Consumer Affairs

Comments Received by the Department of Consumer Affairs

on

Proposed Rule related to Implementation of the Fair Workweek Law

as made available for public inspection

From: David, Emily <edavid@BARNEYS.com>
Sent: Tuesday, November 14, 2017 11:48 AM
To: Rulecomments
Subject: NYC Fair Work Week Law - Chapter 12 of Title 20 of the NYC Administrative Code

To whom it may concern,

I have the following questions/comments regarding the NYC Fair Work Week Law proposed regulations:

1. Does the definition of "retail employee" include all (i) full-time, part-time, and temporary, (ii) exempt and non-exempt, and (iii) in-store and corporate employees employed by a retail employer? What about independent contractors?
2. Does an email from a retail employee constitute written consent for a schedule change made less than 72 hours in advance?
3. Are retail employers required to pay a premium for changes in retail employees' schedule, or does that provision apply only to fast food employers?

Thank you for your consideration,

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THE COUNCIL OF
THE CITY OF NEW YORK
BRAD LANDER
DEPUTY LEADER FOR POLICY
39TH DISTRICT, BROOKLYN

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STANDARDS AND ETHICS
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Testimony of New York City Council Member Brad Lander
to the Department of Consumer Affairs
Regarding the Implementation of the Fair Workweek Law
November 17, 2017

Good morning, I am Annie Levers, Council Member Brad Lander's Policy Director. I am here to express support for the Department of Consumer Affairs' proposed rules to implement the Fair Workweek Law, and make some suggestions for how these rules can be strengthened to further clarify procedures for fast food employers and employees alike. Thank you for the opportunity to testify today.

As one of the prime sponsors of the Fair Workweek Package, Council Member Brad Lander would like to thank DCA Commissioner Salas and OLPS Director Liz Vladeck for promulgating rules in the spirit of these laws, which we worked together to pass to give fast food workers a more stable life and a clear pathway to full-time hours.

We have a few suggestions that we believe will improve DCA's ability to effectively enforce these laws and provide clearer guidance on compliance:

- In line with the legislation, the rules define "good faith estimate" to include the employee's expected days, times and locations of their work hours upon hire. To ensure DCA can effectively assess whether or not schedule changes are "long-term or indefinite," we suggest DCA also require the estimate to identify the average weekly hours the employee is expected to work. This average will allow DCA to more easily identify whether or not schedule changes differ from the good faith estimate by more or less than twenty percent.

- We also support the rules making clear what an initial estimate in "bad" faith might look like, to create a rebuttable presumption that the initial estimate was not made in good faith. For example, a 21% difference in your schedule might be the result of genuine, good faith schedule change request, whereas a 40-50% change in schedule would defeat

the purpose of providing any estimate in the first place. Setting this definition would allow DCA to issue penalties unless the employer presents compelling evidence that the difference was the result of changed circumstances.

- We support giving managers and employers the flexibility to change schedules by just 15 minutes, without triggering premium payments. However, we suggest the rules be amended to make explicitly clear that the employee still has the right to decline the extension of work hours. For example, if an employee cannot show up to work fifteen minutes early because they do not have access to childcare at that time, the employee should not be required to accept that schedule change -- they should be free to decline the offer, without fear of retaliation.

- We appreciate DCA's thoughtful approach to ensuring managers and employers can reasonably comply with the law's requirement to offer existing fast food workers additional shifts -- particularly in cases where the manager has fewer than three days' notice. However, we suggest amending section 14-06 paragraph (b) to provide clearer guidance for managers on how to go about filling those shifts, should no employees take them up on the offer on such short notice. We suggest a framework that would allow managers to begin proactively "offering" the shift (rather than "assigning" the shift, as the rule currently states) to existing fast food workers within 24 hours of the shift, and to make clear that those workers would still have the opportunity to deny the shift and receive a premium payment should they choose to accept it.

- In addition, we suggest the rules include a definition when an employee is "currently employed at" a given location, as an employee that has worked at least one shift at that location in the past 30 days.

- To provide some additional guidance to employers, we suggest adding examples of when the employers are not required to pay premium payments for schedule changes. For example, if an employee asks a manager to leave a little early and the employer agrees, the employer is not obligated to pay the premium change.

- The rules could also make more clear that a new fast food worker can indeed perform work that is not described in or set forth in the original job posting, in accordance with the law.

- We suggest defining "consent" in greater detail to make clear that employers must receive written consent from fast food workers every time they add a shift to their schedule (not just once, upon hire, for instance).

- Finally, we suggest making clear that any waiver by an employee of any provision under these laws is unlawful and will be subject to penalties.

Thank you again for your hard work to implement these laws effectively -- and for providing me with the opportunity to testify.

CLASP
Policy solutions that work for low-income people

Casey Adams
Deputy Director of City Legislative Affairs
New York City Department of Consumer Affairs
42 Broadway 5th Floor
New York, NY 10004

Dear Deputy Director Adams,

The Center for Law and Social Policy (CLASP) is a national organization that works to improve the lives of low-income people by developing and advocating for federal, state and local policies that strengthen families and create pathways to education and work. As a part of our work to improve the job quality for low-wage workers, CLASP has done extensive research and policy analysis on issues related to fair work schedules. Additionally, we have worked closely with the San Francisco Office of Labor Standards Enforcement (OLSE) as they have worked to implement and enforce their first-in-the-nation Formula Retail Employee Rights Ordinances.

We commend the Department of Consumer Affair's for its thoughtful approach in developing the proposed Fair Workweek Rules, and we appreciate the opportunity to comment on them. We are providing written comments in order to strengthen and clarify the rules so that they meet the goals of the legislation –namely to to address the lack of predictability, stability, and flexibility many hourly workers in the food and retail industries currently experience and that adversly affects their economic security.

Section § 14-03 Good Faith Estimate

We recommend strengthening and providing additional clarifying language in Section 20-1221 which requires a fast food employer to provide "a good faith estimate in writing setting forth the number of hours a fast food employee can expect to work per week for the duration of the employee's employment and the expected dates, times and locations of those hours." The rule should require fast food employers to specify dates, times, and a number of hours in the good faith estimate. While this requirement is implied in the rule's definition of a "long term or indefinite change" (section 14-03 (b)), it should be made explicit that employers must identify the average weekly work hours, days of the week, shifts and locations with specificity.

The rule also needs to establish guidelines for the good faith estimate to ensure that such estimates actually comports with the Fair Workweek law.

Section § 14-05 Minimal Changes to Shifts

Language in this section should clarify that a fast food worker has a right to decline an extension of work hours of 15 minutes or less, pursuant to section 20-1221(d).

Section § 14-06 Notice and Offer of Additional Shifts

We are concerned with the language in subsection (b), that states "In such circumstances, any existing fast food employee may be temporarily assigned to work a shift that is during the three day notice period." Our first concern is that the word "assigned" implies that any fast food employee can be scheduled to work the

shift without regard to the employee's right to decline pursuant to section 20-1221(d). Our second concerns is that the Fair Workweek Law is clear that when there are less than three consecutive days before the start of the available shift, the employer must still offer shifts to existing employees rather than fill shifts by temporarily assigning them. The Fair Workweek Law authorizes DCA to promulgate rules defining when the posting period may be abbreviated in order for the work to be timely performed, but not to promulgate a rule exempting shifts entirely from the posting requirement.

Lastly, we urge DCA to remove the proposed language authorizing fast food employers to limit the offer of shifts to employees who work at its fast food establishments located in the same borough as the location where the shifts will be worked.

Section 20-1221(d)

We urge DCA to clarify that written consent must be obtained for each shift or partial shift to which the employee consents. Furthermore, DCA should make explicit that any waiver by an employee of any provisions of the Fair Workweek Law is unlawful and that demanding such a waiver may subject the employer to penalties.

Conclusion

We thank DCA for these propsed rules and look forward to working with the agency in the implementation and enforcement phase of the law.

To: New York City Department of Consumer Affairs
From: Council Member Corey Johnson
Re: Implementation of Fair Workweek Law
Date: 17 December, 2017

I appreciate the opportunity to provide comments on the proposed rules by the Department of Consumer Affairs pertaining to the Fair Workweek laws, passed by the City Council and signed into law in May of this Year.

I was proud to sponsor and support the Fair Workweek package of legislation when it was introduced before the council. These laws will give workers in the fast food industry the opportunity to acquire more hours at their job so they can earn a decent income and will give both fast food and retail workers greater ability to plan and manage their lives by requiring advance notice of schedules and by placing limits on "clopening" and on-call shifts.

In order to see that these laws deliver on their promise of giving workers a fair workweek, we must ensure that the rules guiding them are well constructed and easy to follow for all stakeholders. I applaud the work of the staff of the DCA in drafting the proposed rules with this goal in mind.

Below are a number of suggestions that I believe could further clarify the operation of the laws for covered employers whilst also ensuring that covered workers understand their rights.

Good Faith Estimate, s.14-03
The proposed rules deal only with long-term and indefinite changes to a good faith estimate and leave the required contents of the initial estimate to be implied by section 14-03(b). The rules could be improved by explicitly listing the requirements of the good faith estimate at the beginning of section 14-03. This list should require specific details of the number of hours, the days, locations and the times of shifts (including morning, afternoon and night shifts) estimated to be worked each week.

Following from this, section 14-03 should provide parameters as to what variation from an original estimate is permissible whilst remaining compliant with the requirement of the law for employees to receive a realistic and "good faith" estimate of their schedule upon hiring. This is essential to ensure that employers make considered and truthful estimates to each employee. The following terms could set a rebuttable presumption that the original estimate was non-compliant.

> *Three work weeks out of six consecutive work weeks in which: the number of actual hours worked differs by forty percent from the good faith estimate; the days differ from the good faith estimate at least twice per week; the locations differ from the good faith estimate at least twice*

per week; or morning, afternoon, or night shifts differ from the good faith estimate at least twice per week.

Minimal Changes to Shifts, s.14-05

It should be made clear, as per section 20-1221(d) of the law that a fast food worker has a right to decline to work such a change to a shift.

Notice and Offer of Additional Shifts, s.14-06

The intention of section 20-1241 is to ensure existing employees are notified of, and have access to, available hours within an establishment. The rules, as currently drafted at 14-06(b), allow for an available shift, scheduled to start within three day of when the employer is notified of the need to fill it, to be temporarily assigned to "any existing employee". The example provided in this section suggests that such an "assignment" may occur without the need to first notify employees of the available hours.

At section 20-1241(b) the law allows for a shorter notification period than the otherwise applicable three days, to be prescribed by the rules of the director, for circumstances in which it is necessary in order for the work to be performed.

To remain consistent with the intent of the law, the rules pertaining to shifts made available within three days of their commencement should make clear that posting requirements continue to apply, and that employees retain the right to decline to work such hours if they are offered or "assigned" to work them.

In addition, it is arbitrary and potentially disadvantageous to workers, to allow employers to restrict the offering of available shifts to employees who work in the same borough as the location where the shifts are to be worked. Fast food employees often work in a different borough to where they live and may benefit from accepting shifts in their home borough. This language should be removed from the final rules.

Accepting and Awarding Additional Shifts, s.14-07

Terms should be included here to clarify what is meant by an employee "currently employed" at a location. A reasonable threshold is if an employee has worked at least one shift at that location in the past 30 days.

Rules not contained in the draft

There are a number of additional rules that would be beneficial for DCA to promulgate to further clarify the operation of the laws:

Requests from an employee to change their schedule

As per section 20-1222(c)(2), voluntary requests in writing from an employee to change their schedule do not trigger a schedule change premium. The rules could benefit from guidance and examples being provided, to ensure the exemption from premiums is confined to requests regarding specific shifts (as opposed to an expressed general desire to work more hours) and those made without the employers prompting or invitation.

Hiring of new employees subsequent to hours being made available to existing employees

As per Section 20-1241(g), the law specifies the circumstances in which an employer may proceed with hiring new staff. The rules should make clear that in order to comply with this section the shifts new employees are hired to work should in fact be consistent with those offered to existing employees.

Employee consent to work additional hours

The rules should clarify that general or ongoing consent is not sufficient to satisfy the requirements of section 20-1221(d). Written consent must be obtained in each circumstance.

Individual waivers

The rules should explicitly state that any waiver by an employee of any provision of the law is unlawful and that any request or demand by an employer of an employee to sign such waiver may be subject to penalties.

Conclusion

I reiterate my appreciation for the DCA for their work in drafting these rules and facilitating this feedback process. I look forward to seeing these rules and the Fair Work Week laws come into effect to the benefit of thousands of workers across New York City.

