations define "egregious failure by the employee to perform their duties" as an employee's "willful refusal to perform work for the majority of time on a shift." Unfortunately, this definition could be read narrowly to remove a fair amount of egregious conduct that common sense would dictate should result in immediate termination. The preliminary regulations define "egregious misconduct" as: "workplace conduct that is so outrageous, dangerous, or illegal that an employer cannot reasonably expect to correct it through progressive discipline." The examples given include "violence or threats of violence, theft, sexual harassment, race discrimination, or willful destruction of property."

2. Notice Requirements

The just cause law requires the employer to provide a notice of discharge within five days of a discharge, which includes a written explanation of the precise reasons for the discharge. However, the preliminary regulations expand the requirements regarding this notice.

For instance, if the discharge is for just cause, the employer must itemize each disciplinary step taken and the dates of such discipline. If the discharge is for a bona fide economic reason, the notice must contain information regarding the employee's right to reinstatement and how the employer will contact the employee.

The preliminary regulations also specifically require that the notice of discharge be provided by email, and if there is no operational email address on file, it must be mailed to the employee's last known address using trackable mail.

3. Bona Fide Economic Reasons and Offers of Reinstatement

The just cause law allows layoffs based on a bona fide economic reason due to the closing, or technological or reorganizational changes in response to a reduction in volume of production, sales, or profit. Unfortunately, the preliminary regulations provide no further insight as to what constitutes a "bona fide economic reason" or what business records would potentially be sufficient to justify the layoff, as required in the statute. The lack of guidance here just adds to employers' burdens in trying to meet their obligations with this extraordinary complex law.

Fair Workweek Changes

While the FWW law has been around since 2017, employers still express confusion and frustration with compliance obligations. There are five significant items of note when it comes to proposed regulations addressing this law.

1. **Recordkeeping**
   The preliminary regulations expand and require more specificity as to the records an employer must maintain. Employers must now explicitly ask for and maintain employees' email addresses, as well as telephone numbers and mailing addresses.

   More substantively, in addition to maintaining records of schedules, consents for changes or reductions in schedules, written requests to work a clopening shift, offers and acceptance of shifts, and similar records, employers must now ensure they maintain records of the dates, times, and methods of transmission of such notices and communications.

   Additionally, the preliminary regulations set forth parameters for an employer's electronic recordkeeping system. These new rules are incredibly important, as employers increasingly turn to HR software to assist with compliance efforts. These requirements include:

   - All electronic records must be maintained and preserved in their original format for three years, consistent with the three-year statutory requirement for all records.
   - Records must be readily exportable in non-proprietary, machine-readable data formats, as may be needed to produce records to DCWP as part of an investigation.
   - The electronic software or application must not be subject to any agreement or restriction that would compromise or limit the employer's ability to produce records to DCWP as part of an investigation.
   - The electronic software or application must not be configured to overwrite or destroy any information required to be maintained or the electronic system must be supplemented by an alternative system for retaining true and accurate copies of information and records that might otherwise be overwritten or destroyed. The likely purpose of this requirement is to ensure that all versions of communications, such as schedules that may get changed, are maintained, and not just the final versions.
   - If employers wish to provide a notice of available shifts electronically, the electronic communication must include the contents of the offer or an alert that the offer is available and a link where the employee can readily view the offer.

2. **Updated Procedures for Consent**
   Employee consent is required for numerous provisions of the FWW, such as consent to work additional hours, consent to work a clopening shift, or consent for a reduction of hours. Now, under the proposed new rules, DCWP defines "consent" as the "meaningful opportunity to decline, free from any interference, coercion, or risk of

"meaningful opportunity to decline, free from any interference, coercion, or risk of adverse action from the employer."

However, DCWP did provide some leeway to employers in the situation where a schedule change involves an unscheduled addition of time, most commonly when an employee stays late past the end of their shift. Employers can obtain employee consent no later than 15 minutes *after* the employee begins to work the additional time. It should be noted, though, that while this rule may be a helpful nod to fast food employers' practical considerations, it appears to directly contradict Section 20-1221(d), which explicitly requires employee written consent to work additional hours not included in a work schedule "at or before the start of the shift."

3. **Regular Schedules**
   One significant change to the FWW law in July was a change of terminology from employers providing good faith estimates (GFE) to employers providing regular schedules, and attendant limitations on reducing regular schedules by 15% or more. Similar to the previous GFE, regular schedules provide employees with a regular set of recurring weekly shifts. Employers must provide a regular schedule no later than when an employee gets their first schedule and when there is a "long-term or indefinite change" to the regular schedule.

   While the previous regulations gave specific guidance as to when a "long-term or indefinite change" occurred triggering the need for a new GFE (e.g. 3 out of 6 consecutive workweeks of scheduling differences), these preliminary regulations provide no such explicit guidance for when regular schedules must be updated.

   The preliminary regulations do clarify, however, that there be a regular schedule in effect at all times and that a regular schedule is in effect unless and until a new regular schedule is provided to the employee. This strict condition opens the possibility for additional employer obligations, such as providing updated regular schedules when an individual goes on an extended leave of absence, lest an employer unwittingly allow an employee to work less hours than what is on the regular schedule "in effect" during the leave.

