Consumer and Worker Protection

Comments Received by the Department of Consumer and Worker Protection on

Proposed Rules related to the Fair Workweek Law

IMPORTANT: The information in this document is made available solely to inform the public about comments submitted to the agency during a rulemaking proceeding and is not intended to be used for any other purpose

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THE COUNCIL OF
THE CITY OF NEW YORK
SHAHANA HANIF
39TH DISTRICT, BROOKLYN

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MEMBER OF COMMITTEE ON CRIMINAL JUSTICE
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MEMBER OF COMMITTEE ON CULTURAL AFFAIRS, LIBRARIES, AND INTERNATIONAL INTERGROUP RELATIONS
MEMBER OF COMMITTEE ON MENTAL HEALTH, DISABILITIES, AND ADDICTIONS

Good morning, I'm Council Member Shahana Hanif. Thank you to the Department of Consumer and Worker Protection for holding this hearing and for granting me the opportunity to speak.

I am beyond excited that New York City has made Just Cause protections a reality for fast food workers. I am grateful to our new Council Speaker Adrienne Adams and our new Comptroller Brad Lander, who preceded me in representing District 39, for passing Local Laws 1 and 2 of 2021, which are being discussed today.

Additionally, this could not have been possible without the incredible advocacy of our workers and our labor unions. Thanks to your work, the 67,000 workers in our City's fast food industry will benefit from this key protection. Given the demographic breakdown of the industry, this is a win for women, for immigrants, and for Black and Brown New Yorkers.

We've always known that our fast food workers are essential and this pandemic has made that even more clear. But at-will employment policies made workers disposable in the eyes of employers. A study from the Center for Popular Democracy found that two-thirds of firings happened without any reason provided to the worker. In the most egregious cases, firings could be made in order to retaliate against workers for exercising their right to form a union, drawing attention to labor violations, or speaking out against sexual harrassment and assault. Just Cause will reinforce and protect job security and encourage workers to exercise their rights in the workplace.

I am committed to ensuring that Local Laws 1 and 2 are implemented effectively. As the new chair of the Council's Committee on Immigration, I want to emphasize that in order for this to occur, all outreach efforts and informational campaigns must be communicated in the languages that the workers speak. In a City as proudly diverse as ours, that is not simply English and Spanish. Language access efforts need to be hyper-localized and should occur in partnership with community organizations who are trusted messengers in the areas they serve. If there are opportunities for my Office to be of assistance in this regard, I encourage the Department to proactively reach out.

Further, I want to make it clear that Just Cause protections should not be confined only to fast food workers. Every worker in New York City should be protected from at-will firings and I am looking forward to working with my colleagues in the City Council to make this a reality.

Thank you for your time and consideration.

From: SEIU Local 32BJ
To: Department of Consumer and Worker Protection
Date: February 3, 2022
Re: Comments on proposed rules to implement Fair Workweek Law for fast food workers

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SEIU Local 32BJ has been one of the most active organizations in the city helping to enforce the Fair Workweek and Just Cause laws since their passage. Through our years of experience educating fast food workers of their rights, investigating possible violations, and assisting workers with the preparation of complaints, we have developed an intricate understanding of how the law operates in practice.

The following recommendations derive from that experience, and we offer them to further improve upon the strong draft proposed rules released by the Department. Thank you for your consideration.

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§ 7-620 [Regular scheduling]

- Amend subsection (f): "~~If an employer's practice is to allow employees to provide the hours they are available and unavailable to work, then a~~ An employer may not add or change a recurring shift on an employee's regular schedule if it conflicts with times that the employee has previously informed the employer that they are unavailable to work, unless the employee consents in writing. If an employee changes their availability to work in writing such that they are no longer available to work all or part of a shift on their regular schedule, and an employer reduces the employee's regular schedule to accommodate the employee's new availability, that constitutes such employee's written consent to a reduction in hours on the regular schedule corresponding to that shift. In this scenario, the employer has discretion to remove the entire recurring shift, or just the conflicting portion of it, from the regular schedule. An employer may require employees to provide reasonable advance notice, not to exceed 21 days, of a change in an employee's hours of availability."

  [. . .]

  Example 4: Martha informs her employer that she will not be available to work for the next 28 days, effectively immediately. Assuming Martha is not taking leave that is protected under any provision of federal, state, or local law, Martha's employer has a variety of lawful responses. For example, the employer may issue progressive discipline to Martha for changing her hours of availability ~~with less than 30 days' notice~~ without reasonable advance notice, and/or for not working shifts on her work schedule, as long as issuing such discipline is consistent with the employer's progressive discipline policy . . ."

The opening clause of this subsection could generate confusion for employees and difficulties in enforcement. For example, what is the definition of having a "practice" of allowing employees to provide their availability? Given that it is likely most employers already have a practice of asking employees for their availability in order to comply with the regular scheduling provisions of the law, enforcement of this rule would be easier if there is one uniform standard.

Defining a 21-day upper bound for "reasonable advance notice" provides employees and employers more predictability in changes to an employee's availability, gives employers enough time to meet their obligation to post work schedules 14 days in advance, and preserves flexibility in this requirement to adjust for special circumstances.