Casey Adams
Deputy Director of City Legislative Affairs
New York City Department of Consumer Affairs
42 Broadway 5th Floor
New York, NY 10004

The Center for Popular Democracy (CPD) appreciates the opportunity to comment on DCA's proposed Fair Workweek Rules. CPD's Fair Workweek Initiative supports efforts across the country to restore a workweek that enables working families to thrive. We are nationally recognized for our policy, research and employer-engagement expertise on issues relating to hours and wages. CPD played an important role in the implementation of the San Francisco Retail Workers Bill of Rights, the first fair workweek ordinance in the country, and in the enactment of Fair Workweek ordinances in Emeryville and San Jose CA, Seattle WA, New York City and the first state-level Fair Workweek law in Oregon. Our staff has expertise in the industries where work-hours issues are most prevalent and understand both the business models that have generated these practices and the negative impact on workers and their families. We write to suggest modifications to the proposed Fair Workweek rules to better effectuate the Council's goal of providing stable, predictable work hours and good jobs in New York City's fast food industry, and to clarify the requirements of the Fair Workweek Law (local law numbers 99, 100, 106 and 107).

§ 14-03 Good Faith Estimate

Section 20-1221 requires a fast food employer to provide "a good faith estimate in writing setting forth the number of hours a fast food employee can expect to work per week for the duration of the employee's employment and the expected dates, times and locations of those hours." This section also requires an employer to update the employee promptly "if a long-term or indefinite change is made to the good faith estimate." We support the guidance in section 14-03(b) on the definition of a "long term or indefinite change" that would trigger the requirement to update the good faith estimate. However, we urge DCA to strengthen this rule in two respects.

First, the rule should unambiguously require fast food employers to specify dates, times, and a number of hours in the good faith estimate. This requirement is implied by the rule's definition of a long term or indefinite change: to determine whether "the number of actual hours worked differs by twenty percent" from the good faith estimate, the estimate itself must specify an average number of weekly work hours (rather than a range). Likewise, the employer must specify whether the employee will work morning, afternoon or night shifts in order to determine whether shifts actually worked differ from the good faith estimate at least once per week. However, the rule should make explicit that employers must identify the average weekly work hours, days of the week, shifts and locations with specificity.

Second, the rule provides guidance only on the requirement to update the good faith estimate. It does not establish parameters for DCA's evaluation of whether the initial estimate, provided "[n]o later than when a new fast food employee receives such employee's first work schedule," complies with the Fair Workweek Law's good faith requirement. The purpose of the good faith estimate is to allow fast food workers to evaluate their

employment prospects based on a realistic expectation of their work schedule. That purpose would be defeated if employers were permitted to provide baseless "estimates" in order to recruit workers to their business (for example, with a false promise of full-time hours or desirable shifts), only to provide a wholly different schedule once the worker has quit their previous job and started the new one. Thus, this rule should make clear that an initial estimate made in *bad* faith does not comply with the Fair Workweek Law, and provide guidance as to how DCA will apply the good faith standard. For example, the following circumstances could create a rebuttable presumption that the initial estimate was not made in good faith: Three work weeks out of six consecutive work weeks in which: the number of actual hours worked differs by forty percent from the good faith estimate; the days differ from the good faith estimate at least twice per week; the locations differ from the good faith estimate at least twice per week; or morning, afternoon, or night shifts differ from the good faith estimate at least twice per week.

§ 14-05 Minimal Changes to Shifts

This rule states that the schedule change premium required by section 20-1222 is not owed for changes of 15 minutes or less. It should clarify that a fast food worker has a right to decline an extension of work hours of 15 minutes or less, pursuant to section 20-1221(d).

§ 14-06 Notice and Offer of Additional Shifts

In subsection (b), we agree with the proposed rule stating that "When a fast food employer has less than three days' notice of a need to fill an additional shift, the fast food employer shall post notice of the additional shift as soon as practicable after finding out about the need to fill the shift." However, we believe that following sentence is inconsistent with section 20-1241: "In such circumstance, any existing fast food employee may be temporarily assigned to work a shift that is during the three-day notice period." First, the word "assigned" implies that any fast food employee can be scheduled to work the shift without regard to the employee's right to decline pursuant to section 20-1221(d). But even if the language were revised to indicate that the employer can assign a shift to any employee who accepts it, that outcome is inconsistent with the Fair Workweek Law's plain language. Section 20-1241(b) requires employers to post the notice of additional work "for three consecutive calendar days . . . unless a shorter posting period is necessary in order for the work to be timely performed, as may be prescribed by the rules of the director." Likewise, subsection (f) states:

> "If no fast food employee who is employed at the location where offered shifts will be worked accepts such shifts within three consecutive calendar days of the offer, **or, in the case of shifts that are offered with less than three days' notice to a fast food employee before the start of such shifts**, no less than 24 hours before the start of such shifts unless such 24 hour period is impracticable under the circumstances, the fast food employer may distribute such shifts to fast food employees from other locations who accept such shifts or may hire or contract for such new fast food employees as are necessary to perform the work."

It is therefore clear that when there are less than three consecutive days before the start of the available shift, the employer must still offer shifts to existing employees rather than fill shifts by temporarily assigning them. The Fair Workweek Law authorizes DCA to promulgate rules defining when the posting period may be abbreviated in order for the work to be timely performed, but not to promulgate a rule exempting shifts entirely from the posting requirement.

Furthermore, we urge DCA to remove the proposed language authorizing fast food employers to limit the offer of shifts to employees who work at its fast food establishments located in the same borough as the location where the shifts will be worked. If an employer is already required to offer shifts to employees at multiple locations, the employer doesn't gain anything by limiting the offer by borough. Yet a fast food employee who

normally works in Manhattan but lives in the Bronx may benefit greatly by picking up an extra shift closer to home.

§ 14-07 Accepting and Awarding Additional Shifts

Subsection (b) refers to "fast food employees currently employed at the location where the shifts will be worked," but fails to define when an employee is "currently employed at" a given location. We suggest the following definition:

> "A fast food employee is currently employed at the location where the offered shifts will be worked if the employee has worked at least one shift at that location in the past 30 days. An employee may be currently employed at multiple locations at the same time."

Additional suggestions

We urge DCA to promulgate rules clarifying the rights and obligations under the following provisions of the Fair Workweek Law:

Section 20-1222(c)(2). The rules should provide guidance as to when the employee has requested a change in schedule that does not trigger a schedule change premium. We believe that this exception applies to requests made (1) with respect to a specific shift and (2) without employer invitation or prompting.

> Example 1. An employee asks her manager if she can leave before the scheduled end time of her shift, and the employer agrees. The employer is not obligated to pay the schedule change premium.
>
> Example 2. An employer announces that it is a slow day and asks if anyone wants to go home early. The employer will owe a schedule change premium if any employee accepts this invitation.
>
> Example 3. An employee has expressed a generalized desire to work more hours. After the written schedule has been posted, the manager realizes there is a need for additional staff during the time covered by the posted schedule. The manager must notify the employee of the specific hours offered in accordance with section 20-1241 and the employee must consent in writing to those specific hours and receive the schedule change premium.
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> Example 4. An employee notifies the employer that she must be absent on a scheduled work day due to the illness of her child. The employer is not obligated to pay a schedule change premium.

Section 20-1241(g). The Fair Workweek Law specifies when an employer may, after complying with the ordinance's requirements to offer additional shifts to current employees, hire new staff:

> "[T]he fast food employer may immediately proceed with hiring or contracting for new fast food employees to perform the work described in, and in accordance with the criteria set forth in, the notice posted pursuant to subdivision b."

We urge DCA to include guidance to employers on compliance with this provision, and recommend the following examples:

> Example 1: The employer posts shifts consisting of 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the current employees accepts the offered hours. The employer hires a new employee and assigns him to work 8 pm to 12 am on Friday, Saturday and Sunday. On occasion, when creating the work schedule as required by section 20-1221, the employer also assigns the new employee to fill shifts during the day or on other evenings, to meet increased demand or fill in for absent employees. The employer has complied with the ordinance by hiring a new employee to perform the work described in the notice.

Example 2: The employer posts an opportunity for hours from 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the current employees accepts the offered hours. The employer hires a new employee and assigns her to shifts between the hours of 9 am and 7 pm. The employer has not complied with the ordinance because the hours in the notice do not match the hours actually assigned to the employee and the employee is assigned hours that were not previously offered to current employees.

Example 3: The employer posts shifts from 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the current employees accepts the additional hours. The employer hires three new employees, A, B and C. The employer assigns Employee A to work 8 pm to 12 am on Friday, Saturday and Sunday. The employer assigns Employees B and C to shifts between the hours of 9 am and 7 pm. The hiring of Employees B and C does not comply with the ordinance because they are not performing the work described in the notice and are working hours that were not previously offered to existing employees.

Section 20-1221(d). We urge DCA to clarify that written consent must be obtained for each shift or partial shift to which the employee consents. We suggest language along these lines:

> "Generalized, ongoing, open-ended written consent purporting to accept additional hours across multiple dates does not comply with section 20-1221(d). Written consent must be obtained for each day an employee works that was not included in the initial written work schedule."

Individual waivers. DCA should make explicit that any waiver by an employee of any provisions of the Fair Workweek Law is unlawful and that demanding such a waiver may subject the employer to penalties. We suggest the following language:

> "Any waiver by an individual employee of any provisions of the Fair Workweek Law shall be deemed contrary to public policy and shall be void and unenforceable. An employer who requires an employee to waive remedies or penalties provided by this chapter for violations thereof as a condition of employment, under a threat of adverse action, or as a precondition for awarding hours under section 20-1241 may be subject to the remedies and penalties set forth in sections 20-1208(a)(1), (a)(3)(a)-(b), (d), (e); 20-1208(b), 20-1209, 20-1210, and 20-1211 of Chapter 12."

Conclusion

We applaud DCA's thoughtful approach to implementing the Fair Workweek Law and look forward to collaborating to implement and enforce the law.

Rachel Deutsch
Senior Staff Attorney for Worker Justice

FAST FOOD JUSTICE

30 Broad Street, 9th Fl.
New York, NY 10004
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November 16, 2017

To: New York City Department of Consumer Affairs (by email and hand delivery)

The Board of Directors of Fast Food Justice, Inc. appreciates the opportunity to comment on DCA's proposed rules implementing Chapter 12 of Title 20 of the Administrative Code of the City of New York.

Fast Food Justice, a not-for-profit organization, seeks, through education and advocacy in the public domain, to improve the work conditions and lives of fast food workers in New York City, and the lives of their families and the communities they live in. The organization educates workers and advocates on their behalf regarding such issues as fair scheduling, immigrant rights, affordable housing, fair public transport policies, family-sustaining income, access to health care and fair policing policies.

Like the Center for Popular Democracy ("CPD"), whose comments on the proposed Fair Workweek rules we endorse, we suggest modifications to those rules. We believe these modifications will better effectuate the Council's goal of providing stable, predictable work hours and good jobs in New York City's fast food industry, and clarify the requirements of the Fair Workweek Law (local law numbers 99, 100, 106 and 107).

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Section 20-1221 requires a fast food employer to provide "a good faith estimate in writing setting forth the number of hours a fast food employee can expect to work per week for the duration of the employee's employment and the expected dates, times and locations of those hours." This section also requires an employer to update the employee promptly "if a long-term or indefinite change is made to the good faith estimate." We support the guidance in section 14-03(b) on the definition of a "long term or indefinite change" that would trigger the requirement to update the good faith estimate. However, we urge DCA to strengthen this rule in two respects.

First, the rule should unambiguously require fast food employers to specify dates, times, and a number of hours in the good faith estimate. This requirement is implied by the rule's definition of a long term or indefinite change: to determine whether "the number of actual hours worked differs by twenty percent" from the good faith estimate, the estimate itself must specify an average number of weekly work hours (rather than a range). Likewise, the employer must specify whether the employee will work morning, afternoon or night shifts

in order to determine whether shifts actually worked differ from the good faith estimate at least once per week. However, the rule should make explicit that employers must identify the average weekly work hours, days of the week, shifts and locations with specificity.

Second, the rule provides guidance only on the requirement to update the good faith estimate. It does not establish parameters for DCA's evaluation of whether the initial estimate provided "[n]o later than when a new fast food employee receives such employee's first work schedule" complies with the Fair Workweek Law's good faith requirement. The purpose of the good faith estimate is to allow fast food workers to evaluate their employment prospects based on a realistic expectation of their work schedule. That purpose would be defeated if employers were permitted to provide baseless "estimates" in order to recruit workers to their business (for example, with a false promise of full-time hours or desirable shifts), only to provide a wholly different schedule once the worker has quit their previous job and started the new one. Thus, this rule should make clear that an initial estimate made in *bad* faith does not comply with the Fair Workweek Law, and provide guidance as to how DCA will apply the good faith standard. For example, the following circumstances could create a rebuttable presumption that the initial estimate was not made in good faith: Three work weeks out of six consecutive work weeks in which: the number of actual hours worked differs by forty percent from the good faith estimate; the days differ from the good faith estimate at least twice per week; the locations differ from the good faith estimate at least twice per week; or morning, afternoon, or night shifts differ from the good faith estimate at least twice per week.

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This rule states that the schedule change premium required by section 20-1222 is not owed for changes of 15 minutes or less. It should clarify that a fast food worker has a right to decline an extension of work hours of 15 minutes or less, pursuant to section 20-1221(d).

