

# GROCERY WORKER RETENTION ACT: FREQUENTLY ASKED QUESTIONS

## DEFINITIONS IN THE LAW

**Grocery establishment:** Any retail store in New York City where the sale of food for off-site consumption comprises 50 percent or more of the store's gross revenue and exceeds 10,000 square feet. Referred to as "grocery store" in these FAQs.

**Change in control:** Any sale, assignment, transfer, contribution, or other disposition of all or substantially all of the assets of any grocery establishment or a controlling interest in any grocery establishment.

**Incumbent grocery employer:** Any individual, corporation, sole proprietorship, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign, that owns or controls a grocery establishment *prior to* any change in control. Referred to as "previous owner" in these FAQs.

**Successor grocery employer:** Any individual, corporation, sole proprietorship, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign, that owns or controls a grocery establishment *after* any change in control. Referred to as "new owner" in these FAQs.

**Confidential employee:** An employee who meets the definition of a "confidential employee" under federal Labor Law.

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## I. GENERAL QUESTIONS

### 1. What does the Law require?

The Law requires that the new owner retain employees of the previous owner for a 90-day transitional period following a change in control of the grocery store.

### 2. When do grocery employers have to start complying with the Law?

May 8, 2016.

**3. How must a grocery store determine square footage under the Law?**

To determine whether the grocery store is covered under the Law, a grocery store's measurement should include the space used to sell food. A grocery store can exclude any storage space, loading dock, food preparation space, and area designated for consumers to eat food.

**4. Which employees are eligible for protections under the Law?**

Generally, any person who has been continuously employed by a grocery store subject to a change in control on a full-time or part-time basis for at least six months *prior to* the change in control is eligible for protections under the Law.

*Exceptions:* Managers, supervisors, employees who meet the definition of "confidential employee" under federal Labor Law, certain employees covered by collective bargaining agreements, and persons who worked fewer than an average of eight hours per week during the six months prior to the date that the change in control was effective are *not* eligible for protections under the Law.

**5. Will employees lose their eligibility under the Law if they take a leave of absence, are transferred, or are otherwise separated from employment during the six months prior to the change in control?**

It depends. If the separation from employment is six months or less, the separation does *not* constitute an interruption in employment and does not affect eligibility.

**6. Who qualifies as a "confidential employee"?**

Under the Law, a "confidential employee" is an employee who meets the definition of a "confidential employee" under federal Labor Law. Factors to consider when determining whether an employee is a confidential employee include:

- Whether the employee has regular access to the employer's confidential labor relations information; for instance, the employer's collective bargaining strategy. AND
- Whether the employee assists and acts in a capacity requiring confidentiality and loyalty with respect to a managerial employee. AND
- Whether the managerial employee formulates, determines, and carries out management policies in the field of labor relations.

**7. Does access to personnel records mean an employee is a "confidential employee" and not eligible for protection?**

No. An employee is not a confidential employee just because the employee has access to personnel information.

**8. Does the Law apply to grocery employees covered by a collective bargaining agreement (CBA) that was in effect *on or before* the date that the change in control was effective?**

The Law does *not* apply to employees covered by a collective bargaining agreement between the union and the new owner that was in effect on or before the date that the change in control was effective, as long as the collective bargaining agreement provides terms and conditions regarding the discharge or laying off of employees.

**9. Does the Law apply to grocery employees covered by a collective bargaining agreement (CBA) that went into effect *after* the effective date of the change in control?**

Yes. The Law applies to employees covered by a collective bargaining agreement between the union and the new owner that went into effect after the date that the change in control was effective.

**10. Are there rules or regulations implementing the Law?**

The Department of Consumer and Worker Protection (DCWP) is in the process of promulgating rules implementing the Law. DCWP will post rules online once finalized.

## II. GROCERY EMPLOYER OBLIGATIONS

### *Previous Owner*

#### 1. **What does the Law require of the previous owner?**

Generally, the previous owner must:

- Provide the new owner with a list of eligible grocery employees. AND
- Post a notice in the grocery store with information about the change in control, the new owner, employee rights under the Law, and eligible grocery employees. AND
- Provide the list and notice to eligible grocery employees' collective bargaining representatives.