- Add new subsection (h): "An employer shall not condition an employee's ability to voluntarily work non-regularly scheduled on-call shifts on such employee's general availability to work during the times of the shifts."

Workers have reported that managers have told them that they are prohibited from working an on-call shift scheduled at a given time unless they declare that they are always available to work during that time. This has caused workers to feel pressured to change their general availability in order to work some on-call shifts, even if they are not actually consistently available at the time of the shifts. This practice is inconsistent with the purpose of the law, leads to scheduling conflicts and unfair discipline when employers then schedule workers to work shifts they cannot consistently make, and results in employees not having access to hours they could otherwise work. Adding this language to the rules would address this practice.

§ 7-624 [Offering shifts to fast food employees]

- Amend subsection (j): "Employees are entitled to compensatory damages for violations of section 20-1241 of the Fair Workweek Law pursuant to section 20-1208(a)(1) (administrative remedies) and section 20-1211(a)(5) (private cause of action). A court may award compensatory damages in addition to ~~or in lieu of~~ the $300 per-violation damages available under section 20-1208(a)(3)(e) of the Fair Workweek Law. Compensatory damages include the wages current fast food employees did not have an opportunity to earn due to the fast food employer's failure to comply with section 201241 of the Fair Workweek Law."

A court's award of compensatory damages should not be less than the $300 per-violation damages under section 20-1208(a)(3)(e).

§ 7-629 [Bona Fide Economic Discharges]

- Amend subsection (d), reason (5): "has turned down an offer of reinstatement or restoration of hours of the same ~~amount of regularly scheduled hours~~ schedule at the same location that they worked immediately prior to the discharge."

Laid off workers should not lose their right to reinstatement or restoration of hours just because they refused an offer of hours scheduled at times they are not available to work.

§ 7-630 [Circumstances that Are Not a Discharge]

- Amend subsection (a): "When an employee quits under circumstances that do not constitute a constructive discharge, there has not been a discharge for purposes of section 20-1272 of the Fair Workweek Law. Quitting in response to an employer assigning a worker a recurring shift for a time that the employee has previously informed the employer that they are unavailable to work shall be considered a constructive discharge."

The purpose of the Just Cause law is to protect fast food workers from unjust terminations. This addition is necessary to prevent employers from setting up an employee for termination by scheduling them for a time that they are unavailable and issuing discipline based on their failure to work the shift. In practice, many employees will feel pressured to quit if they are placed on the schedule for a time they are unavailable, rather than face discipline and termination.

February 3, 2022

VIA EMAIL

rulecomments@dca.ny.gov

Re: **Comments on Proposed Rules to Implement Local Laws 1 and 2 of 2021**
Re: Fair Workweek and Just Cause Laws for Fast Food Workers (2022)

Commissioner Hatch,

We write on behalf of the NYC BID Association, which represents the 76 Business Improvement Districts throughout New York City, to comment on the proposed rules to implement Local Laws 1 and 2 of 2021 related to the Fair Workweek Law. Our BID stakeholders include thousands of small and large employers, all of whom are on the frontlines of the City's economic recovery from the pandemic. These Proposed Rules are extremely concerning to us.

The provisions in the Proposed Rules go beyond the plain language of the law and create a rigid framework to enforce extremely onerous requirements. Employers covered by these rules will be unnecessarily burdened with impractical reporting requirements, shift scheduling complications, and financial auditing, not to mention a loss of privacy over their confidential financial information. While we fully support the rights of workers, this is an unprecedented intrusion into private sector business operations at a time when the City is still reeling from a global pandemic.

While the proposed rules apply only to certain employers, including quick-service restaurants, we note that many of these establishments are independently owned, small businesses that have been struggling to survive under the weight of the pandemic and countless government mandates. The imposition of these new requirements will create yet another strain on their capacity to effectively operate their small businesses. These rules also set a very worrying precedent for other industries.

We strongly urge the Department to limit the burdensome requirements contained in these Proposed Rules, to delay implementation dates to the extent possible, and to do everything in its power to help keep small businesses in operation.

Respectfully,

Elizabeth Lusskin and David Estrada
Co-Chairs
NYC BID Association

February 3, 2022

Submitted online: https://rules.cityofnewyork.us/rule/fair-workweek-law-for-fast-food-workers/
And via e-mail: Rulecomments@dca.nyc.gov

Peter A. Hatch, Commissioner
New York City Department of
Consumer and Worker Protection
42 Broadway, Manhattan, New York

Re: Comments on Proposed Rules to Implement Local Laws 1 and 2 of 2021
Re: Fair Workweek Law for Fast Food Workers (2022)

Dear Commissioner Hatch:

We write on behalf of the New York State Restaurant Association (NYSRA) and the National Restaurant Association to provide comments[1] for the New York City Department of Consumer and Worker Protection's (the "DCWP") consideration on the proposed rules to implement Local Laws 1 and 2 of 2021 related to the Fair Workweek Law for fast food workers (the "Proposed Rules").