§ 14-06 Notice and Offer of Additional Shifts

In subsection (b), we agree with the proposed rule stating that "When a fast food employer has less than three days' notice of a need to fill an additional shift, the fast food employer shall post notice of the additional shift as soon as practicable after finding out about the need to fill the shift." However, we believe that the following sentence is inconsistent with section 20-1241: "In such circumstance, any existing fast food employee may be temporarily assigned to work a shift that is during the three-day notice period." First, the word "assigned" implies that any fast food employee can be scheduled to work the shift without regard to the employee's right to decline pursuant to section 20-1221(d). But even if the language were revised to indicate that the employer can assign a shift to any employee who accepts it, that outcome is inconsistent with the Fair Workweek Law's plain language. Section 20-1241(b) requires employers to post the notice of additional work "for three consecutive calendar days . . . unless a shorter posting period is necessary in order for the work to be timely performed, as may be prescribed by the rules of the director." Likewise, subsection (f) states:

> "If no fast food employee who is employed at the location where offered shifts will be worked accepts such shifts within three consecutive calendar days of the offer, **or, in the case of shifts that are offered with less than three days' notice to a fast food employee before the start of such shifts**, no less than 24 hours before the start of such shifts unless such 24 hour period is impracticable under the circumstances, the fast food employer may distribute such shifts to fast food employees from other locations who accept such shifts or may hire or contract for such new fast food employees as are necessary to perform the work."

It is therefore clear that when there are less than three consecutive days before the start of the available shift, the employer must still offer shifts to existing employees rather than fill shifts by temporarily

assigning them. The Fair Workweek Law authorizes DCA to promulgate rules defining when the posting period may be abbreviated in order for the work to be timely performed, but not to promulgate a rule exempting shifts entirely from the posting requirement.

Furthermore, we urge DCA to remove the proposed language authorizing fast food employers to limit the offer of shifts to employees who work at its fast food establishments located in the same borough as the location where the shifts will be worked. If an employer is already required to offer shifts to employees at multiple locations, the employer doesn't gain anything by limiting the offer by borough. Yet a fast food employee who normally works in Manhattan but lives in the Bronx may benefit greatly by picking up an extra shift closer to home.

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Additional suggestions

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> Example 2. An employer announces that it is a slow day and asks if anyone wants to go home early. The employer will owe a schedule change premium if any employee accepts this invitation.
>
> Example 3. An employee has expressed a generalized desire to work more hours. After the written schedule has been posted, the manager realizes there is a need for additional staff during the time covered by the posted schedule. The manager must notify the employee of the specific hours offered in accordance with section 20-1241 and the employee must consent in writing to those specific hours and receive the schedule change premium.
>
> Example 4. An employee notifies the employer that she must be absent on a scheduled work day due to the illness of her child. The employer is not obligated to pay a schedule change premium.

Section 20-1241(g). The Fair Workweek Law specifies when an employer may, after complying with the ordinance's requirements to offer additional shifts to current employees, hire new staff:

> "[T]he fast food employer may immediately proceed with hiring or contracting for new fast food employees to perform the work described in, and in accordance with the criteria set forth in, the notice posted pursuant to subdivision b."

We urge DCA to include guidance to employers on compliance with this provision, and recommend the following examples:

Example 1: The employer posts shifts consisting of 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the current employees accepts the offered hours. The employer hires a new employee and assigns him to work 8 pm to 12 am on Friday, Saturday and Sunday. On occasion, when creating the work schedule as required by section 20-1221, the employer also assigns the new employee to fill shifts during the day or on other evenings, to meet increased demand or fill in for absent employees. The employer has complied with the ordinance by hiring a new employee to perform the work described in the notice.

Example 2: The employer posts an opportunity for hours from 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the current employees accepts the offered hours. The employer hires a new employee and assigns her to shifts between the hours of 9 am and 7 pm. The employer has not complied with the ordinance because the hours in the notice do not match the hours actually assigned to the employee and the employee is assigned hours that were not previously offered to current employees.

Example 3: The employer posts shifts from 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the current employees accepts the additional hours. The employer hires three new employees, A, B and C. The employer assigns Employee A to work 8 pm to 12 am on Friday, Saturday and Sunday. The employer assigns Employees B and C to shifts between the hours of 9 am and 7 pm. The hiring of Employees B and C does not comply with the ordinance because they are not performing the work described in the notice and are working hours that were not previously offered to existing employees.

Section 20-1221(d). We urge DCA to clarify that written consent must be obtained for each shift or partial shift to which the employee consents. We suggest language along these lines:

"Generalized, ongoing, open-ended written consent purporting to accept additional hours across multiple dates does not comply with section 20-1221(d). Written consent must be obtained for each day an employee works that was not included in the initial written work schedule."

Finally, we address the issue of individual waivers, which employers have already begun to request. DCA should make explicit that any waiver by an employee of any provision of the Fair Workweek Law, including not just the substantive provisions but the penalty provisions as well, is unlawful and that demanding such a waiver may subject the employer to penalties. We suggest the following language:

"Any waiver by an individual employee of any provision of the Fair Workweek Law shall be deemed contrary to public policy and shall be void and unenforceable. An employer who requires or requests an employee to waive remedies or penalties provided by this chapter for violations thereof, whether as a condition of employment, under a threat of adverse action, as a precondition for awarding hours under section 20-1241, or elsewise, may be subject to the remedies and penalties set forth in sections 20-1208(a)(1), (a)(3)(a)-(b), (d), (e); 20-1208(b), 20-1209, 20-1210, and 20-1211 of Chapter 12."

Conclusion

We applaud DCA's thoughtful approach to implementing the Fair Workweek Law and look forward to collaborating to implement and enforce the law.

Respectfully submitted,
Autumn Weintraub
Executive Director, Fast Food Justice
On behalf of Fast Food Justice's Board of Directors

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November 17, 2017

VIA EMAIL (rulecomments@dca.nyc.gov)

Mr. Casey Adams
Deputy Director of City Legislative Affairs
NYC Department of Consumer Affairs
42 Broadway, 8th Floor
New York, New York 10004

Re: Comments to the NYC Department of Consumer Affairs' Proposed Rules: "Implementation of the Fair Workweek Law"

Dear Deputy Director Adams:

We represent a number of well-known fast-casual restaurants with locations throughout New York City, which are likely covered employers under the New York City Fair Workweek Law (the "Act"). Pursuant to applicable law, on behalf of our clients, we submit the below comments to the New York City Department of Consumer Affairs Office of Labor Policy and Standards' ("DCA") proposed Rules to the Act ("Rules"). We appreciate the opportunity to present our comments and concerns.

1. Introduction

It is clear that the DCA spent a great deal of time and effort reviewing the Act and crafting a set of rules designed to both clarify and expand the Act's requirements concerning advance employee scheduling and access to hours. While we understand the DCA's intent—and support its goal of providing improved clarity and stability to the schedules of fast food employees—we believe that there is still room for improvement and that the DCA can fine-tune some of the more confusing and unduly burdensome provisions in the proposed Rules.

Indeed, we believe that some of the provisions in the proposed Rules may materially and adverse harm not only our clients and their employees, but many other fast food employers and employees as well. Some of the provisions of the proposed Rules contain ambiguities and onerous requirements that, if they remain in place, would do more harm to fast food employees than any

possible good. The industry's ability to offer schedule flexibility is a significant benefit long appreciated by the majority of employees who look to this industry for the opportunity for flexibility with parenting and/or schooling. Therefore, we submit this letter on behalf of our clients, who are concerned that if these ambiguities and onerous requirements remain in the final version of the Rules, they will create substantial hardship for both employers and employees. We hope that the DCA will consider these suggestions and the proposed recommendations set forth below.

2. Specific Comments to the Fair Workweek Rules

A. Section 14-03: Good Faith Estimate

(a) If a fast food employer makes a long-term or indefinite change to the good faith estimate that has been provided to a fast food employee, the fast food employer shall provide an updated good faith estimate to the fast food employee as soon as possible and before the fast food employee receives the first work schedule following the change.

(b) For purposes of this section and Section 20-1221 of the Fair Workweek Law, "long-term or indefinite change" includes, but is not limited to:

i. Three work weeks out of six consecutive work weeks in which the number of actual hours worked differs by twenty percent from the good faith estimate during each of the three weeks;

ii. Three work weeks out of six consecutive work weeks in which the days differ from the good faith estimate at least once per week;

iii. Three work weeks out of six consecutive work weeks in which the locations differ from the good faith estimate at least once per week; or

iv. Three work weeks out of six consecutive work weeks in which morning, afternoon, or night shifts differ from the good faith estimate at least once per week. Morning, afternoon, or night shifts differ from the good faith estimate when a shift that was a morning shift is changed to an afternoon or night shift; a shift that was an afternoon shift is changed to a morning or night shift; or a shift that was a night shift is changed to a morning or afternoon shift. For purposes of this subdivision:

i. Morning means 4:00 am to 11:59 am.

ii. Afternoon means 12:00 pm to 7:59 pm.
iii. Night means 8:00 pm to 3:59 am.

A shift shall be considered a morning, afternoon, or night shift based on when at least 50% of the shift is worked or scheduled to be worked.

(c) For purposes of applying the definition of "long-term or indefinite change," a change in the time of shifts that is earlier or later by fifteen minutes or less shall not be considered.

(d) Each occurrence of a long-term or indefinite change for which a fast food employer fails to provide an updated good faith estimate constitutes a violation of Section 20-1221(a) of the Fair Workweek Law.

While the intent and goal of this Section is clear, there are several provisions that are of concern to our clients, as they do not take into account the realities of operating a fast food establishment, and in practice, this proposed rule may negatively affect fast food employees. To address these concerns, we believe the DCA should revise several provisions of this Section as set forth below.

First, we note that § 20-1221(a) of the Fair Workweek Law requires employers to provide new employees with a good faith estimate of the number of hours a fast food employee can expect to work per week "for the duration of the employee's employment" and "the expected dates, times and locations of those hours." This is problematic for fast food employers for a number of reasons. First, an employer has very little understanding of a new employee's capabilities and how their skills will or will not complement and/or integrate into the employer's existing team. Additionally, the fast food industry is very sensitive to the fluctuations of the economy and the surrounding micro fluctuations of its own community—both of which affect an employee's work schedule. Finally, a major reason why the fast food industry is so attractive to many employees is that it offers entry-level job opportunities that are conducive to ever-changing scheduling demands like school, child-care, and other personal responsibilities. Fast food employment provides employees with the opportunity to have their own flexibility with scheduling and hours worked without risking losing their jobs.

Requiring employers to provide an estimated work schedule to new employees covering the duration of their employment is not only impractical, it is nearly impossible. For example, an employer has no way of knowing whether a new employee who is hired as a cashier can handle the breakfast/lunch/dinner rush periods. The employer should not be required to provide the new employee with an estimated schedule that spans the duration of that employee's employment, and be held to that estimate, before the employer has had the opportunity to evaluate the employee's fit

within the existing team. Further, during their employment, employees may wish to adjust their schedule to address school requirements, personal commitments, family matters, childbirth, or other issues that arise. Moreover, even under the proposed Rules, an employee's own request for a schedule changes, and their own need to adjust their availability (which occurs on a very frequent basis) will subject the employer to all of the requirements of the good-faith reporting requirements of the Act.

We understand, however, that the DCA cannot change the language of the Act to remove or alter the phrase "for the duration of the employee's employment" as the Fair Workweek Law specifically uses such terminology. Therefore, we recommend adding a subsection to § 14-03 that reads:

> *For purposes of this section and Section 20-1221 of the Fair Workweek Law, a change to an employee's good faith estimate shall not be considered a "long-term or indefinite change," such that it triggers (i) the notice requirements of Section 20-1221 of the Fair Workweek Law or (ii) the schedule change premium penalties of Section 20-1222 of the Fair Workweek Law, if such change occurs (y) within the first month of the employee's employment or (z) at the request of the employee.*[1]

This proposed addition to the Rules would still require the employer to provide an updated good faith estimate to the employee after any change within the first month of employment or if the employer revises an employee's schedule as required by the language of the Fair Workweek Law. However, the employer would be relieved from the notice requirements of Section 20-1221 and the schedule change premium penalties of Section 20-1222 if the schedule change is requested by the employee or occurs within the first month of employment when the employer is in the process of assessing the employee's skills and abilities. Absent this (or a similar) change, employers will almost certainly incur significant penalties when they inevitably modify new employees' schedules if the change takes place with less than 14 days' notice during the first month of an individual's employment.