#### 2. **When must the previous owner fulfill its obligations under the Law?**

The previous owner must fulfill its obligations under the Law no less than 15 calendar days before the effective date of any change in control.

#### 3. **What information must be included in the list of eligible employees the previous owner provides to the new owner?**

The list must include the following for each eligible employee:

- Name
- Address
- Phone number (if known)
- Email address
- Date of hire
- Job category

#### 4. **What information must be included in the notice the previous owner must post?**

The required notice must include:

- Effective date of the change in control
- Name and contact information of the new owner
- Explanation of employee rights under the Law
- Names and job categories of each eligible employee

#### 5. **Where must the previous owner post the required notice?**

The previous owner may meet the posting requirements by posting the notice conspicuously in well-known and easily reached places at the grocery store where employees regularly visit and taking reasonable steps to ensure that the notice is not changed, vandalized, or covered by other material.

#### 6. **When does the transitional employment period begin?**

The 90-day transitional employment period begins on the effective date of a change in control or the end of any period during which the grocery store was closed to the public, whichever is later.

#### 7. **How long is the transitional employment period?**

The transitional employment period lasts 90 days.

### *New Owner*

#### 8. **What does the Law require of new owners?**

Generally, the new owner must keep each eligible employee on staff for the transitional employment period and cannot fire an eligible grocery employee during the transitional employment period without cause.

*Exception:* If the new owner decides to reduce the number of staff employed by the previous owner, the new owner can do so but must keep eligible grocery employees on staff according to seniority within each job category. The new owner must maintain a preferential hiring list of any eligible employees who were let go during the transitional period and, according to seniority within their job category, be given preferential notice of and an opportunity either to accept or turn down any jobs that become available in their job category during the transitional period.

**9. Can the new owner reduce staff size after a change in control?**

Yes. See Exception (Question 8) for more information.

**10. How does an employee earn seniority under the Law?**

An employee earns seniority based on that employee's length of continuous employment at the grocery store regardless of job position or full-time or part-time status.

**11. Will employees lose seniority under the Law if they take a leave of absence from the grocery store?**

It depends. If the separation from employment is six months or less, the separation does *not* constitute an interruption in employment and does not affect seniority.

**12. What are the new owner's obligations to eligible grocery employees at the end of the transitional period?**

At the end of the transitional period, the new owner must complete a written performance evaluation for each eligible grocery employee who stayed and worked during the transitional employment period. Regardless of whether the written performance evaluation is positive, negative, or neutral, the grocery store may, but is not required to, offer eligible grocery employees continued employment.

**13. Must a grocery store continue to retain an eligible grocery employee after the transitional employment period?**

No. A grocery store may terminate an eligible grocery employee for any reason or no reason at all, as long as the termination does not violate any other local, state, or federal laws.

**III. EMPLOYER RECORD KEEPING**

**1. What records must the previous owner keep?**

The previous owner must maintain:

- Required list of eligible employees
- Date the list was provided to the new owner
- Written proof that the list was provided to the new owner
- The notice required under the Law (See Section II. Question 4.)
- Date the required notice was posted
- Proof of posting

**2. What records must the new owner keep?**

The new owner must keep:

- Written verification of any offer of employment made to an eligible grocery employee, including the name, address, date of offer, and job category
- Written performance evaluations for each eligible grocery employee at the end of the transitional period
- List of eligible grocery employees received from the previous owner, the date the list was received, and the names of those employees retained for the transitional period

- Preferential hiring list required under the Law, the date eligible employees were given the right of first refusal to jobs that became available during the transitional period, and proof that the right of refusal was given

**3. How long must employers retain records demonstrating compliance with the Law?**

Generally, grocery employers must retain records for a period of three years unless otherwise required by another law, rule, or regulation.