As the DCWP is aware, the food service sector is under unprecedented pressures in the current pandemic, including the small-busines owners that run many of the City's franchised locations. As Mayor Adams has commented, "[o]ur small businesses have been through so much during the COVID-19 pandemic. . . . The last thing they need to deal with are unnecessary fines." In light of this focus on "cutting the red tape" – as well as on job creation, economic recovery, and a safe and healthy return to work – it is surprising that the Proposed Rules only further add to the exhaustive strain placed on the quick-service industry and the unprecedented burden due to the current COVID-19 pandemic.

As it stands, the Fair Workweek and Just Cause requirements represent the single greatest operational burden on quick-service restaurants – many of which are operated by independent

[1] Our comments are limited to operational concerns with the Proposed Rules and have no bearing on other issues with Local Laws 1 and 2 of 2021, including but not limited to issues which may have been raised in litigation against the DCWP and the City of New York.

franchises and small business owners – as they attempt to stay open for business and remain a part of New York City's economic recovery. The proposed rules only function to add even more

exhaustive recordkeeping, operational restrictions, and regulatory burdens, without any meaningful benefit the health and safety of the workforce.

The Proposed Rules are even more stringent and burdensome than the statute mandating their creation, the Fair Workweek Law. We respectfully request that the Proposed Rules be revised to be more limited in scope, in line with the original Fair Workweek legislation. The amended law and Proposed Rules will establish an unprecedented level of government intrusion into and burden on private sector business operations at a time when those businesses are struggling to survive. The result will be a chilling effect on new hiring and investment in New York City. These Proposed Rules will also set a worrying precedent beyond quick-service restaurants.

This letter discusses a few egregious examples of such burdens, but we urge the DCWP to undertake a full evaluation of the proposed rules with an eye toward job creation and economic recovery in addition to worker-focused protections. These are a few select examples of unreasonable burdens worsened by the Proposed Rules, which are discussed in greater detail below: (1) recordkeeping requirements for discharges; (2) unnecessary additional scheduling complications; (3) additional "just cause" obligations; (4) computation of time periods for schedule change premiums; and (5) variations between regular schedules and work schedules.

1. <u>Recordkeeping Requirements for Discharges</u>.

First, the Proposed Rules set forth onerous recordkeeping requirements for quick-service restaurants. As just one example, the Proposed Rules contemplate that an employer would need to provide the City with documents showing a fast food restaurant's "financial condition, including tax returns, income statements, profit and loss statements, monthly gross revenue schedules, and balance sheets" in order to justify decisions to manage its own workforce. 6 RCNY § 7-603(a)(2)(xiii)(1). Such records would need to be maintained for three years. *Id.*

This is an unprecedented government intervention into business operations, whereby each operator must submit to an onerous financial audit before a government entity can decide whether personnel decisions are justified. These Proposed Rules are impractical and only add to the cost and burden of compliance. Nothing in the law itself requires the City to review or approve of such sensitive, proprietary financial data. NYC Admin Code § 20-1272(h).

While the City Council elected to give quick-service restaurants discretion to evaluate various business metrics and records in determining the necessity of discharges for bona fide economic reasons, the Proposed Rules are unreasonably burdensome and make compliance costly, intrusive, and time-consuming. Quick-service restaurants weighing a discharge decision are often in difficult financial situations, and adding a requirement that they maintain and possibly produce high-level and sensitive financial documents will make it all the more difficult for such restaurants to maintain operations.

Accordingly, the DCWP should remove the requirements for the showing of documentation related to a quick-service restaurant's financial condition, or alternatively revise the examples to

include less sensitive metrics and materials. The DCWP should also make clear the grounds and metrics on which the Department will make decisions on what constitutes a "bona fide economic reason" for taking an employment action.

2. <u>Unnecessary Additional Scheduling Complications</u>.

Second, the Proposed Rules further add to impractical government involvement in employee scheduling in a manner that makes front-line management nearly impossible. As an example, the Proposed Rules require fast food restaurants to obtain written consent from fast food employees *before* they work a mere 15 minutes past their scheduled shift end time. Specifically, the Proposed Rules provide that when a "schedule change involves an unscheduled addition of time, the employee's consent must be obtained no later than 15 minutes after the employee begins to work additional time." 6 RCNY § 7-606(a). Notably, this impractical requirement does not appear in the Fair Workweek Law. It would have the effect of requiring fast food restaurants to aggressively police shift end times in a way that is not operationally feasible or necessary to provide predictable scheduling for employees.

For example, if a fast food employee is working a shift and they ask (or are asked) to keep working because an employee working the next shift is late, both the fast food employee and their manager will have to stop that work to execute consent forms in the midst of the shift. Such a requirement is not only well-beyond the amendments to the Fair Workweek Law which are purportedly being addressed by the Proposed Rules, but also not in the interest of either fast food restaurants or fast food employees, adding further administrative burdens to their existing workdays.

We propose that the DCWP remove this language and other language that adds to the already heavy burden of complying with over 35 pages of onerous scheduling requirements already promulgated by the City in informal guidance.