Second, we recommend removing Section 14-03(b)(iv) in its entirety. This section defines "morning," "afternoon," and "evening" shifts, presumably to establish a baseline so that employees and employers know an employee's daily schedule has significantly changed such that an employer may be required to provide new good faith estimate. While the definition of "morning," "afternoon," and "evening" shifts may be well intentioned, it does not take into account the business

[1] We understand that §§ 20-1222(c)(2) and (3) exempt an employer from paying schedule change premiums if an employee requests a change in schedule or trades shifts with another employee. However, we believe this language is a necessary addition to § 14-03 for the sake of clarity.

fluctuations of fast food establishments. Some fast food establishments cater to breakfast, some to lunch, others to dinner, some to late night, and yet others to mid-morning and/or mid-afternoon. These business fluctuations concerning meal and snack times could change from establishment to establishment under the same brand name or across brand names. Having a rigid definition of morning, afternoon, and evening shifts does not take into account these business fluctuations, consumer tastes, or even employee preferences. For example, for an entity like our clients, some of their properties may have a large lunch crowd; it makes no sense to have the definition of "afternoon shift" beginning at Noon, as it will almost certainly require the employer to schedule employees across the morning/afternoon shift definition, and in some cases, 50% of the shift will be in the morning and 50% in the afternoon.[2] Yet, at other properties, this is less of an issue because they have a large dinner crowd but not a large lunch crowd. Still at other properties, they may have a large lunch or dinner crowd depending on the day of the week, or whether the property is located in or near a ballpark or school. In fact, several of our clients' location are located within parks and outdoors and are both seasonal and weather reliant—with the need for employees highly contingent on Mother Nature. Further, these definitions do not take into account the need for staggered shifts throughout the day to insure coverage because of employees own availability and often sudden absences—staggered and overlapping shifts help control for call-outs and "no show" employees. Accordingly, in order to have flexibility for both employers and employees, the definitions of morning, afternoon, and evening shifts should be eliminated from the final Rules.

B. Section 14-05: Minimal Changes to Shifts

A fast food employer may change a work schedule by 15 minutes or less without being obligated to pay the fast food employee a schedule change premium

Under the Fair Workweek Law, an employer must pay employees schedule change premium pay if the employees' actual hours worked differ from the schedule previously provided to the employees. Our clients do appreciate the 15-minute "grace" period that this Section creates and which will allow employers to escape schedule change premiums in the event an employee leaves early or is asked to stay a little past the employee's schedule shift time. However, we believe that 15 minutes is an insufficient grace period given the realities of business demands and how employees may request to leave early for a variety of reasons, including school and family issues. The purpose of the Act is to ensure that fast food employees have predictable schedules, not to penalize employers every time they have unexpected customer demands. Indeed, there are times that

[2] Further, depending on the location —and sometimes the weather—customers begin entering a fast food establishment for lunch at 11:00 am, or sometimes as early as 10:30 am, requiring employee shifts to commence before such times and end after the lunch-hour crush. Similarly, a dinner shift can also start at dramatically different times given the flow of business. Therefore, it makes no sense to have the time-frames for "morning," "afternoon," and "night shifts" cutting across the lunch and dinner hours.

employees are asked to stay past their scheduled shift time in order to cover for a co-worker who might have requested the opportunity to leave early because of school commitments, family matters, or covered leave under New York City's Earned Sick Leave Act. If an employer is only given a 15-minute grace period to avoid schedule change premiums, the employer is less likely to allow employees to leave early unless they are legally obliged to do so (such as an incident covered under the New York City Earned Sick Leave Act). This would be harmful to the very employees the Act is designed to protect.

Further, there are times when customers linger in the establishment for much longer than anticipated, especially during the winter or when there is bad weather. Employers should not be penalized for this unexpected customer issue. Accordingly, we suggest that the grace period be extended to thirty (30) minutes to account for employee and business needs.

C. Section 14-06: Notice and Offer of Additional Shifts

(a) A fast food employer shall notify a fast food employee in writing of the method by which additional shifts will be posted in accordance with Section 20-1241 of the Fair Workweek Law upon commencement of a fast food employee's employment with the fast food employer and within 24 hours of any change to or adoption of a method.

(b) The fast food employer shall post notice of additional shifts for three consecutive calendar days. When a fast food employer has less than three days' notice of a need to fill an additional shift, the fast food employer shall post notice of the additional shift as soon as practicable after finding out about the need to fill the shift. In such circumstance, any existing fast food employee may be temporarily assigned to work a shift that is during the three-day notice period.

(c) A fast food employer that owns 50 or more fast food establishments in New York City may offer additional shifts, in accordance with subdivisions (f) and (g) of Section 20-1241 of the Fair Workweek Law and subdivision (b) of Section 14-07 of these rules, to: (1) fast food employees who work at all locations in New York City, or (2) only to its fast food employees who work at its fast food establishments located in the same borough as the location where the shifts will be worked.

(d) As soon as possible after a fast food employer has filled an additional shift, and using the same method that complies with Section 20-1241 of the Fair Workweek Law by which the fast food employer communicated the offer of additional shifts, the fast food employer must notify all accepting fast food employees when the offered shift has been filled.

We take no issue with subsections (a) and (d) of this Section; providing employees with a clear method for the posting and acceptance of additional shifts, and notifying employees that available shifts have been filled, is beneficial to both employer and employee. However, we have concerns with the practicality of subsections (b) and (c).

Regarding Section 14-06(b), we are concerned with the last sentence, which provides that, when a fast food employer has less than three days' notice of a need to fill an additional shift "*any existing fast food employee may be temporarily assigned to work a shift that is during the three-day notice period.*" As written, an employer that (lawfully) temporarily fills a vacant shift pursuant to this section will still be subject to the schedule change premiums under § 20-1222 of the Act as that temporary assignment under this new Rule will necessarily result in additional hours or shifts being added, and may result in regular hours or shifts being subtracted and cancelled. Accordingly, we recommend revising Section 14-06(b) to read:

> *(b) The fast food employer shall post notice of additional shifts for three consecutive calendar days. When a fast food employer has less than three days' notice of a need to fill an additional shift, the fast food employer shall post notice of the additional shift as soon as practicable after finding out about the need to fill the shift. In such circumstance, any existing fast food employee may be temporarily assigned to work a shift that is during the three-day notice period.* ***Provided, however, that if the employer temporarily assigns an existing fast food employee to work the vacant shift during the three-day notice period, the employer shall not be subject to the schedule change premium provisions in § 20-1222 of the Fair Workweek Law.***

(Emphasis suppled).

With respect to Section 14-06(c), we believe this section should be expanded to cover all fast food employers and not be limited to only those extremely large fast food employers with 50 or more establishments within New York City. As written, § 14-06(c) is much more onerous for smaller employers. There is no reason why the same options should not be available to <u>all</u> fast food employers, regardless of how many establishments they operate. We are also concerned with the requirement in § 20-1241 of the Fair Workweek Law that fast food employers must offer vacant shifts to employees employed at all fast food establishments operated by the employer before hiring any new fast food employees. Although some fast food restaurants have uniform work procedures, each establishment often has particular nuances in the way they conduct business that would make transferring employees between locations incredibly burdensome. For example, one establishment may have staff that is particularly fluent in the language of the guest population, and not as proficient

in the language of a property located in another neighborhood within another borough. Additionally, equipment and menu items may vary from establishment to establishment, which may require additional training, including safety training so that employees and customers are not harmed. Indeed, some establishments operating under the same brand name may have nuts and peanuts on their menus while other establishments do not. Where an establishment carries nuts and peanuts on their menus, employees must be specially trained about allergy protocols so that customers and co-workers are not exposed to such products to which they may have severe allergies.

Moreover, the computer and HRIS systems of most companies are not capable of managing and moving people from one location to another; they are location-based. Thus, if employers were required to transfer employees from location to location, even if for just one-shift, the integrity of the employee's work time could be jeopardized making it difficult for employers to manage overtime and pay it correctly.

Accordingly, we recommend revising § 14-06(c) to read as follows:

> *(c) A fast food employer that owns 50 or more fast food establishments in New York City may offer additional shifts, in accordance with subdivisions (f) and (g) of Section 20-1241 of the Fair Workweek Law and subdivision (b) of Section 14-07 of these rules, to: (1) fast food employees who work at all locations in New York City, or (2) only to its fast food employees who work at its fast food establishments located in the same borough as the location where the shifts will be worked.* ***Further, under this Section 14-06, a fast food employer may limit the additional shifts it offers to employees to available shifts only at the establishment at which the employee regularly works if the employer does not regularly transfer employees between or among establishments unless the employee requests the transfer.***

(Emphasis supplied.)

D. <u>Section 14-07: Accepting and Awarding Additional Shifts</u>

(a) A fast food employee may accept a subset of additional shifts offered by a fast food employer pursuant to Section 20-1241 of the Fair Workweek Law.

(b) A fast food employer must first award shifts or shift increments to fast food employees currently employed at the location where the shifts will be worked, regardless of the employer's other criteria prescribed pursuant to Section 20-1241(b) of the Fair Workweek Law.

(c) A fast food employee may accept an entire shift offered by a fast food employer or any shift increment. A fast food employer is not required to award a fast food employee a shift increment accepted by the fast food employee when the remaining portion of the shift is three hours or less and was not accepted by another fast food employee or other fast food employees.

(d) When a fast food employee accepts a shift that was offered by a fast food employer pursuant to Section 20-1241 of the Fair Workweek Law that overlaps with the fast food employee's existing shift, before hiring a new fast food employee, the fast food employer shall award the fast food employee the offered shift in lieu of the fast food employee's scheduled shift. The fast food employer shall not condition the award of the offered shift on a fast food employee's willingness to work both the non-overlapping hours of the existing shift and the offered shift.

(e) When a fast food employee accepts a shift that was offered by a fast food employer pursuant to Section 20-1241 of the Fair Workweek Law that, if awarded and worked by the fast food employee, would entitle the fast food employee to overtime pay, a fast food employer is not required to award the fast food employee the shift but, before hiring a new fast food employee, 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 fast food employee or is three hours or more.

We have only one recommendation with respect to § 14-07. As with § 14-06, we are concerned with the requirement in § 20-1241 of the Fair Workweek Law that fast food employers must offer vacant shifts to employees employed at all fast food establishments owned by the employer before hiring any new fast food employees. For the reasons stated above, this is impractical and does not take into account employee concerns and business issues that arise, which would make transferring employees between locations incredibly burdensome. Accordingly, we recommend revising § 14-07(b) to read as follows:

> *(b) A fast food employer must first award shifts or shift increments to fast food employees currently employed at the location where the shifts will be worked, regardless of the employer's other criteria prescribed pursuant to Section 20-1241(b) of the Fair Workweek Law.* ***Provided, however, that if the fast food employees currently employed at the location where the shifts will be worked provide written confirmation that they do not accept the shifts or shift increments offered, the employer need not offer additional shifts or shift increments to employees employed at all fast food establishments owned by the employer if***

> ***the employer does not regularly transfer employees between establishments. The employer may then proceed with hiring or contracting for new fast food employees for such shifts or shift increments.***

(Emphasis supplied).

E. Proposed Addition to the Fair Workweek Act: Rule Concerning Section 20-1222 of the Fair Workweek Act (Schedule Change Premium)

Under this section of the Act, if a fast food employer makes a schedule change with less than 14 days' notice, the employee will be entitled to various schedule change premiums. Although our clients do not foresee having an issue with their general ability to post schedules 14 days in advance in most cases, we have serious concerns with § 20-1222(c) because it does not take into account a wide range of normal business circumstances that require schedule changes on short notice.[3]

Further, external events that are beyond the control of fast food employers—such as sporting events, movie premiers, etc.—may cause surges in foot traffic, which in turn would require employers to bring in additional staff to assist with the increase in business. As written, however, employers would incur a schedule change premium if they brought in employees at the last minute. Because of these premiums, employers will be required to make a choice: bring in employees on short notice and incur schedule change premiums or opt not to bring in additional employees and take a risk that their business might suffer (long lines, unhappy customers, and a decrease in their hard-earned customer good will). Not only does this provision of the Act hurt businesses, but if the employer decides not to offer extra shifts on short notice, employees who would otherwise appreciate the opportunity to pick up an extra shift lose that option.[4]

Our greatest concern, however, is that § 20-1222 actually encourages fast food employees to act out and violate company policies. Unfortunately, fast food industry employees often are new to the workforce. Sometimes these employees do not have professional job skills and on occasion,

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[3] For example, fast food employers—like all service employers—often have to make schedule changes with very little notice due to, among other reasons: (1) employee last minute call-outs; (2) employee "no-call, no-shows"; (3) employee illness; (4) employee behavior and performance issues that require the employer to send the employee home early; (5) operational adjustments for inclement weather or last-minute local events, marches, or parades; (6) large orders; (7) large order cancellations; (8) lighter or heavier than expected customer volume.

[4] This exact scenario was observed in San Francisco after that city enacted its version of the Fair Workweek Law. *See* Lydia DePillis, *Why it's hard to legislate good corporate behavior*, WASHINGTON POST, Sept. 25, 2015, https://www.washingtonpost.com/news/wonk/wp/2015/09/25/why-its-difficult-to-legislate-good-corporate-behavior/?utm_term=.cc86714abbeb.

they simply are not equipped with appropriate inter-personal skills. Fights and misconduct do occur—threats of violence, theft, drug use on the job and other similar conduct can and often do occur on a weekly or even daily basis. Employers, like our clients, need to be able to protect the safety and welfare of their other employees, guests, and properties. As written, § 20-1222 acts as a strong disincentive for employers to remove and/or suspend employees on the spot who may be engaged in such insubordinate and/or violent behavior. If an employee violates a company policy and is sent home early, the employee stands to collect $75 under § 20-1222(a)(5)(a). If that employee's policy violation is severe enough to warrant a suspension, the employee stands to collect an additional $45 *per day* that the employee is suspended. This provision not only may incentivize some employees to act out to get paid time off but also may even disincentive some employers from conducting detailed investigations prior to rendering decisions as to employment status. If the violation is so severe that the employee must be terminated, the employee may still be entitled to collect schedule change premiums.