**4. What is the consequence of a grocery employer’s failure to maintain, retain, or produce documents demanded by DCWP or otherwise required to be maintained?**

If a grocery employer fails to maintain, retain, or produce a document or record that is relevant to a fact alleged by DCWP in a Notice of Hearing, DCWP’s account of that fact is given greater weight at a hearing.

The previous owner is subject to civil penalties up to:

- \$500 for failing to maintain, retain, or produce the required list of eligible employees, the date the list was provided to the new owner, and written proof that the list was provided to the new owner AND
- \$500 for failing to maintain, retain, or produce the required notice, the date the required notice was posted, and proof of posting

The new owner is subject to civil penalties up to:

- \$750 for failing to maintain a preferential hiring list of any eligible employee not retained by the new owner AND
- \$500 for failing to retain the preferential hiring list of any eligible employee not retained by the new owner AND
- \$500 for failing to retain written verification of any offer of employment made by the new owner to any eligible grocery employee, the date eligible employees were given the right of first refusal to jobs that became available during the transitional period, and proof that the right of first refusal was given AND
- \$500 for failing to complete or retain written performance evaluations for each eligible employee retained during the transitional period AND
- \$500 for failing to keep the list of eligible employees received from the previous owner, the date the list was received, and the names of employees retained for the transitional period

**IV. COMPLAINTS AND INVESTIGATIONS**

**1. Who may file a complaint alleging violations of the Law?**

Eligible grocery employees or their authorized representative may file a complaint with DCWP within 180 days of the date the employee knew or should have known of the alleged violation.

**2. How much time does an eligible employee have to file a complaint?**

Eligible employees have 180 days from the date they knew or should have known of the alleged violation to file their complaint with DCWP.

**3. Can an employee who files a complaint remain anonymous?**

DCWP will keep the identity of any complainant confidential unless disclosure of their identity is necessary for resolution of the investigation or otherwise required by law. DCWP will, to the extent possible, notify the complainant that DCWP will disclose the complainant’s identity prior to the disclosure.

**4. Who investigates complaints?**

DCWP investigates complaints about alleged violations of the Law.

**5. Can DCWP issue subpoenas or demand information?**

Yes. DCWP may issue subpoenas and document demands to investigate an employer's compliance with the Law. If DCWP issues a subpoena, DCWP must give the employer 20 days' written notice that it must provide DCWP access to its records at DCWP's offices.

**6. Will DCWP notify the employee of the status and outcome of the complaint?**

Yes. DCWP will keep employees reasonably notified regarding the status of the complaint and any investigation. A complainant may contact DCWP to inquire about the status of the complaint.

**7. Can an employee withdraw the complaint once it has been filed with DCWP?**

Yes. A complainant may withdraw the complaint with written notice to DCWP at any time before the case is resolved.

**8. How are complaints resolved?**

Unless the employee withdraws the complaint, DCWP may attempt to resolve the complaint by any method. If DCWP determines that timely settlement is not possible, DCWP will issue a Notice of Hearing before the Office of Administrative Trials and Hearings (OATH) to recover civil penalties. DCWP can settle the case at any time prior to the conclusion of the hearing.

**9. How does DCWP begin a proceeding to recover civil penalties against a grocery store?**

DCWP will issue a Notice of Hearing that requires the employer to appear at a hearing at the Office of Administrative Trials and Hearings (OATH) to recover any civil penalty for violations of the Law.

**10. Will grocery employers have an opportunity to settle a complaint after receiving a Notice of Hearing?**

Yes. DCWP may settle a Notice of Hearing at any time prior to the conclusion of the hearing.

**11. Can DCWP issue a Notice of Hearing for failing to respond to a document request or subpoena?**

Yes. DCWP may issue a Notice of Hearing to an employer who:

- 1) fails to respond to a complaint;
- 2) fails to provide information requested by DCWP in connection with a complaint; or
- 3) fails to provide records or access to records as part of a DCWP investigation.

An employer will have opportunities to comply and face reduced or no civil penalties before the hearing.

