

Management Alert



Shifty Business II: Rules Proposed for NYC's Fair Workweek Law

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Seyfarth Synopsis: The NYC Department of Consumer Affairs has proposed rules implementing the Fair Workweek Law, which imposes significant constraints on shift scheduling in the retail and fast food industries. The comment period extends until November 17, 2017, and the law takes effect on November 26.

The Office of Labor Policy and Standards ("OLPS"), part of the New York City Department of Consumer Affairs, has proposed rules implementing the City's Fair Workweek Law. That law, a set of five bills signed into law by Mayor Bill de Blasio in May and effective November 26, 2017, strictly regulates the scheduling practices of fast food and retail employers in New York City. (Further details about the law are available in our prior client alert [here](#).)

Below is a summary of the proposed regulations. The comment period ends on November 17, 2017, after a public hearing that morning.

Definitions

The rules include many definitions of terms that are not defined in the Law. The key definitions are detailed below.

Fast Food Employers

- **Actual hours worked:** As described below, all covered employers will need to keep records of employees' "actual hours worked." The proposed rules define this term to mean the number, dates, times, and locations of hours worked by the employee, regardless of whether that reflects a departure from the advance work schedule provided.
- **Additional shift:** This means a shift not previously scheduled that would be offered to a new fast food employee in the absence of the Fair Workweek Law's access-to-hours requirement.
- **Good faith estimate:** Fast food employers are required to provide each employee with the expected number, days, times, and locations of hours the employee can anticipate working each week. This information must be provided before the employee's first day of work.
- **New fast food employee:** Fast food employers must comply with the access-to-hours provisions of the Law before hiring new employees and provide new employees with a written schedule and an estimate of hours the employee can expect to work. The proposed regulations define a "new employee" as one who has not worked for that fast food employer in the 6 months prior to commencing employment.
- **Overtime pay:** This means payment at a rate (i) at least one and a half times the employee's regular rate of pay under the Fair Labor Standards Act; or (ii) governed by the overtime requirements of the New York Labor Law or applicable wage

orders. Fast food employers will not be required to award additional shifts, or portions thereof, under the access-to-hours provision where doing so would entitle the employee to overtime pay.

Retail Employers

- *Engaged primarily in the sale of consumer goods:* This refers to retail businesses with more than 50% of sales transactions in a calendar year at one or more locations in New York City to retail consumers. Retail businesses that do not meet this definition are not subject to the Fair Workweek Law.
- *Retail consumer:* This is an individual who buys or leases consumer goods. Excluded are manufacturers, wholesalers, or others who buy or lease consumer goods to resell them as new to others. This definition, in conjunction with “engaged primarily in the sale of consumer goods,” identifies the retail businesses that will be subject to the Law.

Fast Food Employers

Fast food employers are also affected by the following rules implementing the substantive provisions of the Law.

Good Faith Estimate

The Law requires fast food employers to provide each employee, upon hire, with a written work schedule and a good faith estimate of hours the employee can expect to work weekly. The proposed rules clarify what information is required in the good faith estimate and provide examples of long-term or indefinite changes for which the estimate must be updated.

Employers must update the good faith estimate of hours for employees if there are any long-term or indefinite changes thereto as soon as possible and before the employee receives the first work schedule following the change.

The rules provide examples of such changes. Long-term and indefinite changes exist if, in any 3 of 6 consecutive workweeks, there are substantial departures from the good faith estimate, such as:

- Number of hours worked differs by 20% from the estimate;
- Days or locations worked differ at least once per week; or
- A change in any morning, afternoon, or night shift to another part of the day at least once per week.

The rules exclude a change in shift time of 15 minutes or less from the definition. Additionally, *each occurrence* of a long-term or indefinite change for which the employer does not provide an updated good faith estimate is a violation of the advance scheduling requirement.

Shift Changes

The Fair Workweek Law requires fast food employers to pay an amount between \$10 and \$75 in “premium pay” for each change to an employee’s schedule made less than two weeks in advance.