To remedy this oversight in the Fair Workweek Law, we recommend adding a new section to the Rules:

> ***In addition to the reasons set forth in § 20-1222(c) of the Fair Workweek Law, a fast food employee shall not be entitled to any schedule change premium set forth in § 20-1222 of the Fair Workweek Law if:***
>
> ***(a) the employee is sent home early, suspended, or terminated because of the employee's misconduct or violation of the employer's written company policies;***
>
> ***(b) the employee calls out for any reason or is a no-show;***
>
> ***(c) the fast food employer must close or delay the opening of the establishment due to inclement weather; or***
>
> ***(d) the fast food employer offers additional shifts on short notice due to actual or anticipated increased customer traffic, and the fast food employee(s) accept, in writing, the additional shift(s).***

Unless these proposed changes are made to the Rule, fast food employers may dramatically change their scheduling practices and procedures to avoid incurring schedule change premiums. Such changes may work to the detriment of employees, as was the case in San Francisco, where, in response to that city's fair work week legislation employers became less flexible with employee schedule changes, offered fewer part-time positions, scheduled fewer employees per shift, and

offered fewer jobs across the board. *See* Dr. Aaron Yelowitz & Dr. Lloyd Corder, *Weighing Priorities for Part-Time Workers: An Early Evaluation of San Francisco's Formula Retail Scheduling Ordinance*, EMPLOYMENT POLICIES INSTITUTE, May 2016, https://www.epionline.org/wp-content/uploads/2016/05/EPI_WeighingPriorities-32.pdf.

3. Conclusion

We understand and appreciate the intent of the DCA in drafting the proposed Rules. Providing employees with more notice concerning work schedules is a noble and worthwhile goal and one our clients support. Our clients believe that their employees are integral and indispensable to their success, and providing them with a more consistent and predicable work schedule will benefit all of their stakeholders—guests, employees, owners, and the public at large. However, as written, the Act and the proposed Rules do contain some ambiguities and unduly burdensome requirements which we feel will not serve any of the stakeholders. We believe that the above suggestions and comments are reasonable and fair to both fast food employers and their employees and we thank you for your time and consideration in reviewing our concerns. These issues are of paramount concern to our clients—and the fast food industry—and we welcome any opportunity to work with the DCA in developing workable and equitable solutions for the fast food industry and its employees.

Again, we appreciate the efforts of the DCA and thank you for considering the needs of the industry.

Very truly yours,

FOX ROTHSCHILD LLP

Carolyn D. Richmond, Esq.
Glenn S. Grindlinger, Esq.

From: Kate Iannone <kate.iannone@eataly.com>
Sent: Friday, November 17, 2017 11:15 AM
To: Rulecomments
Subject: Fair Workweek comment

Hello,

Please accept this comment on the Fair Workweek law rules.

We recommend that the DCA further clarify the following items in the Fair Workweek law and rules:

* What constitutes a "retail employer" should not be defined by the sale of consumer goods, but by the wage order under which a company falls, i.e. does a business under the hospitality wage order qualify as a retail employer for the purposes of this law? We recommend this be clarified.
* An employee "written consent" to a shift change within 72 hours of the shift start time needs to be clarified. We recommend emails and/or acceptance via an electronic scheduling system be accepted as "written consent" rather than a hard copy form. We recommend this be added to the text of the law/rules.
* Clarification needs to be added for what constitutes a change in shift. If an employee agrees to stay late/leave early after having already clocked in for the shift, is this a change in shift that must be consented to?

Thank you for taking our comment into consideration, and we look forward to hearing clarification on these items and the proposed rules overall.

Sincerely,
Kate Iannone

Louis Meyer LMEYER@BRIAD.COM

Subject: Restrictive Scheduling Hearing Questions from Wendy's

1. Do we need to distribute Good Faith Estimates (GFE's) to all employees at the effective date of the Law or just new employees as the verbiage states? Without an existing GFE how would we determine if/when a Revised GFE needs to be given (for employees already employed at the time the law goes into effect)
2. Do we have to pay a premium to an employee that is NCNS?...or just to the employee that picks up their shift?
3. Paid Sick Leave...does the absent employee get paid for PSL AND for the dropped shift premium?
4. Can the 15 minute waiver time be extended with the employee is subject to the arrival times of public transportation? The employer should not have to pay a premium because of public transportation issues.
5. Will there be direction on what an audit will encompass?
6. Changes that result to OT; do they still get the premium on top of the time and half?
7. Late employee; can someone take part of their shift? Will we need to document the late employee so that no premium is paid and pay the $15 still on the one that picks up part of the shift?
8. Since we are actually 4 weeks out on requests for time off; can employees exchange shifts to meet their needs, with each other without Premium being paid- both sign an agreement to the change and reason why?
9. What will an audit encompass – need clarification; will it be handled same as state and federal protocol?

Thank you;

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From: Joe Denardo <jdenardo@natrest.com>
Sent: Saturday, November 11, 2017 6:35 PM
To: Rulecomments
Subject: Fwd: Questions for Fair Workweek Law

From: Joe Denardo <jdenardo@natrest.com<mailto:jdenardo@natrest.com>>
Date: November 9, 2017 at 3:40:11 PM EST
To: '"rulecomments@dca.nyc.com<mailto:rulecomments@dca.nyc.com>"'
<rulecomments@dca.nyc.com<mailto:rulecomments@dca.nyc.com>>
Subject: Questions for Fair Workweek Law

1. If an employee clocks out late on his/her own accord past the 15 minutes, do we need to compensate?

2. Does the premium pay count towards the hourly wage in computing overtime?

3. If an employee shows up late so that the hours are reduced, does the employer still get penalized? How do we document that the employee was late for potential future audits?

4. If an employee punches out late continuously, what are the employer's rights? An employee can abuse the system by purposely clocking out late to get a $15.00 premium.

5. If an employee resigns and the schedule is changed to cover the shift does a premium have to be paid to the replacement employee? If so, then why is the employer being penalized for something it has no control over?

6. How do we offer available shifts?:

a. By tenure

b. By performance

c. By managing payroll dollars (such as overtime)

7. How is the 15 minute minimal change shift measured? Are the minutes before scheduled start time and after scheduled end time get added together? Or is it 15 minutes on each end?

8. Regarding not posting the schedule of employees who have been granted an accommodation – how do we know who those employees are? Is it up to them to tell the employer?

9. If there are multiple premiums due to an employee in a given week, can they be lumped together on the pay stub? Is there a specific language that needs to be on the stub? Can we just call it PREMIUM?

10. If we change the location, but not the time of an employee's shift, is premium pay due?

11. If a schedule is changed for 5 days, is the premium due for each shift or is it considered one schedule change?

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Comments to the New York City Department of Consumer Affairs
Hearing on the Implementation of the Fair Workweek Law – November 17, 2017

Submitted by:
Karen Brown
Senior Director of Human Resources
Nathan's Famous

On behalf of Nathan's Famous, thank you for the opportunity to testify on the implementation of the Fair Workweek Law. Nathan's Famous began as a nickel hot dog stand in Coney Island, Brooklyn in 1916. This first location was opened by immigrants Nathan and Ida Handwerker using family recipes. From this humble beginning, Nathan's has grown into a large public company with franchised locations across the country and around the world. However, our headquarters remains in New York State, and we will always be a New York company at heart. We have three company-owned retail locations in New York City, our original location on Surf Ave which is still operating on Coney Island, a seasonal location on the Boardwalk also in Coney Island, and a free standing location on 86th Street in Brooklyn. Nathan's also employs two types of employees, regular full and part time year round employees and seasonal employees. The well-being of our employees is of paramount importance to Nathan's Famous, and we maintain very positive relations with Local 1102 in New York, which represents many of our employees. However, we would like to offer a series of comments and concerns regarding the practical implementation of the Fair Workweek Law.

I. Nathan's Famous Recommendations on Proposed Regulations:

Our first set of comments addresses the Department of Consumer Affairs' (DCA) proposed regulations (Chapter 14 pf Title 6 of the Rules of the City of New York), which are intended to clarify the Fair Workweek Law. We believe that by addressing these comments, the DCA will

be able to further clarify and improve the proposed regulations, which will lead to better implementation of the law, and a more fair set of regulations for employers.

A. DCA Proposed Rule on Minimum Changes to Shifts

§14-05 Minimal Changes to Shifts
A fast food employer may change a work schedule by 15 minutes or less without being obligated to pay the fast food employee a schedule change premium.

Nathan's Famous Recommendation: This proposed rule change should be modified to include an exception for hourly employees in management positions that may choose to stay longer than their scheduled shift, as long as the employee is not directed by the employer to stay longer than their scheduled shift. In our locations, many managers are paid hourly wages, and also control the schedule of employees. These hourly managers have control of adjusting the schedule for all hourly employees at a specific location, including their own. Without our proposed modification, hourly managers may choose to stay longer than scheduled without approval from a supervisor solely to obtain the premium payments, taking advantage of both the law and the employer.

B. DCA Proposed Rule on Accepting and Awarding Additional Shifts

§14-07 Accepting and Awarding Additional Shifts
(e) When a fast food employee accepts a shift that was offered by a fast food employer pursuant to Section 20-1241 of the Fair Workweek Law that, if awarded and worked by the fast food employee, would entitle the fast food employee to overtime pay, a fast food employer is not required to award the fast food employee the shift but, before hiring a new fast food employee, 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 fast food employee or is three hours or more.

Nathan's Famous Recommendation: This proposal should be modified to allow an employer to hire a new fast food employee where awarding the shift to an existing employee would bring the employee's total hours worked to thirty hours, meaning that the employee becomes full-time. As written, the proposed regulation will be costly and problematic for many employers, including Nathan's Famous. Under our union contract, Nathan's Famous is required to

contribute over $600 per month to the union for each full-time non-seasonal employee (meaning those working 30 hours per week or more) for health-care costs regardless of whether the person already has health coverage. While the company negotiated the contract, the costs are not incurred for part-time employees, whom Nathan's Famous currently employs without triggering the healthcare contribution. Under the current proposed regulation, an employer would be required to allow a part-time employee to become a full-time employee, creating unintended costly obligations to the employer. We strongly suggest modifying the language to allow employers to maintain many part-time employees.

Nathan's Famous Recommendation: The DCA should consider adding language to proposed regulation §14-07 to allow an employer to consider hiring a new employee rather than offering a shift to an existing employee where allowing the new employee to take on an open shift would trigger "spread of hours" pay for the employee. Spread of hours pay requires that employees be paid an additional hour of minimum wage pay when the beginning and end of the employee's workday spends a period of time greater than ten hours, which certainly could happen under the proposed regulatory scheme for awarding additional shifts. We believe that the proposed regulation places an additional burden on employers that are already required to pay premiums to employees who have work days that span greater than 10 hours. These employers will have to pay two different premiums to employees that request or accept additional shifts under the new proposed regulation if the new shift implicates spread of hours pay.

II. Consideration of Additional Regulations:

Nathan's Famous also offers a series of suggestions that were not addressed in the proposed regulations which we believe would further enhance implementation. Our proposed regulations address several topics, including schedule changes due to holidays, weather affecting the

operation of seasonal locations, employees volunteering to cover newly available shifts, and "encouraging" employers to train existing employees for other jobs in a location in order to fill open shifts.

Nathan's Famous Recommendation on Inclement Weather: The DCA should consider adding a provision clarifying occurrences in which fast food employers are not required to pay employees premiums for changes in hours (NYC Administrative Code §1222(5)(c)). The statute includes a series of exemptions for which employers are not required to pay schedule change premiums, but the exemptions do not include unforeseeable inclement weather that prevents locations from opening, or severely limits business. Many seasonal businesses are heavily dependent on weather for operation, and it is often unforeseeable several days ahead of time that a business will not be open due to weather conditions. For example, the Nathan's Famous seasonal location on Coney Island does not open if it is raining during its operating season because there is no indoor area within the location for patrons to sit, and thus the business is substantially unable to generate any revenue in the event of inclement weather. In addition, the Surf Ave location may remain open during inclement weather, but it has limited revenue since they have no indoor seating and only limited standing room. The employees are aware of the seasonal nature of the business at these locations and come back to work there year after year. The union also recognizes seasonal employees. All employees are made aware at the outset of employment at these locations that shifts are subject to change due to inclement weather that prevents the location from opening, or severely limits business. It would be unduly burdensome to Nathan's Famous, or any other similarly situated employer, to be required to pay schedule change premiums to employees when business is limited or does not open due to inclement weather.

