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RULES PROPOSED FOR NYC'S FAIR WORKWEEK LAW

Insights
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New York City's Department of Consumer Affairs (DCA), the agency tasked with enforcing the city's new "Fair Workweek Law," recently issued proposed rules to implement the legislation and provide guidance to covered employers and workers. Given that the law is scheduled to take effect in just a few weeks on November 26, 2017, you should familiarize yourself with the relevant statutes and examine the proposed regulations so that you are in a position to be in full compliance.

BACKGROUND: FAIR WORKWEEK LAW SIGNED INTO LAW

As we previously reported, New York City passed a suite of legislation dubbed the Fair Workweek Law which will severely limit the scheduling practices and flexibility of retail and fast food employers. The law, slated to take effect November 26, 2017, is aimed at giving employees in the retail and fast food industries more notice and predictability in their schedules, while compensating them with extra pay for last-minute schedule changes.

Specifically, the Fair Workweek Law requires that fast food employers (1) provide employees with two weeks' notice of schedules; (2) pay premiums to employees for changes made to their schedules; (3) offer open shifts to existing fast food employees; (4) ban "clopenings" for fast food employees; (5) ban on-call scheduling for retail employees; and (6) provide retail employees with 72 hours advance notice of schedules. Further details about the law are available here.

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Melissa Camire
Partner

212.899.9965

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CITY AGENCY RELEASES IMPLEMENTING REGULATIONS

The DCA's proposed regulations are intended to provide clarification to the Fair Workweek Law, and further expand on the restrictions that fast food and retail employers must follow. The agency has scheduled a public hearing on the proposed rules on November 17, 2017 at 10 a.m., and written comments to the proposed rules must be submitted on or before 5 p.m. on November 17. Below is a summary of the proposed regulations.

FAST FOOD EMPLOYERS

- *Good Faith Estimate of Work Schedule:* The Fair Workweek Law requires fast food employers to provide employees with a good faith estimate of their work schedule upon hire and an updated good faith estimate if there is a "long-term or indefinite change." The updated good faith estimate must be provided to the impacted employee as soon as possible and before the employee receives the first work schedule following the change.

The proposed rules explain that, for purposes of this provision, a "long-term or indefinite change" exists if, in any of three of six consecutive workweeks: (i) the number of actual hours worked differs by 20 percent from the good faith estimate; (ii) the days differ from the good faith estimate at least once per week; (iii) the locations differ from the good faith estimate at least once per week; or (iv) the types of shifts (i.e., morning (4:00 a.m. to 11:59 a.m.), afternoon (12:00 p.m. to 7:59 p.m.) or night shift (8:00 p.m. to 3:59 a.m.)) differ from the good faith estimate at least once per week. A change of time for shifts that is earlier or later by 15 minutes or less is not considered a "long-term or indefinite change."

- *Premiums for Schedule Changes:* The Fair Workweek Law mandates that fast food employers provide work schedules to their employees 14 days in advance of the first day of the schedule. If changes are made to the schedule, certain premiums must be paid to the employee, ranging from $10 to $75, depending on whether shifts or hours are added, cancelled or changed and the amount of notice given.

The proposed regulations clarify that an employer may change a work schedule by 15 minutes or less without being

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obligated to pay the schedule change premiums. So, if an employee agrees to stay beyond their shift for 15 minutes or less, the employer would not need to pay the premium, but the premium would be required if the employee stays 16 minutes or more beyond the conclusion of the scheduled shift.

- *Access to Hours*: The proposed regulations expand upon fast food employers' obligation to offer available shifts to existing employees before hiring new employees. Under the law, a fast food employer must post a notice detailing additional shifts for three consecutive calendar days, which includes, among other things, the number of shifts offered, the schedule of the shifts, the length of time the shifts are anticipated, the number of employees needed to fill the shifts, the process for employees to notify the employer of their interest in the shifts, and the criteria that will be used to distribute the shifts. A fast food employer must notify employees of the method by which available shifts will be posted, in writing upon hire and whenever there is a change to the method.

The proposed regulations clarify that, when a fast food employer has less than three days' notice of a need to fill an additional shift, the notice must be posted as soon as practicable, but any employee can be temporarily assigned to work a shift that is during the three-day notice period (presumably with any required schedule change premium). After the additional shifts have been filled, the employer must notify all accepting employees as soon as possible that the offered shift has been filled, using the same method used to communicate the initial offer of the additional shift.

The proposed regulations clarify that a fast food employer that owns 50 or more fast food establishments in New York City can choose whether to offer additional shifts to employees who work at all locations in New York City, or only those employees who work in the same borough as the location where the shifts will be worked. Either way, the employer must first award the shifts to employees currently employed at the location where the shifts will be worked.

The proposed regulations also explain that an employee may accept the entire shift offered, a portion of the shift (dubbed a "shift increment"), or a subset of shifts if more than one shift is being offered. An employer is not required to award a shift increment when the remaining portion of the shift is three hours or less and was not accepted by another

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employee. Further, if accepting a shift would entitle the fast food employee to overtime pay, the fast food employer is not required to award the shift to that employee. Also, before hiring a new employee, the employer must award the fast food employee the largest shift increment possible that would not trigger overtime pay, provided that the remaining portion of the shift was accepted by another employee or is three hours or more.

FAST FOOD AND RETAIL EMPLOYEES

- *Notice of Rights*: The proposed rules clarify that the yet to be published notice of rights regarding the Fair Workweek Law must be printed on 11″ by 17″ inch paper in font no smaller than 12 point.

- *Recordkeeping Requirements*: The proposed regulations expand on the recordkeeping requirements under the Fair Workweek Law. Specifically, fast food and retail employers must maintain in an electronically accessible format the actual hours worked by each employee each week, an employee's written consent to any schedule changes where required, and each written schedule provided to an employee. Fast food employers must also maintain records that show the good faith estimate of schedule provided to employees pursuant to the law as well as dates and amounts of premium pay for schedule changes. These records must be maintained for three years.

- *Employee Record Requests*: Upon request, fast food and retail employers must provide an employee with their work schedule for any previous week worked for the past three years within 14 days of the request, as well as the most current version of the work schedule for all employees at the same location within one week of the employee's request. Per the proposed regulations, fast food and retail employers are prohibited from posting or otherwise disclosing 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 the accommodation.

- *Private Right of Action*: The proposed regulations state that a person who files a complaint with the DCA must withdraw the complaint in writing prior to commencing a

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civil lawsuit. The withdrawal of the complaint does not preclude the DCA from investigating the employer or commencing, prosecuting, or settling a case against the employer based on the same violations. A person who filed a civil lawsuit must withdraw those claims or have them dismissed without prejudice before filing a complaint with the DCA.

IMPLICATIONS FOR NEW YORK CITY EMPLOYERS

The Fair Workweek Law presents significant burdens to the scheduling and recordkeeping requirements of fast food and retail employers. There is no easy way to cut it. As the effective date of the law quickly approaches, fast food and retail employees must make sure they understand the new obligations and take necessary steps to implement them.

If you have questions about how these changes will affect your workplace, contact any attorney in our New York City office at 212.899.9960, or your regular Fisher Phillips attorney.

This Legal Alert provides information about specific city legislation and proposed regulations. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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