



Comments Received by the Department of
Consumer and Worker Protection on
Proposed Rules related to the Adjudication of Violations

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From: Statz, Olga (OATH)
Sent: Monday, December 5, 2022 4:59 PM
To: Rulecomments
Subject: Comment by OATH on DCWP's Amendment of Procedures for Adjudication of Violations (Reference Number 2022 RG 075)

OATH has reviewed the proposed rules and submits the following comment:

Although OATH does not oppose the rule, OATH wishes to clarify that it alone has ultimate decision making authority respecting whether the Trials or the Hearings Division will hear and determine a matter. In other words, although DCWP and other enforcement agencies may decide to file a matter in one or another unit of the tribunal, OATH has and reserves the exclusive right to transfer that matter to the unit it determines is best suited to hear it. OATH's rules provide as much in 48 RCNY §6-08 (3), which states that "Each case docketed with the Hearings Division is subject to review by the Chief Administrative Law Judge, who shall determine whether the case shall proceed at the Hearings Division or be removed to the Trials Division."

DCWP's initial choice of venue in these rules in no way curtails OATH's right.

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December 21, 2022

Commissioner Vilda Vera Mayuga
New York City Department of Consumer and Worker Protection
Via email only: rulecomments@dcwp.nyc.gov

Re: Adjudication of Violations

Dear Commissioner Mayuga:

We represent The New York City Hospitality Alliance (“The Alliance”), a not-for-profit trade association representing New York City’s hospitality industry, including over 2,000 establishments across the five boroughs.

The Alliance opposes the proposed rule change allowing certain labor law claims to be heard by the Hearings Division at the Office of Administrative Trials and Hearings (“OATH”).

Comments

Currently, the rules of the Department of Consumer and Worker Protection require the Department to file all claimed violations of laws and rules related to relationships in the workplace or conferring rights or benefits on workers in the Trials Division at OATH. Such labor law claims often have immense consequences, with six-figure, and sometimes even seven-figure, civil penalties being awarded. With such considerable outcomes on the line, the need for adequate due process is imperative when navigating these claims.

Under the NYC Paid Safe and Sick Leave Law (“PSL”) and the NYC Fair Workweek Law (“FWW”), an employer is not always informed about the substance of allegations made against it in a complaint. Typically, the employer will receive notice that a complaint has been filed (but not the substance of the complaint nor the name of the complainant) as well as a request from the City for documents and information. The request is broad, and will either cover all PSL and/or FWW documents related to the particular establishment that the complaint concerns, or just the business at large.

As a recent example, a small New York City restaurant group with 4 restaurants received a generalized complaint regarding its compliance with PSL across its 4 restaurants over a three-year period, requiring a significant amount of document production without knowing what the specific issue was. The burdens are multiplied as a business opens more restaurants. As another recent example, a business with over 20 restaurants in New York City received a complaint alleging that it violated FWW and was similarly required to produce all documentation concerning its compliance with FWW for the past three years, city-wide. The number of files and documents at issue was in the millions. To this day, the business does not know what the specific allegations are/were.

In short, these claims are often pursued by the City on a “class-wide” or company-wide” basis, and not an individual basis, even if there is a complaint from only one individual. This leads to a lengthy and arduous discovery process, which calls for the utmost due process.

Further, under FWW, the City is required “to keep the identity of any complainant confidential unless disclosure is necessary to resolve the investigation or is otherwise required by law.” 12 N.Y.C. Admin. Code § 20-1207(5). PSL contains an identical confidentiality requirement. See 12 N.Y.C. Admin Code § 20-924(b) (“The department shall maintain confidential the identity of any natural person providing information relevant to enforcement of this chapter unless disclosure of such person's identity is necessary to the department for resolution of its investigation or otherwise required by federal or state law.”). Thus, throughout the entire investigation, the employer may not know who is at issue or the extent of the claims against it. Moreover, since there is no requirement that the City attempt to resolve a claim prior to sending it to OATH, the employer may not know any of this information until it is notified that the matter is before OATH.

The due process afforded in the Hearings Division is an ill-suited mismatch for these types of claims. The Hearings Division is an administrative summons court. Its docket is large and its rules are designed for the summary disposition of matters. The *per diem* hearing officers who preside over the Hearings Division adjudicate routine agency summonses on comparatively straightforward legal and factual issues. Discovery is heavily circumscribed, and hearing procedure is informal.

Though limited pre-hearing discovery is permitted by Hearings Division rules, common practice is for the parties to simply transmit documents for the first time via email during the hearing. This is not a suitable discovery process for such fact-intensive and consequential matters. Further, hearings within the Hearings Division are presided over by *per diem* hearing officers,. These hearing officers are not specialists in one area of the law – in fact, Hearings Division hearing officers often know very little about the legal subject matter of any particular case, and in our experience can often be found doing their best to learn the relative legal principals “on the spot” at the hearing itself. The same goes for the facts of any particular case. In contrast, Trials Division judges have developed specialized knowledge of this area of the law. Coupled with their lighter docket compared to the Hearings Division, along with more robust discovery; Trials Division judges have a deeper understanding of the legal and factual issues at hand.

Employment claims, whether they involve purported violations of PSL, FWW, or other matters, are inherently fact-intensive and require parties to produce witnesses who can attest to what occurred when and the circumstances surrounding it. These issues are only exacerbated if the allegations concern a business's practice City-wide. Thus, to send these types of cases to the Hearings Division would have a detrimental impact on businesses' due process rights and fundamental issues of fairness.

For the reasons listed above, we encourage the Department to not adopt the proposed rule.

Very truly yours,

PESETSKY & BOOKMAN, P.C.

A handwritten signature in black ink, appearing to be 'PD', written over a horizontal line.

By: Phil Dorn, Esq.