Nathan's Famous Recommendation on Employees Volunteering for Additional Shifts and Hours: The DCA should consider adding a provision clarifying whether employers are required to pay schedule change premiums when an employee volunteers to cover an open or additional shift that have yet to be advertised or may not otherwise be filled by the employee. The statute is clear that where two employees switch shifts, or where an employee requests a shift change in writing, the employer is not required to pay schedule change premiums, but does not appear to address situations in which employees request or volunteer for additional hours. For example, where an employee calls out sick and currently scheduled employees volunteer to stay later of come in early to earn extra money, it appears that the employer is required to pay schedule change premiums. Where there is a newly open shift and the employee volunteers to fill the role to benefit themselves with additional hours of pay, and the employer has not had the opportunity to advertise and may not otherwise fill the position, the employer should not be penalized for offering additional hours to employees that desire additional hours, regardless of whether there is a formal request for a schedule change made in writing.

Nathan's Famous Recommendation on Advanced Scheduling and Holidays: The DCA should consider adding a provision clarifying the advanced scheduling requirements (NYC Administrative Code §20-1221) as they relate to holidays for which an employer is not open. It is not clear how the advanced scheduling portion of the Fair Workweek Law treats holidays for purposes of notifying employees that work a set schedule, particularly where several holidays fall in a short period of time, and an employee's regular work schedule may be interrupted.

Nathan's Famous Recommendation on Training Existing Employees for New Positions: The DCA should consider adding a provision related to training existing employees for jobs that they do not currently perform, and are not trained to perform (NYC Administrate Code §20-

1241(h)). The enacted statute states that a fast food employer is "encouraged" to offer current employees training for additional tasks where the employer has needs, but this would be a costly practice for large employers that hire hundreds of seasonal people. For example, when a shift for a cook opens at a Nathan's Famous location, and a cashier wants training to temporarily fill the cook position, the employer would have to pay for the training twice: once for the cashier, and once for a more permanent replacement. The regulatory scheme could be improved to incentivize such "encouraged" training, because currently providing the training is costly for employers. It is unfair what "encourage" means within the statute, and whether any new and burdensome requirements will be placed on employers.

Conclusion:

Nathan's Famous has been operating as a New York business and employer for over 100 years. We treat our employees well, and encourage union involvement. However, as discussed above, the statutory scheme remains vague in many instances, and the proposed regulations do not ensure a fair implementation to employers. Further, the proposed regulations should not be applied to employers of seasonal workers, as their businesses often rely heavily on weather and other varying factors that regularly affect the staffing needs of the business, and the proposals will be very costly to these businesses. The proposed regulations should be reviewed, modified, and improved, to ensure a fair scheme that satisfactorily addresses the needs of both employees and employers.

Thank you,

Karen Brown

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NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

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November 17, 2017

Comments from the National Women's Law Center on New York City's Draft Fair Workweek Rules

The National Women's Law Center (NWLC) appreciates this opportunity to provide comments on New York City's important Fair Workweek rules. NWLC is a non-profit organization that has been working since 1972 to secure and defend women's legal rights, and to help women and their families achieve economic security. NWLC is part of a national policy group helping to lead the movement to secure fair scheduling practices for working people, because unpredictable schedules disproportionately impact women and are particularly detrimental to women with caregiving responsibilities. We advocated for the strong New York City Fair Workweek law as well as the first statewide fair workweek law in Oregon—and we are leading efforts to achieve similar protections at the federal level through the Schedules That Work Act.

We write to suggest several modifications to the proposed rules that would help clarify the New York City Fair Workweek law's requirements.

I. § 14-03: Good Faith Estimate

Section 20-1221 of the Fair Workweek law requires a fast food employer to provide "a good faith estimate in writing setting forth the number of hours a fast food employee can expect to work per week for the duration of the employee's employment and the expected dates, times and locations of those hours," no later than when the fast food employee receives the employee's first work schedule. This section also requires an employer to update the employee promptly "if a long-term or indefinite change is made to the good faith estimate."

We support the draft rule's definition of when an employer makes a "long-term or indefinite change" to the good faith estimate requiring a new estimate, but we encourage the Department of Consumer Affairs (DCA) to clarify what constitutes a good faith estimate in the first instance, including when that estimate must be provided. Specifically, the final rules should include the parameters for DCA's evaluation of whether an employer's initial estimate was provided in good faith, and should make explicit that employers must identify the average weekly work hours, days of the week, shifts and locations with specificity. The accuracy of the initial estimate of how many hours an employee will be working—and when and where—is incredibly important for a worker to be able to determine whether they should be searching for an additional or different job, whether and when they can

schedule a class or a training opportunity, or how they can arrange for child care or care of other family members.

Because the accuracy of this estimate is so important, it is also crucial for the draft rules to provide guidance as to how DCA will apply the good faith standard. For example, the following circumstances could create a rebuttable presumption that the initial estimate was not made in good faith:

- An employee experiences three work weeks out of six consecutive work weeks in which:
    - the number of actual hours worked differs by 40 percent or more from the good faith estimate;
    - the days worked differ from the good faith estimate at least twice per week;
    - the locations differ from the good faith estimate at least twice per week; or
    - morning, afternoon, or night shifts differ from the good faith estimate at least twice per week.

II. § 14-05: Minimal Changes to Shifts

This rule states that the schedule change premium required by section 20-1222 is not owed for changes of 15 minutes or less. We encourage DCA to clarify the rules by stating that a fast food worker has a right to decline an extension of work hours of 15 minutes or less, pursuant to section 20-1221(d). In general, the rules should make clear that a worker has a right to decline a change in his or her work schedule. This right is incredibly important to working people, especially if the proposed schedule change conflicts with child care arrangements, a school or scheduled training opportunities, or a work schedule at a second job.

III. § 14-06: Notice and Offer of Additional Shifts

Section 20-1241 of the Fair Workweek law requires that fast food employers offer additional shifts to their existing employees before offering these shifts to external candidates. Furthermore, the law requires a detailed posting with respect to the offered shifts for three days, "unless a shorter posting period is necessary in order for the work to be timely performed as may be prescribed by the rules of the director."

The rules correctly state that "[w]hen a fast food employer has less than three days' notice of a need to fill an additional shift, the fast food employer shall post notice of the additional shift as soon as practicable after finding out about the need to fill the shift." However, we believe that the following clause in the draft rules is inconsistent with the Fair Workweek law: "In such circumstance, any existing fast food employee may be temporarily assigned to work a shift that is during the three-day notice period."

First, the word "assigned" in this clause suggests that, in this circumstance, an employer can schedule an employee to work the shift without regard to the employee's absolute right to decline the hours pursuant to section 20-1221(d). Second, the text of the Fair Workweek law is clear that the employer shall still post notice of the additional shift even if three days of posting is impracticable. Section 20-1241(b) requires employers to post the notice of additional work "for three consecutive calendar

days . . . unless a *shorter posting period* is necessary in order for the work to be timely performed, as may be prescribed by the rules of the director. " (emphasis added). Likewise, subsection (f) states:

> "If no fast food employee who is employed at the location where offered shifts will be worked accepts such shifts within three consecutive calendar days of the offer, **or, in the case of shifts that are offered with less than three days' notice to a fast food employee before the start of such shifts**, no less than 24 hours before the start of such shifts unless such 24 hour period is impracticable under the circumstances, the fast food employer may distribute such shifts to fast food employees from other locations who accept such shifts or may hire or contract for such new fast food employees as are necessary to perform the work."

This language indicates that the employer shall still post notice of the offer of additional shifts to all employees even if they learn of the need less than three days in advance of the shift. Providing for temporary assignment does not comply with this language.

We urge DCA to promulgate rules that state when the posting period can be shortened, not provide that it can be dispensed with entirely if the employer learns of the staffing need less than three days before the shift must be covered.

IV. Additional Modifications

We have extensively researched the negative impacts on parents and children of both unpredictable work schedules and employees' lack of control over their schedules. We hear too many stories of working parents who are retaliated against for asking for a small change in their work schedule to take a sick child to the doctor or to be able to pick up their children from child care certain nights of the week. The scheduling predictability protections provided for in the Fair Workweek law will give workers greater control over their lives and make it easier for parents to plan family and personal obligations so they do not conflict with work. But it is critical that the rules around schedule predictability not interfere with workers' ability to make changes to their schedules when they need to. As such, we urge DCA to clarify in the rules that employee-initiated changes to work schedules are not prohibited by these laws and provide additional guidance about when an employee has requested a change in his or her schedule that does not trigger a schedule change premium, per section 20-1222(c)(2).

Specifically, the rules should clarify that this exception to premium pay applies to requests made (1) with respect to a specific shift and (2) without employer invitation or prompting and provide example, such as:

> Example 1. An employee asks her manager if she can leave before the scheduled end time of her shift, and the employer agrees. The employer is not obligated to pay the schedule change premium.

Example 2. An employer announces that it is a slow day and asks if anyone wants to go home early. The employer will owe a schedule change premium if any employee accepts this invitation.

Example 3. An employee has expressed a generalized desire to work more hours. After the written schedule has been posted, the manager realizes there is a need for additional staff during the time covered by the posted schedule. The manager must notify the employee of the specific hours offered in accordance with section 20-1241 and the employee must consent in writing to those specific hours and receive the schedule change premium.

Example 4. An employee notifies the employer that she must be absent on a scheduled work day due to the illness of her child. The employer is not obligated to pay a schedule change premium.

Again, NWLC thanks you for the opportunity to provide comments on these important regulations.

Sincerely,

Emily Martin
General Counsel and Vice President for Workplace Justice

Julie Vogtman
Director of Job Quality and Senior Counsel

Andrea Johnson
Senior Counsel for State Policy

ALBANY • BUFFALO • NEW YORK CITY
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Re: Proposed Rules for Implementation of NYC Fair Workweek Law

Dear Mr. Adams:

I write on behalf of the New York Staffing Association (NYSA), which represents the temporary help firms in New York State. These firms placed over 500,000 workers on temporary and contract assignments in 2016, contributing significantly to the State and City economy, stability, growth and employment. Because of the unique way the industry operates – firms generally place individuals who specifically seek temporary and part time work on assignment, which frequently arise on short notice –we seek to discuss with representatives of the Department of Consumer Affairs three areas of the law as applied to temporary help firms, to wit:

1. The definition of a "Fast Food Establishment" and "Fast Food Employer";
2. The definition of a "Retail Employer" and "Retail Employee"; and
3. The application of the notice provisions of the law.

Given the nature of operations of temporary help firms, we believe a meeting, as opposed to submitting written comments, on the proposed regulations would be more productive.

NYSA looks forward to meeting with representatives of the Department of Consumer Affairs to discuss these issues. Thank you in advance for your attention to this matter.

Respectfully submitted,

John McCarthy, Esq.

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November 16, 2017

Hon. Lorelei Salas
Commissioner
NYC Department of Consumer Affairs
42 Broadway 5th Floor
New York, NY 10004

Dear Commissioner Salas:

I am writing to you on behalf of the New York State Restaurant Association, a trade group that represents food and beverage establishments both here in New York City and throughout the State. The Association is the largest hospitality trade association in New York and it has advocated on behalf of its members for more than 80 years. Our members represent one of the largest constituencies regulated by the City as nearly every agency regulates restaurants in one aspect or another. The purpose of this letter is to provide general comments on behalf of quick service restaurant owners and operators doing business in New York City regarding rules being proposed by the Department of Consumer Affairs Office of Labor Policy and Standards to implement Chapter 12 of Title 20 of the NYC Administrative Code.

By way of background, when "Fair Workweek" legislation was first introduced, the restaurant industry explained to Mayor de Blasio and members of the City Council that a one-size-fits-all approach to regulating scheduling practices will harm small business owners and their employees. For example, quick service restaurants rely upon flexibility in scheduling to accommodate the diverse needs of their workers and maintain the quality of service provided to customers.

Unfortunately, despite numerous requests by small business owners and their employees to make common sense changes, the Council chose to pass legislation that will hurt both employees and employers. The resulting law will:

- Unfairly discriminate against one segment of the hospitality industry
- Impose overly restrictive scheduling mandates on employers which will result in unnecessary fees, fines, and legal penalties.
- Hinder, if not stifle, the opportunity for part - and full time - employees who value flexibility to accommodate their lifestyle and maximize their income potential
- Stifle business growth and reduce investments made by small business owners
- Reduce the quality of customer service our consumers expect when open shifts are left unfilled s
- Make legal compliance nearly impossible for small business owners
- Put workers in a position to be harassed by so-called "not-for-profit organizers" seeking to generate fees under the guise of providing the same worker protections which already exist under local, state, and federal law
- Lead to costly and unnecessary legal battles and create a cottage industry for plaintiffs' attorneys seeking to generate fees and settlements instead of working to protect workers' rights

The following questions are being offered by small business owners and operators to demonstrate the lack of clarity that exists regarding the law's applicability and how to comply:

- Does the law apply to managers who are paid on an hourly basis? For example, is the law being violated when a manager who is paid on an hourly basis works longer hours to cover for an employee who does not show up for a shift?
- Is there an exemption for premium pay when employees call out for health reasons?
- Is there an exemption for premium pay when an employer sends an employee home for warranted and documented disciplinary reasons?