3. <u>Additional "Just Cause" Obligations</u>

Third, we are concerned about the elimination of managerial authority to separate employees for egregious misconduct. The Proposed Rules prohibit immediately discharging an employee, even for significant misconduct, unless it rises to the level of "violence or threats of violence, theft, sexual harassment, race discrimination, or willful destruction of property." 6 RCNY § 7-627(c). These examples effectively set an unduly high burden for egregious misconduct. Notably, the Fair Workweek Law does not define egregious misconduct and these examples do not accurately or fully reflect the circumstances under which a fast food restaurant may need to take immediate action and terminate an employee.

Accordingly, we propose that the DCWP acknowledge that private employers should identify their own policies, procedures, and misconduct, so long as such rules are consistently applied and are not unlawful. To the extent the DCWP still believes that examples of egregious misconduct should be included in the Proposed Rule, we suggest that additional examples should be included, including but not limited to: (a) insubordination; (b) conduct that seriously harms or threatens the health and safety of other employees, customers, or guests; (c) the falsification of time or other business records; (d) working under the influence of alcohol or illegal drugs; and

(e) refusal to comply with any work-related health and safety requirements imposed by City, State, or Federal Government.

Separately, the Proposed Rules are inconsistent in that they provide a fast food restaurant may immediately discharge an employee for "willful refusal to perform work for the majority of time on a shift" but they may not immediately discharge an employee for "lateness or failure to appear for a scheduled work shift." 6 RCNY § 7-627(b), (d). The Proposed Rules rightly do not require a fast food employer to progressively discipline a fast food employee who clocks in and refuses to work, and should also allow a fast food employer to take immediate action when a fast food employee effectively does the same thing by not reporting for their scheduled shift. Predictive scheduling within the meaning of the Fair Workweek Law should be predictive for both fast food employees *and* fast food employers, and the Proposed Rules have the effect of incentivizing no-shows (as opposed to arriving at work and not performing job duties). We suggest that 6 RCNY § 7-627(d) be removed from the Proposed Rules.

4. Computation of Time Periods for Schedule Change Premiums.

Fourth, we note that the Proposed Rules effectively write in new temporal requirements for schedule change premiums not contemplated by the Fair Workweek Law. Specifically, the Proposed Rules provide that "the amount of each schedule change premium owed is based on hours elapsed between the first day on the work schedule, which begins at 12:00 a.m., and the date and time the fast food employer transmits the revised written schedule to the affected employees or re-posts the schedule." 6 RCNY § 7-622(a). The Fair Workweek Law contemplates notice dating to the date of the *shifts* at issue, not the date of the *first day of the work schedule containing the shifts*. *See* NYC Admin Code § 20-1222(a) (addressing days' notice to the employee). There is no support anywhere in the Fair Workweek Law or legislative history for the Proposed Rules' modification of the premium scheme to relate to the first day of a work schedule – which is not a date of significance to the fast food employee. We respectfully submit that, absent legislation re-defining schedule change premiums, the Proposed Rules instead defer to the existing statute and longstanding practice.

5. Variations Between Regular Schedules and Work Schedules

Fifth, the Proposed Rules only add ambiguity and complexity. As an example, there is ambiguity concerning what constitutes a variation in shifts between a regular schedule and a work schedule. The Proposed Rules broadly provide that a variation in shifts refers to "changes to the location of a shift, the day of the shift, the start or end times of a shift, the removal of a shift, or the addition of any shift not included on the regular schedule." 6 RCNY § 7-621(b). Practically, however, a fast food employee does not experience a meaningful change to their predictability when a shift's location is changed to a nearby restaurant. Moreover, under the
Proposed Rules, if a shift with the same scheduled hours is moved from one day to another, it effectively counts as a double change (the subtraction of the old shift and addition of the new shift), even where the employee's net hours remain the same and so they experience no change to their economic predictability. We respectfully suggest that the DCWP take meaningful predictability into account when considering what constitutes a variation of 15 percent from a regular schedule and throughout its rules.

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Finally, at a broad level, we note that the Proposed Rules are even more stringent and burdensome than statute mandating their creation, the Fair Workweek Law. We respectfully request that the Proposed Rules—at a minimum— be revised so that they are consistent with the more-limited scope promulgated by the City Council in amending the Fair Workweek Law.

The ambiguities and issues outlined above demonstrate just a few of the difficulties facing fast food restaurants who endeavor to comply with the Fair Workweek Law as amended. For these reasons, we ask the DCWP to review the Proposed Rules and revise them accordingly. Please do not hesitate to contact the undersigned to discuss. Thank you for your consideration.