The rules also provide that employers will not be obligated to pay a premium for a change in an employee’s work schedule by 15 minutes or less. The example provided is that of an employee who agrees to stay up to 15 minutes past the scheduled end of her shift.

Notice and Offer of Additional Shifts

Under the access-to-hours provisions of the Law, fast food employers must first offer additional shifts to current employees before hiring a new employee to work those shifts. The proposed rules provide that:

- Employers must notify employees in writing, upon hire, of the method by which additional shifts under the access-to-hours provision of the Law will be posted. They must also notify employees of any changes to the notification method within 24 hours of the change. Employers must use that same method to notify all accepting employees as soon as possible after the offered shift has been filled.

- Employers must post a notice of additional available shifts for three consecutive calendar days. When the employer has less than three days' notice of the need to fill a shift (*i.e.*, when an employee unexpectedly quits or takes time off), the notice should be posted as soon as possible. The employer may temporarily assign an existing employee to work a shift that becomes available with less than three days' notice, but must comply with the shift notice provisions for any shifts available in more than three days.
- Employers with 50 or more fast food establishments within New York City may offer additional shifts to employees at all New York City locations or to only those employees working in the same borough as the open shifts.

Accepting and Awarding Additional Shifts

The rules further elaborate how current fast food employees may accept and be awarded additional shifts to be offered under the Law's access-to-hours requirement.

Employers must first award additional shifts to employees currently working at the location of the available shifts.

Employees may accept a subset of additional shifts offered, an entire shift, or *any* shift increment. However, an employer does not have to award a shift increment to an employee when the remainder of the shift is 3 hours or less and was not accepted by other employees.

An employee may accept an open shift that overlaps with that employee's current shift. The employer must award the employee the offered shift instead of the current shift and cannot require the employee to work both shifts' hours as a condition of that grant.

If an employee accepts an offered shift that would entitle the employee to overtime pay, the employer is not required to award that employee the shift, but must still award the largest shift increment possible that would not cause the employee to earn overtime pay (provided that the remainder of the shift is at least 3 hours or is accepted by another employee). Only then may the employer hire a new employee for the open shift.

Recordkeeping

Fast food employers must maintain records in addition to those described in General Provisions below. Fast food employers must maintain records showing good faith estimates provided to employees and the dates and amounts of any premium payments, whether they were noted on wage stubs or other written documentation.

General Provisions

Notice of Rights: The required notice of rights under the Fair Workweek Law must be posted on 11 inch by 17 inch paper with at least 12 point font. A notice of rights has not yet been published.

Posted Notice of Schedules: Employers must not post or otherwise disclose to other fast food or retail employees the work schedule of an employee if the disclosure would conflict with the employee's accommodation based on domestic violence, stalking, or sexual assault victim status.

Recordkeeping: Employers must maintain and retain records documenting their compliance with the law in an electronically accessible format for 3 years. These records must show actual hours worked by each employee each week; an employee's written consent to any schedule changes, where required; and each written schedule provided to an employee. Fast food employers are subject to additional recordkeeping obligations, as discussed above.

Employee Records Requests: The Fair Workweek Law requires employers to provide employees, upon request, with their past schedules as well as the current schedule of other employees in the same work location. Employers have 14 days to complete a request for an employee's own previous schedule. Employers have one week to complete an employee's request for the current schedule of all employees in that location, but cannot disclose the schedule of an employee with an accommodation due to domestic violence, stalking, or sexual assault victim status.

Private Right of Action: Once an individual has filed a complaint with OLPS or commenced a lawsuit based on the Fair Workweek Law, OLPS may continue to investigate an employer even if the complainant's involvement in the case ends. An individual who submitted a complaint under the Fair Workweek Law to OLPS must withdraw that complaint in writing prior to filing a lawsuit. A person who filed a lawsuit based on the Fair Workweek Law must withdraw those claims or have them dismissed with prejudice before filing a complaint with OLPS.

Implications for Employers

Employers should prepare to revise their written policies in accordance with the Fair Workweek Law, and may receive questions from employees in advance of implementation. We will continue to track implementation of the legislation, and advise of any updates.

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Seyfarth Shaw LLP Management Alert | October 30, 2017

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