The restaurant industry fuels New York's economic engine by creating jobs and growth opportunities for hundreds of thousands of people. We also fuel millions of hungry New Yorkers every day. It is important that our concerns are heard and addressed.

Thank you for the opportunity to provide general comments. We look forward to your response and welcome the opportunity to explore these issues further.

Please contact me at 212-398-9160 if you have any questions.

Thank you.

Kevin Dugan
Regional Director
New York State Restaurant Association

Planned Parenthood
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Planned Parenthood of New York City

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Planned Parenthood of New York City
Testimony in support of
Proposed Rules for Fast Food, Retail Workers Scheduling Law
November 17, 2017

Planned Parenthood of New York City thanks the Department of Consumer Affairs (DCA) for convening this hearing as well as Commissioner Lorelei Salas for her dedication to this issue and offering the opportunity to share comments on the proposed rules.

PPNYC is proud to stand with fast food workers in the fight for a living wage and equitable work conditions, and we proudly support the passage of the Fair Workweek Law to reform scheduling practices for fast food and retail workers across New York City.

As one of New York City's leading sexual and reproductive health and safety net provider, we know all too well the realities faced by so many New Yorkers who struggle with numerous barriers to accessing care. We care for patients every day who are working full-time yet are struggling to make ends meet. Over half of our patients are enrolled in Medicaid, and many New Yorkers access our services at no to low cost, often because they are not eligible for health insurance. The issues that affect our patients are deeply connected—from lack of access to health care and housing, to economic insecurity and discrimination. Every New Yorker deserves a fair living wage that allows them to afford health care, education, housing, childcare, and transportation to care for themselves and their families and to shape their own futures.

The Fair Workweek package is much-needed legislation that will ban "on-call" scheduling, require advance scheduling notice for retail and fast food employees, and impose more comprehensive requirements on additional work shifts. The law also requires employers to remove and send voluntary contributions to nonprofits when their employees make the request in writing. PPNYC is pleased to see the proposed rule put forth by the Department of Consumer Affairs to assist employers with compliance and ensure the law's success, and we look forward to its enactment on November 26th, 2017.

While we support the proposed rules added to Title 6 of the Rules of the City of New York, PPNYC recommends DCA simplify Section 15-03(c), which imposes a burdensome process on workers looking to sign up online to deduct a portion of their earnings to donate to a nonprofit. The process requires an employee to electronically sign and submit an authorization, receive a confirmation from the nonprofit on a pop-up screen directing them to their email, access their email, which for some could be days after signing the authorization, and respond confirming their authorized signature. If an employee overlooks the email, or doesn't confirm they signed the form, their electronic signature is deemed invalid.

This process is more extensive than what is required of other employees in New York City. For many organizations, when an individual authorizes recurring donations to a nonprofit using an

electronic signature, a pop-up confirmation notification verifies that their authorization was received and lets the individual know how to rescind the donation if they would like. The additional measure in DCA's proposed rule requires that a fast food worker cannot contribute to a nonprofit until they check their email and reconfirm authorization, creating a barrier for staff who may not have regular access to email.

New York City should make it easier, not more difficult, for employees to support the nonprofit organization of their choice. We urge the Department of Consumer Affairs to take the aforementioned recommendation into consideration and look forward to the Fair Work Week package being implemented into law later this month. Thank you for the opportunity to testify.

FAIR WORKWEEK INITIATIVE | THE CENTER FOR POPULAR DEMOCRACY

Casey Adams
Deputy Director of City Legislative Affairs
New York City Department of Consumer Affairs
42 Broadway 5th Floor
New York, NY 10004

The Center for Popular Democracy (CPD) appreciates the opportunity to comment on DCA's proposed Fair Workweek Rules. CPD's Fair Workweek Initiative supports efforts across the country to restore a workweek that enables working families to thrive. We are nationally recognized for our policy, research and employer-engagement expertise on issues relating to hours and wages. CPD played an important role in the implementation of the San Francisco Retail Workers Bill of Rights, the first fair workweek ordinance in the country, and in the enactment of Fair Workweek ordinances in Emeryville and San Jose CA, Seattle WA, New York City and the first state-level Fair Workweek law in Oregon. Our staff has expertise in the industries where work-hours issues are most prevalent and understand both the business models that have generated these practices and the negative impact on workers and their families. We write to suggest modifications to the proposed Fair Workweek rules to better effectuate the Council's goal of providing stable, predictable work hours and good jobs in New York City's fast food industry, and to clarify the requirements of the Fair Workweek Law (local law numbers 99, 100, 106 and 107).

§ 14-03 Good Faith Estimate

Section 20-1221 requires a fast food employer to provide "a good faith estimate in writing setting forth the number of hours a fast food employee can expect to work per week for the duration of the employee's employment and the expected dates, times and locations of those hours." This section also requires an employer to update the employee promptly "if a long-term or indefinite change is made to the good faith estimate." We support the guidance in section 14-03(b) on the definition of a "long term or indefinite change" that would trigger the requirement to update the good faith estimate. However, we urge DCA to strengthen this rule in two respects.

First, the rule should unambiguously require fast food employers to specify dates, times, and a number of hours in the good faith estimate. This requirement is implied by the rule's definition of a long term or indefinite change: to determine whether "the number of actual hours worked differs by twenty percent" from the good faith estimate, the estimate itself must specify an average number of weekly work hours (rather than a range). Likewise, the employer must specify whether the employee will work morning, afternoon or night shifts in order to determine whether shifts actually worked differ from the good faith estimate at least once per week. However, the rule should make explicit that employers must identify the average weekly work hours, days of the week, shifts and locations with specificity.

Second, the rule provides guidance only on the requirement to update the good faith estimate. It does not establish parameters for DCA's evaluation of whether the initial estimate, provided "[n]o later than when a new fast food employee receives such employee's first work schedule," complies with the Fair Workweek Law's good faith requirement. The purpose of the good faith estimate is to allow fast food workers to evaluate their

employment prospects based on a realistic expectation of their work schedule. That purpose would be defeated if employers were permitted to provide baseless "estimates" in order to recruit workers to their business (for example, with a false promise of full-time hours or desirable shifts), only to provide a wholly different schedule once the worker has quit their previous job and started the new one. Thus, this rule should make clear that an initial estimate made in *bad* faith does not comply with the Fair Workweek Law, and provide guidance as to how DCA will apply the good faith standard. For example, the following circumstances could create a rebuttable presumption that the initial estimate was not made in good faith: Three work weeks out of six consecutive work weeks in which: the number of actual hours worked differs by forty percent from the good faith estimate; the days differ from the good faith estimate at least twice per week; the locations differ from the good faith estimate at least twice per week; or morning, afternoon, or night shifts differ from the good faith estimate at least twice per week.

§ 14-05 Minimal Changes to Shifts

This rule states that the schedule change premium required by section 20-1222 is not owed for changes of 15 minutes or less. It should clarify that a fast food worker has a right to decline an extension of work hours of 15 minutes or less, pursuant to section 20-1221(d).

§ 14-06 Notice and Offer of Additional Shifts

In subsection (b), we agree with the proposed rule stating that "When a fast food employer has less than three days' notice of a need to fill an additional shift, the fast food employer shall post notice of the additional shift as soon as practicable after finding out about the need to fill the shift." However, we believe that following sentence is inconsistent with section 20-1241: "In such circumstance, any existing fast food employee may be temporarily assigned to work a shift that is during the three-day notice period." First, the word "assigned" implies that any fast food employee can be scheduled to work the shift without regard to the employee's right to decline pursuant to section 20-1221(d). But even if the language were revised to indicate that the employer can assign a shift to any employee who accepts it, that outcome is inconsistent with the Fair Workweek Law's plain language. Section 20-1241(b) requires employers to post the notice of additional work "for three consecutive calendar days . . . unless a shorter posting period is necessary in order for the work to be timely performed, as may be prescribed by the rules of the director." Likewise, subsection (f) states:

> "If no fast food employee who is employed at the location where offered shifts will be worked accepts such shifts within three consecutive calendar days of the offer, **or, in the case of shifts that are offered with less than three days' notice to a fast food employee before the start of such shifts**, no less than 24 hours before the start of such shifts unless such 24 hour period is impracticable under the circumstances, the fast food employer may distribute such shifts to fast food employees from other locations who accept such shifts or may hire or contract for such new fast food employees as are necessary to perform the work."

It is therefore clear that when there are less than three consecutive days before the start of the available shift, the employer must still offer shifts to existing employees rather than fill shifts by temporarily assigning them. The Fair Workweek Law authorizes DCA to promulgate rules defining when the posting period may be abbreviated in order for the work to be timely performed, but not to promulgate a rule exempting shifts entirely from the posting requirement.

Furthermore, we urge DCA to remove the proposed language authorizing fast food employers to limit the offer of shifts to employees who work at its fast food establishments located in the same borough as the location where the shifts will be worked. If an employer is already required to offer shifts to employees at multiple locations, the employer doesn't gain anything by limiting the offer by borough. Yet a fast food employee who

normally works in Manhattan but lives in the Bronx may benefit greatly by picking up an extra shift closer to home.

§ 14-07 Accepting and Awarding Additional Shifts

Subsection (b) refers to "fast food employees currently employed at the location where the shifts will be worked," but fails to define when an employee is "currently employed at" a given location. We suggest the following definition:

> "A fast food employee is currently employed at the location where the offered shifts will be worked if the employee has worked at least one shift at that location in the past 30 days. An employee may be currently employed at multiple locations at the same time."

Additional suggestions

We urge DCA to promulgate rules clarifying the rights and obligations under the following provisions of the Fair Workweek Law:

Section 20-1222(c)(2). The rules should provide guidance as to when the employee has requested a change in schedule that does not trigger a schedule change premium. We believe that this exception applies to requests made (1) with respect to a specific shift and (2) without employer invitation or prompting.

> Example 1. An employee asks her manager if she can leave before the scheduled end time of her shift, and the employer agrees. The employer is not obligated to pay the schedule change premium.
>
> Example 2. An employer announces that it is a slow day and asks if anyone wants to go home early. The employer will owe a schedule change premium if any employee accepts this invitation.
>
> Example 3. An employee has expressed a generalized desire to work more hours. After the written schedule has been posted, the manager realizes there is a need for additional staff during the time covered by the posted schedule. The manager must notify the employee of the specific hours offered in accordance with section 20-1241 and the employee must consent in writing to those specific hours and receive the schedule change premium.
>
> Example 4. An employee notifies the employer that she must be absent on a scheduled work day due to the illness of her child. The employer is not obligated to pay a schedule change premium.

Section 20-1241(g). The Fair Workweek Law specifies when an employer may, after complying with the ordinance's requirements to offer additional shifts to current employees, hire new staff:

> "[T]he fast food employer may immediately proceed with hiring or contracting for new fast food employees to perform the work described in, and in accordance with the criteria set forth in, the notice posted pursuant to subdivision b."

We urge DCA to include guidance to employers on compliance with this provision, and recommend the following examples:

> Example 1: The employer posts shifts consisting of 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the current employees accepts the offered hours. The employer hires a new employee and assigns him to work 8 pm to 12 am on Friday, Saturday and Sunday. On occasion, when creating the work schedule as required by section 20-1221, the employer also assigns the new employee to fill shifts during the day or on other evenings, to meet increased demand or fill in for absent employees. The employer has complied with the ordinance by hiring a new employee to perform the work described in the notice.

Example 2: The employer posts an opportunity for hours from 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the current employees accepts the offered hours. The employer hires a new employee and assigns her to shifts between the hours of 9 am and 7 pm. The employer has not complied with the ordinance because the hours in the notice do not match the hours actually assigned to the employee and the employee is assigned hours that were not previously offered to current employees.

Example 3: The employer posts shifts from 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the current employees accepts the additional hours. The employer hires three new employees, A, B and C. The employer assigns Employee A to work 8 pm to 12 am on Friday, Saturday and Sunday. The employer assigns Employees B and C to shifts between the hours of 9 am and 7 pm. The hiring of Employees B and C does not comply with the ordinance because they are not performing the work described in the notice and are working hours that were not previously offered to existing employees.

Section 20-1221(d). We urge DCA to clarify that written consent must be obtained for each shift or partial shift to which the employee consents. We suggest language along these lines:

> "Generalized, ongoing, open-ended written consent purporting to accept additional hours across multiple dates does not comply with section 20-1221(d). Written consent must be obtained for each day an employee works that was not included in the initial written work schedule."

Individual waivers. DCA should make explicit that any waiver by an employee of any provisions of the Fair Workweek Law is unlawful and that demanding such a waiver may subject the employer to penalties. We suggest the following language:

> "Any waiver by an individual employee of any provisions of the Fair Workweek Law shall be deemed contrary to public policy and shall be void and unenforceable. An employer who requires an employee to waive remedies or penalties provided by this chapter for violations thereof as a condition of employment, under a threat of adverse action, or as a precondition for awarding hours under section 20-1241 may be subject to the remedies and penalties set forth in sections 20-1208(a)(1), (a)(3)(a)-(b), (d), (e); 20-1208(b), 20-1209, 20-1210, and 20-1211 of Chapter 12."