Respectfully submitted,

Melissa Fleischut
President and CEO
New York State Restaurant Association
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National Restaurant Association
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1). I would like to comment on the addition of extending the 15 minutes that an employer must pay a premium to anyone staying longer on their shifts to "20" minutes rather than the 15 minutes proposed. Even in the Philadelphia Fair work week there is a 20 minute grace period. 15 minutes is not enough time sometimes and the employees are still wrapping up by talking to other employees and losing track of time and due to mismanagement and improperly trained assistant managers in the overnight shifts, premium pay is inadvertently being calculated due to employees stay after and not clocking out. Having a few extra minutes in conjunction with other states should be warranted especially it is easier to calculate the minutes when doing payroll calculations for ease of math.
I am hereby requesting that 20 minutes grace period be allowed rather than the 15 minutes and no premium pay would be paid to an employee --

2). I would like to make a motion to remove the 14 day notice for employees in NYC fair work week and amend it to 10 day notice. It is hard to make a schedule for 14 days in advance in NYC. That is almost 3 weeks worth of schedules posted ahead of time! For example, right now, we have schedules posted for this week ending Feb 6th and we have had employees who have already quit since January still on our schedule. We have had to post open shifts to cover those and have not had any success in getting employees to cover those shifts, so we have to pay premium pay for asking employees to pick up shifts due to the schedule being made 14 days in advance. If we can align with the Philadelphia Fairwork week at the very least, we can make them 10 days in advance and at least give business owners some accommodations as well here.

Here is their reference. https://www.phila.gov/media/20210325112806/FWW-FAQ-March-2021.docx.pdf

Please take my comments into consideration on behalf of all fast food restaurant owners in NYC. thank you.

Sufiya Syed
Chief Human Resources Officer
SYED RESTAURANT ENTERPRISES INC.

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February 3, 2021

VIA EMAIL (Rulecomments@dca.nyc.gov)

The Honorable Peter Hatch
Commissioner
New York City Department of Consumer and Worker Protection
42 Broadway
New York, NY 10004

Re: Comments to Proposed Rules for New York City Fair Workweek Law

Dear Commissioner Hatch:

We represent several fast food and quick-service restaurants who are "covered employers" under the New York City Fair Workweek Law ("FWW"). On behalf of our clients, we wish to thank the Department of Consumer & Worker Protection ("DCWP") for the opportunity to present our comments and concerns to the Proposed Rule Amendments to F WW ("Rule Amendments") that were recently proposed. Enclosed are our specific concerns and proposed revisions to the Rule Amendments.

1. Introduction

In November 2017, the FWW became effective and all "covered employers" as defined under FWW had to comply with its requirements. In conjunction with the effective date of FWW, under its rule making authority, DC WP issued Rules concerning FWW. In January 2021, the City amended FWW, to add, among other provisions, a requirement that covered employers must provide a regular schedule to new hires and limiting the manner and method in which covered employers could terminate the employment (or reduce the hours of) fast food employees. These FWW amendments became effective on or about July 4, 2021. Now, DCWP has proposed the Rule Amendments, which attempt to address the January 2021 FWW amendments and to "clarify" other FWW provisions.

We recognize that the process of drafting the original Rule Amendments was a difficult task and that it is impossible to contemplate every conceivable situation that could arise in the workplace. However, the Rule Amendments should not create additional uncertainty for employers and create new liabilities that do not exist — nor were ever intended — under the express terms of FWW. As such, while overall the Rule Amendments provide additional clarity to FWW, there

are a few provisions that should be revised or "tweaked" in order to avoid what we would assume would be unintended consequences that could disrupt small businesses and stymie the creation of jobs in New York City. Thus, we hope that DCWP will seriously consider implementing the suggestions and the proposed recommendations set forth below.

2. Specific Comments to the Proposed Rule Amendments

A. Section 7-603: Recordkeeping (General Concerns)

Under this proposed provision, covered employers must keep and maintain various records related to F WW for at least three years. Virtually every sub-provision of this section requires covered employers to keep information in a specific manner. Specifically, they all require that covered employers retain "the dates, times, and method" in which such information was issued or provided. We believe that this is overly burdensome, confusing, and should be reconsidered. We do not have an issue with requiring that employers maintain the "date" that the information was issued and provided; such a requirement is reasonable. However, requiring that covered employers maintain the "time" that such information is provided is unreasonable and overly burdensome. To maintain the "time" that such information is issued/provided, employers would essentially be required to have all employees electronically sign and receive such information. This would be hannful to those covered employers, especially franchisees and small business, that do not have the resources to invest in an on-line scheduling and on-boarding system. It is also harmful to those employees who do not have easy access to a computer or tablet. In addition, it is extremely burdensome to have line managers, most of whom are young and inexperienced, to notate not only the date but also the time on every document, electronic or otherwise, related to FWW. Accordingly, we would recommend the removal of the "time" requirement.

Further, the term "method" is confusing and not intuitive. It is unclear whether these proposed Rule Amendments require covered employers to maintain a specific document detailing how every communication was sent (e.g. via email, hard copy, regular mail, etc.. or whether the covered employer would be in compliance if the covered employer simply had a system or policy that references how specific communications are issued. In addition, it is unclear how an employer is supposed to maintain a record of the "method" if the "method" is an electronic system that generates the communication directly to the employee. Therefore, we would recommend that either the Rule Amendments clarify what is meant by "method" or eliminate the requirement entirely.

B. Section 7-603(a)(1)(iv): Recordkeeping (Trading Shifts)

In this proposal, covered employers are required to keep records regarding "agreement among employees to trade shifts, including the shifts being traded and the date and time of such agreement." Practically, it will be difficult, if not impossible, for covered employers to comply with this requirement.