**12. May an employer avoid penalties for failing to respond to a document request or subpoena?**

Yes. An employer may "cure" such a violation alleged in the Notice of Hearing without penalty by either:

- 1) producing the requested information or records on or before the first scheduled hearing date;  
or
- 2) resolving to the satisfaction of DCWP on or before the first scheduled hearing date the complaint that was filed against the grocery employer.

**13. Can a complainant opt out of a settlement reached by DCWP?**

Yes. A complainant may opt out of a DCWP settlement by withdrawing the complaint in writing to DCWP.

## **V. PRIVATE LAWSUIT**

### **1. Can an eligible grocery employee bring a private civil lawsuit for a violation of the Law?**

Yes. Any eligible employee alleging a violation of the Law can bring a civil action against the previous or new owner but only if the grocery employee has first filed the complaint with DCWP and either:

- DCWP hasn't resolved the complaint or issued a Notice of Hearing within 120 days AND the grocery employee has withdrawn the complaint with DCWP in writing. **OR**
- The grocery employee has opted out of a settlement reached by DCWP AND has withdrawn the complaint with DCWP in writing.

## **VI. REMEDIES FOR EMPLOYEES**

### **1. Are grocery employees entitled to restitution under the Law?**

Yes. If a grocery employee wins at a hearing or civil action, restitution under the Law may include:

- Three times (3x) the pay for each day the employee was wrongfully discharged or not retained AND
- The value of the benefits the grocery employee would have received for those days AND
- An order requiring that the new owner retain its eligible employees during the transitional period AND
- Reasonable attorney's fees and costs (provided the grocery employee is the winning party in a private civil action)

### **2. How is a grocery employee's pay rate calculated for purposes of determining restitution?**

The rate of compensation is at least:

- The average regular rate of pay received by the eligible employee during the last three years of employment in the same job category OR
- The most recent regular rate received by the eligible grocery employee, whichever is higher

## **VII. PENALTIES AND ENFORCEMENT**

### **1. Who enforces the Law?**

DCWP enforces the Law, but an eligible employee may bring a civil lawsuit to enforce the Law after the employee has first filed the complaint with DCWP and either:

- DCWP has not resolved the complaint or issued a Notice of Hearing within 120 days AND the grocery employee has withdrawn the complaint with DCWP in writing. **OR**
- The grocery employee has opted out of a settlement reached by DCWP AND has withdrawn the complaint with DCWP in writing.

### **2. What are the maximum penalties for previous owners under the Law?**

The following civil penalties may be imposed against previous owners for violations of the Law:

- Up to \$1,000 for failure to provide the new owner with a list of eligible employees AND
- Up to \$1,000 for failure to post the required notice in the grocery store with information concerning the change in control, the new owner, employee rights under the Law, and the eligible grocery employees AND
- Up to \$1,000 for failure to provide both the list and notice to eligible grocery employees' collective bargaining representatives AND
- Up to \$500 for failure to maintain the required list of eligible employees, the date the list was provided to the new owner, and written proof that the list was provided to the new owner AND

- Up to \$500 for failure to maintain records that show the required notice, the date the notice was posted, and proof of posting

### **3. What are the maximum penalties for new owners under the Law?**

The following civil penalties may be imposed against new owners for violations of the Law:

- Up to \$750 for each employee not retained or terminated without cause during the transitional period AND
- Up to \$500 for failure to retain the list of eligible grocery employees received from the previous owner, the date the list was received, and the names of those employees retained for the transitional period AND
- Up to \$750 for failure to maintain a preferential hiring list of any eligible employees not retained during the transitional period AND
- Up to \$500 for failure to retain the preferential hiring list of any eligible employee not retained by the new owner AND
- Up to \$500 for failure to retain written verification of any offer of employment made by the new owner to any eligible employee, the date eligible employees were given the right of first refusal of jobs that became available during the transitional employment period, and proof that the right of first refusal was given AND
- Up to \$500 for failure to complete or retain written performance evaluations for each eligible grocery employee retained during the transitional period

### **4. Where will hearings for violations of this Law brought by DCWP take place?**

Hearings will take place before the Office of Administrative Trials and Hearings (OATH). OATH shall have the power to impose penalties under the Law.