Top 5 Surprises for NYC Fast Food Employers in Finalized Fair Workweek Law Rules

Insights
6.22.22

New York City workplace regulators just finalized rules for New York City's Fair Workweek and just cause laws for fast food workers – and there are some changes from the initial proposals that may come as a surprise to unsuspecting employers. As previously reported, New York City's Department of Consumer and Worker Protection – the City agency tasked with implementing the laws – published proposed rules earlier this year dealing with the updated FWW law and new just cause law, both of which went into effect in July 2021. Following the rulemaking process, the agency finalized these rules by incorporating revisions responsive to comments from members of the fast food industry. While the final rules largely follow the proposed rules, there are a few instances where the final rules differ – and could catch you off guard. The final rules are set to go into effect on June 23 – what are the five most significant differences between the final rules and the proposed rules you need to know about?

1. **Definition of *De Minimus* Schedule Changes Broadened**

   Under the proposed regulations, a "*de minimis*" schedule change of less than 15 minutes did not trigger the consent or premium pay requirements of the statute. The proposed regulations defined "*de minimis*" as a *total* schedule change of 15 minutes, aggregating changes to the start and stop time. So, for example, a change of 10 minutes at the beginning of the shift and 10 minutes at the end of the shift, for a total of 20 minutes, was not a *de minimis* change.

   However, the final regulations expanded what constitutes "*de minimis*" by no longer aggregating schedule changes, and providing a 15-minute grace period before and after each shift. Not only will this give employers more flexibility, it will reduce employers' administrative burden by no longer requiring as detailed recordkeeping. This revision greatly reduces the burden on employers since they will only have to review the start and stop time of an employee's shift when monitoring compliance with the law.

2. **Exceptions to Premium Pay for Shortened Shifts in Certain Circumstances**

   Under the FWW law, an employer must pay an employee a schedule change premium when there is a schedule change (not at the employee's request) with less than 14 days' notice. The final regulations added an exception to this requirement when an employer shortens a shift (for

example, by cutting hours or canceling a shift entirely) but still pays the affected employee(s) for the originally scheduled work hours.

However, in order for the employer to be absolved of paying premium pay in this scenario, the employer must pay the employee for the entirety of the shift *and* maintain a record reflecting the date and time the scheduled hours were paid and not worked. While this is a commonsense provision, the added recordkeeping requirement is a trap for the unwary. If the employer dismisses employees early and pays them for the rest of the day but does not maintain a record that the employees left early, the employer could potentially owe a premium pay on top of the hours paid for time not worked under a strict reading of the regulations.

3. **Employee Written Consent for Schedule Changes**

The FWW law requires that an employer must receive the advance written consent of an employee to work additional hours. The proposed regulations provided employers with a 15-minute grace period to obtain the written consent only when there was an unscheduled addition of time at the end of the employee's shift. So, for example, if an employer needed an employee to continue working past their shift end time, the employer would have 15 minutes past the previous end of the employee's shift to obtain written consent – the employer would not be required to disrupt operations and get that consent before the end of the shift.

The final regulations ever so slightly broaden when this grace period can be applied. The final regulations state that the employer can rely on the 15-minute grace period to obtain consent "if an employer cannot obtain an employee's written consent before the additional time begins, *such as* when the schedule change involves an unscheduled addition of time." While the change from the proposed regulations may only seem like semantics, the change does contemplate that there will be scenarios other than just an unscheduled addition of time at the end of the shift when the grace period may come into play.

4. **Timing For Work Schedule Notification**

The FWW law requires employers to provide employees with notice of their work schedule no later than 14 days before the first day of the new schedule and require certain premium pay for schedule changes made within 14 days' notice, within seven days' notice, and within 24 hours. The final regulations state that the "days" referred to in the statute must be calculated using hours' equivalent – *i.e.,* 14 days is 336 hours and 7 days is 168 hours.

5. **Reduction In Potential Damages**

As we previously noted, the proposed regulations drastically increased the potential damages for violations of the Access to Hours provision. The proposed regulations stated that it would be a distinct violation as to each current fast food employee entitled to receive an offer of shifts, which compounded the statutory damages and potential compensatory damages in an exponential manner to the point where only one access to hours violation could result in drastic penalties.

The final regulations slightly walked back this method of calculating damages. The final regulations state that the penalty for an access to hours violation is associated only with the shift not offered, and the penalty will be distributed equitably among fast food employees who should have received an offer of that shift. However, the final regulations still allow DCWP or a court to grant compensatory damages (*i.e.,* back pay) to *all* current fast food employees who did not receive the offer of the shift improperly. Again, this could result in a severe penalty for employers who slip up even once, and will undoubtedly lead to confusion in determining how to calculate back pay and how and when back pay ever stops accruing.

What's Next?

With the effective date of the regulations just hours away and substantial penalties at stake should fast food employers fail to comply, you should (if you have not already) review your policies and procedures to make sure you are in compliance with the law and its regulations. If you are not compliant, you should (quickly) align your policies and procedures with the requirements under the law.

We will continue to monitor developments impacting fast food employers as they grapple with the FWW, 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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