When employees swap or trade shifts, often, they engage in the transaction amongst themselves and only inform the employer afterwards. While the covered employer will know which shifts were traded and the employees at issue, they will not know, nor have a record of, when the trade occurred, much less the time the trade occurred. Accordingly, we would request that the Rule

Amendments be revised to reflect that covered employers only need to keep records regarding the shifts traded and the individuals involved — not the date and time that the trade occurred.

B. Section [ ][ ][ ] Recordkeeping (Employee Absences)

In this proposal, covered employers are required to keep records regarding "[e]ach employee absence including but not limited to arriving late to work, not reporting to work, calling out sick or using other leave." Our clients do not have any issues with this proposal except for the phrase "late to work".

Many times, when an employee is only a few minutes late to work, the employer asks for the reason as to why the employee is late; if the reason is reasonable (e.g., traffic, train did not come, bus was stuck behind an accident, etc.. .), a manager will simply ask the employee to clock in and get to work. The manager will not discipline or otherwise document why the employee was late. In addition, when an employee is late to work, they are not absent from work. Therefore, the phrase "late to work" in this sentence concerning employee absences could cause confusion. Accordingly, to avoid confusion, and allow covered employers to manage their business more easily, we would recommend that the phrase "late to work" be struck from this proposal to the Rule Amendments.

C. Section [ ][ ][ ] Recordkeeping (Notice of Discharge)

In this proposal, covered employers are required to keep records regarding "[e]ach Notice of Discharge provided to a fast-food employee . . .and proof that the Notice of Discharge was received by the fast-food employee." While well-intended, in some situations, especially those involving egregious misconduct, it may be impossible for a covered employer to "prove" that the Notice of Discharge was "received" by the employee.

There are several situations where an employer might not be able to prove that the employee received the Notice of Discharge. For example, if an employee stops showing up to work, the employer will have to send the Notice of Discharge to the employee via email, overnight courier, or regular mail. In such circumstances, a covered employer may not be able to prove that the employee received the Notice of Discharge; at best, the employer may only be able to show that the email was sent or that someone from the employee's residence signed for the letter containing the Notice of Discharge. Another example could be where the employee is removed from the workplace due to alleged discrimination, harassment, violence, or similar actions against others so that an investigation can be undertaken. Again, should a covered employer terminate the

employee as a result thereof, it may send the Notice of Discharge to the employee via email, overnight courier, or regular mail. As such, it will be difficult (or impossible) for the employer to prove that the employee "received" the Notice of Discharge.

Accordingly, we would request that this provision be clarified or revised to reflect the realities of the modern day workplace to state that an employer can meet its obligations to provide a Notice of Discharge to an employee by showing some evidence that it emailed, or otherwise sent the Notice of Discharge to the employee via reasonable means, and not have to prove that the employee actually received it.

D. Section 7-603(a)(2)(xiii)(1): Recordkeeping (Economic Information)

In this section, covered employers are required to keep financial records regarding its business decision to reduce hours or lay off employee due to a bona fide economic reason. Our clients have no issues with preserving such records. However, should these records need to be produced to DCWP, there must be certain assurances that the information is kept confidential as the records concern sensitive financial information about the covered employer. Indeed, should third parties obtain such information, it could devastate a covered employer, potentially leading to bankruptcy or provide competitors with an unfair business advantage, which will severely harm the employees of the covered employers. Accordingly, we would recommend that the Rule Amendments clarify that such financial information will be kept confidential to the fullest extent permissible under the law in order to assuage the fears of many covered employers.

E. Section 7-603(d): Recordkeeping (Providing Documents)

In this section, covered employers are required to maintain and preserve documents required under FWW "in their original format" for at least three years as well as be able to export such documents in a "non-proprietary, machine readable data format" to DCWP upon request. Our clients have two issues with this proposal.

First, the requirement to maintain documents in "their original format" is extremely burdensome. An employer may change payroll providers, time keeping management systems, and other computer systems. In such event, the data from the old system is typically transferred into the new system but may not be in the "original format" as can be seen from the metadata. Further, to the extent any of the documentation is provided or issued in hard copy, many times a covered employer will scan that document into its computer system, discarding the hard copy. Again, in such a situation, the covered employer would not maintain the document in its "original format". Further, if the covered employer maintains and preserves the required record, it should not matter if the records are in their original format or not. Therefore, we would request that the phrase "in their original format" be stricken from the Rule Amendments.

Second, there is nothing in FWW that requires or implies that a covered employer must maintain records electronically, much less in a machine-readable data format. Indeed, some employers issue and provide hard copies of FWW records (e.g., schedules posted in the restaurant) that cannot be converted into a machine-readable data format. Moreover, this requirement is most burdensome to the smallest of covered employers, such as a proprietor of one, small bakery franchise that may only employ a few individuals. Therefore, we would request that the requirement that records be maintained, retained, or produced in a machine-readable data format be removed from the Rule Amendments.