   The preliminary regulations also permit an employer to have a practice allowing employees to provide available and unavailable hours, thereby giving employers some flexibility to alter regular schedules. If an employee changes their availability in writing to remove availability during all or part of their regularly scheduled shift, this constitutes written consent for the employer to remove all or part of that regularly scheduled shift. An employer may even require that employees provide reasonable advance notice of their change in availability, for which employees can be disciplined if they do not provide sufficient notice.

Moreover, the preliminary regulations affirm that an employer can change an employee's regular schedule for any reason without their consent so long as: (1) the changed schedule does not conflict with times the employee has previously informed the employer that they are unable to work; (2) the employer does not reduce the total hours in the regular schedule by more than 15% from the employee's baseline; and (3) the employer provides the employee with an updated copy of the regular schedule at least 14 days before the first day on the first work schedule following the change.

4. **Written Schedules and Schedule Change Premiums**
   The updated FWW prohibits an employee's actual written schedule to vary by more than 15% from the employee's regular schedule. The preliminary regulations clarify that the variations refer to any changes to the location of a shift, the day of a shift, the start or end times of a shift, the removal of a shift, or the addition of a shift. The 15% refers to *all total changes* in the regular schedule, and an employer cannot change each shift by less 15% if the total adds up to more than 15%.

   The preliminary regulations also state that the advance notice time for calculating the correct premium is based on the *hours* elapsed between the *first day on the work schedule* and the date and time the change is made and the revised schedule is sent or reposted. So, 14 days' notice means at least 336 hours before the 12:00 AM first day on the work schedule, and 7 days' notice means at least 168 hours before 12:00 AM on the first day of the work schedule. Any change made on or after 12:00 AM on the first day of the work schedule is considered a change with less than 24 hours' notice (even if the shift being changed is more than 24 hours in the future).

   The preliminary regulations also state that if there is a discrepancy between hours worked and the shift on the latest posted schedule, and there is no record of an exception to a schedule change premium, the employer is considered to have made a scheduling change with less than 24 hours' notice and must pay the premium. This goes beyond a rebuttable presumption to impose a *per se* penalty on employers who fail to maintain this record.

   The preliminary regulations go on to state that this premium penalty is not meant to apply to situations where an employee is absent from, is late to, or leaves early from work, and that the employer may create its own record of such an instance. This portion of the preliminary regulations make it even more important for employers to maintain proper records because if they don't, they will owe a premium regardless of whether they can otherwise prove the exception applied without a record. Again, it is unclear whether this regulation is supported by the text of the statute.

5. **Access to Hours**
   The access-to-hours provisions of the FWW require that an employer first offer open shifts to employees laid off due to a bona fide economic reason within the previous

year, and then to current employees, before it hires new employees. It also requires employers to have a process by which those shifts are publicly offered and filled.

The preliminary regulations clarify that this process must only be followed when an employer is hiring or anticipates hiring a new employee. This allows employers to fill open shifts by increasing hours for current employees without needing to undertake the burdensome access to hours process. DCWP's clarity here is advantageous for both employers and employees. In addition, the preliminary regulations clarify that a newly hired employee can only be hired for shifts that were publicly offered; only after hire can the newly hired employee be placed in shifts other than what was offered.

Significantly, the preliminary regulations greatly increase potential damages for violations. The preliminary regulations state that any time an employer hires a new employee in violation of the access to hours provision, it would be a distinct violation *as to each current fast food employee entitled to receive an offer of shifts*. This means that if an employer has 100 employees and unlawfully hires one new employee, the employer would be subject to not just one violation, but *100 violations* (and, potentially, the $300 penalty for those 100 violations). To compound this, the preliminary regulations specifically define the "compensatory damages" to which employees are entitled as "all wages current fast food employees did not have an opportunity to earn" due to the employer's failure to comply. This could mean that *each and every one of the 100 employees* would be entitled to back pay. If the employer does not realize its access to hours mistake for some time, the damages that could accrue based on one access to hours mistake are immense. Moreover, the preliminary regulations do not state how this back pay could ever be cut off.

What's Next?

DCWP will hold a public hearing on these proposed regulations on February 3. The public can submit comments on the proposed rules on or before that date. Any member of the public can submit comments to DCWP through the NYC rules website or by emailing Rulecomments@dca.nyc.gov. Although it is unlikely the rules will change substantially before they become final, they do still remain subject to change after the public hearings and comments.

There is also an overarching question as to whether some of the preliminary regulations could be challenged as not authorized by or in conflict with the actual statute. We will monitor the situation and provide updates should legal action derail or alter any of these proposed changes.

Certainly, the consequences of some of DCWP's proposed changes as they currently stand will make employers wary. You should begin your preparations now to minimize the compliance sting that these changes are sure to bring. We will keep you updated when the regulations become final and are set to be implemented, so make sure you are subscribed to Fisher Phillips' Insight system to

gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our New York City office.

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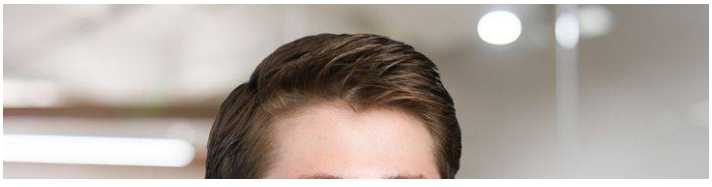

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