Conclusion

We applaud DCA's thoughtful approach to implementing the Fair Workweek Law and look forward to collaborating to implement and enforce the law.

Rachel Deutsch
Senior Staff Attorney for Worker Justice

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Ted Potrikus
President and CEO

November 10, 2017

Casey Adams
Deputy Director of City Legislative Affairs
Department of Consumer Affairs
42 Broadway, 8th Floor
New York, New York 10004

RE: "Fair Workweek Law"
Proposed Rules

Dear Mr. Adams:

The Retail Council of New York State hereby submits the following comments with regard to rules proposed to implement Chapter 12 of Title 20 of the New York City Administrative Code (the "Fair Workweek Law") and the guidance intended for covered employers and workers. The Retail Council represents retail employers of all size and sort throughout the state, including many retail entities with locations in New York City.

Existing best practices throughout the retail industry have as cornerstones these fundamentals that we believe should form a consistent and uniform policy for the entirety of New York State, enforced statewide by the state's Department of Labor:

- Discourage employers – not just retail businesses – from requiring workers to put their lives on hold and be available for work regardless of whether they will be called in or paid;

- Encourage employers to provide to workers who seek flexibility in their work schedules an opportunity to find it;

- Encourage transparency in the scheduling process;

- Encourage employers to give to their workers ownership of their schedules, and encourage workers to take ownership of their schedules, so the employer's available hours can be matched with the workers' schedules; and

- Promote the ability for workers to pick up, swap, trade, or post their assigned hours with minimal managerial intervention and without requiring their employer to make premium or penalty payments.

The captioned rules as proposed put these fundamentals out of reach and fall short of standing as a model for the rest of the state to follow. Please be assured, however, that the Retail Council has been working constructively with the New York State Department of Labor to reach the goals outlined above and, appropriately, govern the whole of New York State. Those concepts are best addressed through the proposed regulations filed by the Commissioner of Labor on November 10, 2017.

The Appellate Division of the Supreme Court of the State of New York ruled in *Wholesale Laundry Board of Trade, Inc. v City of New York* (1962) and in *ILC Data v. County of Suffolk* (1992) that state law preempts local laws pertaining to matters of labor and workforce protection. These decisions render superfluous and void the "Fair Workweek Law" and accompanying rules proposed solely for New York City, and **we underscore emphatically our overarching assertion that the matter of employee scheduling – like other issues pertaining to workforce development – remains fully under the jurisdiction of the state government.**

Our argument favoring statewide superseding notwithstanding, we have specific questions regarding the content of the rules as drafted:

(1) In light of the Appellate Division decisions cited above, from where specifically does New York City derive the power to enforce the "Fair Workweek Law"?

(2) The rules as proposed are unclear as to whether an employer must provide a paper copy of work schedules or if the City would allow an electronic posting system accessible by all employees. Many retailers are committed to reducing their carbon footprints and are concerned that the lack of clarity to the rule would require the constant generation and distribution of reams of paper for distribution to employees. Also, would any updated schedule be required to be given only to employees whose schedules have been updated?

(3) The rules as proposed are equally unclear as to how an employer may "directly notify" an employee of updates made to schedules. We submit that an employer satisfies this requirement by delivering such notice to an employee electronically, via email or otherwise.

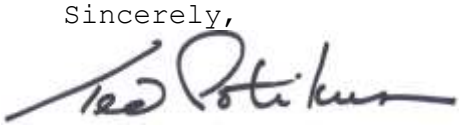
(4) We submit that the proposed rules fail to recognize the universe of scenarios in which an employee may not agree to a modified schedule within 72 hours. The exceptions seemingly provided so far are narrow and do not appear to account for last-minute changes required when employees call out sick unexpectedly or when similar unplanned, unexpected situations arise.

(5) The prohibition against on-call scheduling (§20-1251) is unclear as to what is legally required in writing. What is the retention requirement for the written consent form, and where should it be kept? We understand the rules to require employers to keep documents that show an employee's written consent to any schedule changes in an electronically accessible format for a period of three years, but there is no guidance on consent form language.

We do not seek to block a path toward enforceable rules affecting the scheduling of employees across the job spectrum. Testifying before the New York State Commissioner of Labor in September and October 2017, the Retail Council of New York State is on record supporting the goal to "provide New Yorkers with job opportunities and schedule flexibility they want while helping New York retailers win and grow in a challenging and competitive international marketplace."

A statewide solution, now in reach with the promulgation of regulations from the Department of Labor, is the best path to that goal that I know we share with the City of New York. We look forward to your support for those superseding regulations.

Sincerely,



President and CEO
Retail Council of New York State

RWDSU
Retail, Wholesale and Department Store Union

Stuart Appelbaum, *President*
Jack C. Wurm, Jr., *Secretary-Treasurer*
Joseph Dorismond, *Recorder*

Comments on the Department of Consumer Affairs Proposed Regulations
to Implement the Fair Workweek Laws
The Retail, Wholesale and Department Store Union
November 17, 2017

The Retail, Wholesale and Department Store Union represents over 100,000 workers primarily in retail, food processing, and other low wage sectors. Our comments today will focus on the portions of the proposed fair workweek regulations Our members care deeply about a fair workweek. Unfair scheduling practices undermine a worker's ability to have a stable schedule and an income they can count on. On-call scheduling, one of the worst of the unfair scheduling practices, prevents a worker from knowing whether they will be required to work until just before a scheduled shift. Imagine putting your life on hold to be available for work – regardless of whether you will be called-in or paid. If you are a part-time worker, the uncertainty of your schedule means you can't arrange for a needed second job, and that you can't count on a paycheck to pay rent. If you are a parent, you don't know if you are going to need child care. If you want to continue your schooling, you can't sign up for classes without knowing your availability.

On-call scheduling shifts the costs of doing business from the employer to low wage employees, those who can afford it least. Yet, research has shown that this practice has negative impacts on businesses as well, in the form of higher turnover and reduced morale leading to lower customer satisfaction, yet the practice is still pervasive.

For these reasons, we applaud the Mayor, City Council, and the Department of Consumer Affairs for taking the high road to end these abusive scheduling practices.

Below are several suggestions that we think will improve the implementation of the program.

Outreach and Education
DCA should ensure proper outreach and education on the new regulations. This could include creating and distributing worker-friendly educational materials, conducting education and outreach to employers, and collaborating with community groups and unions to educate workers.

Public Data
DCA should also make their enforcement data public. The information that is made public could including the name of the business, address, specific violations, required penalties or remedies, timeline, and whether or not the penalty has been paid.

Request by an Employee for a Schedule Change

As per section 20-1222(c)(2), voluntary requests in writing from an employee to change their schedule do not trigger a schedule change premium. The rules could benefit from guidance and examples being provided, to ensure the exemption from premiums is confined to requests regarding specific shifts (as opposed to an expressed general desire to work more hours) and those made without the employers prompting or invitation. DCA could consider creating a model form for employers that clearly states that the request for a schedule change has been initiated by the employee.

Employee Consent to Work Additional Hours

The rules should clarify that general or ongoing consent is not sufficient to satisfy the requirements of section 20-1221(d). Written consent must be obtained in each circumstance. This is also an area where DCA could consider creating a model form for employers.

Individual Waivers

The rules should explicitly state that any waiver by an employee of any provision of the law is unlawful and that any request or demand by an employer of an employee to sign such waiver may be subject to penalties.

Vorys comments

From: Griffaton, Michael C. <MCGriffaton@vorys.com>
Sent: Wednesday, November 08, 2017 11:04 AM
To: Rulecomments
Subject: Rules: Implementation of the Fair Workweek Law

I am submitting this comment pursuant to the Notice of Proposed Hearing and Opportunity to Comment on the Fair Workweek Law.

This comment pertains to retail employers and their employees. Unlike fast food employees, under the Law as it pertains to retail employers, it is unclear whether employees can be asked and/or required to work beyond their scheduled shifts. This practice does not implicate the on-call practices that are prohibited in the Law. Therefore, the rules should specifically/expressly provide that a retail employer does not violate the law by asking and/or requiring employees to continue to work beyond their scheduled shifts without penalty in order to account for the changing, unpredictable, and dynamic needs of the retail environment.

Michael C. Griffaton
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Comment on Proposed Rule: Fair Work Week Legislation

Part I: Scope

The Fair Workweek Law will affect the current 95,000 fast food workers as well as a portion of the 338,575 retail workers in New York City (retail workers are defined as those who are employed by retailers with over 20 employees where 50% of their sales come from consumer goods sold to retail consumers).[1] Between these two groups combined, there will be hundreds of thousands of New Yorkers in each of the five boroughs affected by this legislation. Further, it will impact all those hired by fast food restaurants and said retailers after November 26, 2017.

Once the legislation goes into effect the challenge becomes informing covered employees of their rights under these laws. It is difficult to address this group as a whole because they work in different locations throughout New York City and also at different times, spanning shifts over 24 hours. Furthermore, the workers impacted as a group are not required to know about the law because it is not their job to adhere to the new regulation. Being that employers are responsible for implementing the changes required by the new regulations, they generally hold the knowledge about the legal ramifications of the legislation. It follows then that employers should educate their employees about their new rights as they know about and understand the law. In order for the new legislation to be effective, workers first need to know what their rights are, as well as the means by which they can hold employers accountable by enforcing them.

Part II: Current Method of Notification and Why That's Not Likely to Be Effective

The agency has proposed dimensions and font requirements for the poster requirement outlined in § 20-1205 of the New York City Code, which are: "The notice of rights required to be posted pursuant to Section 20-1205 of the Fair Workweek Law shall be on 11x17 inch paper

[1] *Hearing Testimony 3/3/17*.

and in font no smaller than 12 point." Requiring employers to display posters of workers' rights has become commonplace, with the Department of Labor, alone, requiring the display of up to eleven different posters.[2] These posters are a type of transparency mandate[3] meant to address the information asymmetries that exist between workers and employers, which can cause market failures.[4]

However, serious doubts exist about the effectiveness of these posters: "their very ubiquity may mean that they tend to fade into the background of the workplace."[5] One comment made to the National Labor Relations Board's proposed poster rule stated, "My bulletin boards are filled with required notifications that nobody reads. In the past 15 years, not one of our 200 employees has ever asked about any of these required postings. I have never seen anyone ever read one of them."[6] Additionally, a survey of over 4300 low-wage workers found that about 59% did not know their minimum wage and overtime rights and 78% did not know how to file a government complaint, despite the Fair Labor Standards Act requiring covered employers to display a poster showing the federal minimum wage figure in large type at the top.[7]

Part III: Proposed Method and Rationale (Seattle +)

Given that posting in a workplace is an ineffective method of informing employees about their rights under these laws, we recommend that the agency adopt something similar to the

[2] Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 Conn. L. Rev. 177, 198 (2015).
[3] *Id*. at 182.
[4] Amanda L. Ireland, *Notification of Employee Rights Under the National Labor Relations Act: A Turning Point for the National Labor Relations Board*, 13 Nev. L. J. 937, 972-73 (2013).
[5] Alexander, *supra* 212.
[6] Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,017 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).
[7] Alexander, *supra* 198-99, 213.

regulation enacted in Seattle. Seattle *encourages* employers to notify employees of their rights individually. Specifically, their rule states that at the time of hire, the employer is *encouraged* to provide each employee with a copy of the workplace poster giving notice of the rights to secure scheduling under their ordinance.[8] In addition, the employer is *encouraged* to provide the poster in the employee's primary language in physical or electronic format.[9]

We recognize that the Department of Consumer Affairs does not have the authority under the provisions of the Fair Workweek statutes to require private employers to notify their employees of their rights individually, and furthermore that there could be First Amendment implications to such a requirement. Even so, the agency has been tasked with education and outreach (*See* Section 20-1202: "The director shall conduct outreach and education about the provisions of this chapter. Such outreach and education shall be provided to employers, employees and members of the public who are likely to be affected by this law").

For these reasons it follows that it is a more practicable suggestion that the Fair Workweek regulation should *encourage* employers to educate their employees individually. We suggest that New York expand on the Seattle regulation by not only providing new hires with a copy of the poster, but also *encourage* employers to reach out to their current employees by their preferred method of communication, i.e. via email or text message, to inform them of their new rights.

Part IV: Making the Proposal More Attractive to Employers

[8] Ex. A at 25; SHRR 120-350(2), *Practices for administering Secure Scheduling requirements for employees working in Seattle*, Seattle Office of Labor Standards, http://www.seattle.gov/Documents/Departments/LaborStandards/OLS_Final_SS_Rules_04-12-17.pdf (last visited Nov. 14, 2017).
[9] *Id*.

While encouragement is all well and good, we believe that providing employers with incentives to follow the above suggestions would be even more effective. Some possible incentives could be that if employers can prove they have taken affirmative action to inform their employees of their rights they are eligible for: a grace period from fees/penalty/etc., a discount on fees/penalties/etc., recognition of some kind by the agency, or any other incentive deemed appropriate by the agency. We believe that any cost an employer incentive would incur would be more than outweighed by the benefit of having more employees notified of their rights under this law.