Section 7-603(0: Recordkeeping (Notice of Available Shifts)

In this section, covered employers are required to provide notice of available shifts electronically to employees. The proposal states that the electronic communication "must include: (i) the contents of the offer or (ii) an alert that an offer is available and a link to where the employee can readily view the contents of the offer." What this proposal does not indicate is whether the employer can make the offer in an attachment to the electronic communication. For example, an employer may send out an email to employees informing them of the offer and set forth the details of the available shifts in an attachment to the email. The Rule Amendments should clarify that providing the details of the offer in an attachment to the electronic communication is compliant and consistent with FWW.

G. Section 7-606(a): Consent

Under FWW, a covered employer must obtain an employee's written consent to reduce an employee's hours, to work additional hours, or to work a clopening. This proposal states that in order for the consent to be "valid" the consent must be voluntary and "the employee must have a meaningful opportunity to decline, free from any interference, coercion, or risk of adverse action from the employer." It would be helpful to have examples of how such consent can be worded or sample language that a covered employer can use when obtaining such consent. For example, if the employee signs a written consent that states "I hereby voluntarily consent to work additional hours on February 3, 2021 by extending the end of my shift from 4 pm to 6 pm," is this sufficient? How will an employer prove that the consent contained all of the requirements necessary for DCWP to find that the "employee [had] a meaningful opportunity to decline, free from any interference, coercion, or risk of adverse action from the employer"? Any additional guidance will assist covered employers in ensuring that they are compliant with FWW would be helpful.

H. Section 7-607: De Minimus Schedule Changes

This first sentence of this section is confusing. Currently, a de minimus schedule change is one where a covered employer changes an employee's schedule by less than 15 minutes in total. For example, an employer could ask an employee to clock in (start work) 5 minutes before the scheduled shift and clock out (end work) 10 minutes after the scheduled end of their shift without

having to incur premium payments. It is our understanding that DCWP intends on maintaining this interpretation of FWW. However, the first sentence of this proposal could be read to imply that there is a de minimus change if a covered employer asks an employee to start up to 1 5 minutes before the schedule time, work until 15 minutes after their scheduled end time, or have a total shift length that does not change by more than 15 minutes in total. The awkward wording of this first sentence creates unnecessary confusion.

In addition, the DCWP should consider adding to this provision to address situations where an employee is late to their scheduled shift. In such cases, is a covered employer permitted to extend the employee's shift beyond the 15-minute end scheduled time, but within the total scheduled work time without having to pay premium payments? For example, if an employee is schedule to work from 6 am to 1 1 am and the employee starts work at 6:20, because the employee is late, can the employer require the employee to work until 11:20 (or even 11:30) without incurring premium payments and obtaining a written consent? The Rule Amendments should clarify this common scenario.

1. Section 7-622: Schedule Chancres

This proposal seems to change the timing of a schedule change. As we understand this proposal the timing of the schedule change is calculated based on the start of the workweek in which the change is to occur. For example, if the covered employer has a Monday through Sunday workweek, and the employer seeks to reduce the employee's schedule on Friday of that workweek, if the employer makes that request to the employee on Sunday immediately before the Friday in which the change is to occur, the employer must pay the employee a $75.00 premium because the change occurs within 24 hours of the start of the workweek, rather than $45.00 (under the theory that the change is less than 7 days and more than 24 hours before the day on which the change is to occur). If our understanding of the proposal is correct, we have serious concerns with it.

FWW requires that a covered employer pay employees premium payments when, among other things, there are changes to an employee's schedule with less than 14 days' notice to the employee. The language of the law does not state that premium payments are to be made when an employee is informed about the change less than 14 days prior to the start of the workweek. Therefore, the most natural reading of the law is that the 14-day period is based on when the change will occur, not the start of the workweek in which the change will occur. As such, this provision of the Rule Amendments should be revised accordingly.

Moreover, if the provision remains in place as drafted, it will significantly impact covered employers. Often, a covered employer will ask to change an employee's schedule not due to the whims of the employer, but because of downstream effects of employee actions. For example, during the COVID-19 pandemic, numerous employees would call out due to sickness or the need to isolate requiring a covered employer to cover at least some of the shifts that became available. Covered employers are already required to pay the absent employees COVID pay under New York

law irrespective of any accrued sick and safe time an employee has under State or City Law. A covered employer should not have this financial burden compounded by paying higher premiums to an employee who voluntarily agrees to work additional hours, simply because the change occurs after the start of the workweek. Similarly, if a covered employer determines that as a result of the pandemic, it can expect a sudden and significant decline in business, the employer should not be penalized by having to pay higher premiums simply because it makes the decision after the start of the workweek, but well in advance of the day impacted by this decision.

Accordingly, we would request that this provision of the Rule Amendments be revised so that the timing of premium payments are tied to the day the schedule is impacted rather than the start of the workweek in which the schedule is impacted.

On a related note, when business is slow, some employers will elect to send employees home early, but pay them to the end of their shift rather than pay premium payments. For example, if an employee is scheduled to work from 4 pm to 1 1 pm and is paid $15.00 per hour, if business is very slow, the manager may send the employee home at 9 pm and pay the employee $30.00 that the employee would have earned. This way the employee does not lose income and is not forced to sit around for 2 hours doing nothing. Indeed, many employees request this option because they are given additional free time and do not have to stay at work to do nothing. The Rule Amendments should explicitly state that such a practice is permitted under FWW as it is a benefit to both the employee (who gets money and free time) and the covered employer (who saves money on premium payments).

J. Section 7-6240): Offering Shifts to Employees

This provision states that if a covered employer violates FWW sections 20-1241 , aggrieved individuals could recover compensatory damages equal to the "wages current fast-food employees did not have an opportunity to earn." This proposal provides fast food employees with a windfall and is punitive, not compensatory.

FWW allows an aggrieved individual to obtain compensatory damages for, among other things, the failure to offer available shifts. Compensatory damages are damages that "will compensate the injured party for the injury sustained and noting morel.]" Black's Law Dictionary 270 (6th ed. 1991); see also Black's Law Dictionary (1 I th ed. 2019) ("Damages sufficient in amount to indemnify the injured person for the loss suffered."). This proposal does not compensate an aggrieved individual for the failure to offer additional shifts for at least three reasons. First, there is no guarantee that the employee is even eligible to work the available shift; thus, the proposed damages are not compensatory. Second, the employee might not have wanted to work the available shift; so again, the proposed damages are not compensatory. Third, taken to its logical conclusion, it would result in numerous individuals obtaining compensatory damages for a shift that only one person could have taken. For example, if a fast food restaurant has 25 employees and one 8-hour shift becomes available that is not offered to current employees, as this proposal is

written all 25 employees would be entitled to 8 hours of pay even though, at most, only one employee could have taken the shift if it was made available.

Therefore, this proposal is more akin to consequential, exemplary, expectancy, and/or special damages. See generally Black's Law Dictionary (1 I th ed. 2019) (defining: (i) "consequential damages" as [l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act; (ii) "exemplary damages" as "damages "intended to punish"; (iii) "expectancy damages" as "loss of what a person reasonably anticipated from a transaction that was not completed"; and (iv) "special damages" as [d]amages that are alleged to have been sustained in the circumstances of a particular wrong".). FWW does not permit such damages to be awarded for violation of Section 20-1241. Accordingly, this provision should be removed from the Rule Amendments.

K. Section 7-629: Bona Fide Economic Discharges

One area that the text of FWW and the Rule Amendments do not address is forecasting. Many covered employers use forecasting tools to determine the anticipated business they can expect to receive from week to week so that the covered employer can schedule accordingly. Indeed, many covered employers can anticipate when business will decline and thus there will be less employees needed to work. This is especially important with those covered employers whose business is seasonal.

The text of FWW and the Rule Amendments do not address this frequent tool. Because forecasting is not addressed, many covered employers believe that they cannot reduce employee hours until they actually experience a decline in business, profits, sales, or volume, and even in such cases there is uncertainty as to time frame they must review in order to determine when they can legally reduce employee hours.

The failure to address forecasting is best exemplified by a covered employer that operates an ice cream store. Ice cream is more popular in July than in January. Most operators know that after Labor Day, their business will decrease substantially, and they use forecasting tools to estimate how much product and labor they will need after Labor Day and into the winter months. Yet, F WW does not appear to allow such an operator to reduce employee hours until the covered employer actually has a decrease in sales. Further, there is uncertainty for how long sales must decrease before an employer can reduce its headcount. Is one week sufficient? One month? Two months? This uncertainty results in covered employers either risking FWW violations if they reduce headcount too soon or having employees come to work to do nothing. This makes no sense and is not in anyone's interest.

Accordingly, we would request that the Rule Amendments be modified so that employers can rely on forecasting tools that anticipate a decline in business, sales, profits, or volume in determining when a covered employer has a bona fide economic reason to reduce headcount.

3. Conclusion

We thank you for your time and consideration in reviewing our concerns. These issues are of paramount concern to our community and we welcome any opportunity to work with the DCWP in developing workable and equitable solutions for the fast-food industry and its employees.

Again, we appreciate the efforts of the DCWP and thank the DCWP for considering the needs of FWW covered employers.

Very truly yours,

FOX ROTHSCHILD LLP

Glenn S. Grindlinger, Esq.

NYC Rules Website Comments:

Heather Harris

Am I understanding correctly that retail employers will no longer be required to post a physical copy of the schedule? Petco only gives us our individual schedules electronically. We never know who else is scheduled for any given week.

Comment added January 5, 2022 2:48pm

Heather Harris

Can you please stop calling it the fair Workweek law for fast food workers? It is not just for fast food workers.

Comment added January 5, 2022 2:50pm

Mariana Liou

When FAQs are written to accompany the final rule, for each FAQ please include and cite the section(s) from the NYC Administrative Code and/or Rules of the City of NY as per their subchapters, chapters, and/or titles. This traceability is critical to ensure the integrity of the FAQs.

Comment added January 30, 2022 3:52pm

vasil shalamberidze

I think, it isn"t only for fast food workers, i mean Fair Workweek Low

Comment added February 1, 2022 11:53am

Angelo Amador

See attachment for comments from the New York State Restaurant Association and the National Restaurant Association.

Comment attachment

NYSRA-NRA-Just-Cause-Regulation-Comments-02-03-2022.pdf

Comment added February 3, 2022 2:39pm