

Management Alert



Shifty Business IV: NYC Fair Workweek Law and Final Rules Are Now Effective

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Seyfarth Synopsis: The New York City Department of Consumer Affairs has issued final rules to implement the Fair Workweek Law, which imposes significant constraints on shift scheduling in the retail and fast food industries and took effect on November 26.

Two days after the Fair Workweek Law took effect, the Office of Labor Policy and Standards (OLPS), part of the New York City Department of Consumer Affairs (DCA), published final rules implementing the Law. Those rules took effect immediately. They do not significantly change or expand upon the obligations imposed by the statute, nor do they vary materially from the proposed rules issued a few weeks ago.

Below is a summary of the final rules. For further details about the Law, see our prior alerts [here](#) and [here](#).

Definitions

The final rules define several terms used without definition in the Law. The key definitions are detailed below.

General

- **Actual hours worked:** As described below, all covered employers will need to keep records of employees' "actual hours worked." The 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.

Fast Food Employers

- **Additional shift:** This means a shift not previously scheduled that would be offered to a new fast food employee in the absence of the Law's access-to-hours requirement.
- **Good faith estimate:** Fast food employers are required to provide each employee with the number, days, times, and locations of hours the employee can expect to work each week. "Times" for this purpose means the start and end time of each shift. This information must be provided before the employee's first day of work.
- **Current fast food employee:** Fast food employers must provide current employees the opportunity to work an available shift before hiring a new employee to fill the shift. The final rules define "current employee" as one who has worked at least 8 hours in the past 30 days or is otherwise currently on the employer's payroll.
- **New fast food employee:** The final rules revise the definition of "new employee" to one who has not worked at least 8 hours in the prior 30 days for the employer.

- *Overtime pay*: Fast food employers are not required to award additional shifts, or portions thereof, under the access-to-hours provision where doing so would entitle the employee to overtime pay. “Overtime pay” 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.
- *Salaried*: Fast food employees who are salaried are not covered by the Law. The rules clarify that “salaried” means not covered by the overtime requirements of New York state law or regulations.

Retail Employers

- *Engaged primarily in the sale of consumer goods*: This refers to retail businesses with more than 50% of sales transactions to retail consumers in a calendar year at one or more locations in New York City. Retail businesses that do not meet this definition are not subject to the 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 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 final 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.

In one significant deviation from the proposed rules, the final rules provide revised 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% per week;
- Start and end times of one shift per week differ by at least one hour and a total of 6 hours are changed over 6 weeks; or
- Locations or days worked differ at least once per week.

Each occurrence of a long-term or indefinite change for which the employer does not provide an updated good faith estimate before the employee’s next work schedule is a violation of the advance scheduling requirement.

Work Schedules

Fast food employers are required to provide employees with a written notice of work schedules containing all of an employee’s scheduled shifts. The rules provide that on or before a fast food employee’s first day of work, the employer must provide an initial work schedule containing all shifts the employee will work until the start of the first shift on the next work schedule. The employer must also issue an updated work schedule as required by the advance scheduling provisions of the Law.

Shift Changes

The 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 final rules provide that employers are not obligated to pay a premium for changes to a scheduled shift totaling 15 minutes or less. A schedule change premium is required when total changes to a shift exceed 15 minutes. Employers will still be required to secure an employee's written consent to work the additional time.

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 final 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 this 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, even for shifts made available with less than three days' notice.
- When an employer has less than three days' notice of the need to fill a shift, the employer must post the additional shift within 24 hours of being notified. The employer may then temporarily offer any current employee that shift, 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 current employees working at the location of the available shifts, regardless of the employer's other criteria for awarding 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 even accept an open shift that overlaps with that employee's current shift. The employer must award that employee the offered shift instead of the employee's currently scheduled shift and cannot require the employee to work both shifts' hours as a condition of that grant. Only then may the employer hire a new employee for the shift.

An employer is not required to award an accepting employee an offered shift that would entitle the employee to overtime pay. The employer 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 entire 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 noted on wage stubs or other written documentation.

Retail Employers

Work Schedules

The final rules require written work schedules provided by retail employers to span at least seven days.

General Provisions

- *No Waivers:* The final rules explicitly preclude the use of employee waivers of rights under the Law.
- *Written Consent:* Employers must obtain written consent to work additional hours or shifts in reference to a *specific schedule change*. The final rules prohibit a general or ongoing consent, such as one issued at the start of employment.
- *Notice of Rights:* The required notice of rights under the Fair Workweek Law must be posted on 11 x 17-inch paper. Notices have been released: [Retail](#), [Fast Food - Fair Workweek](#), and [Fast Food - Pay Deductions](#). Employers should expect notices to be released in additional languages and must post notices in any language that is the primary language of 5% of their employees.
- *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 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 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 Law to OLPS must withdraw that complaint in writing prior to filing a lawsuit. An individual who filed a lawsuit based on the Law must withdraw those claims or have them dismissed with prejudice before filing a complaint with OLPS.

Implications for Employers

In addition to its final rules, the DCA announced that OLPS "will be going door-to-door to ensure that New Yorkers are aware of their rights and their obligations under these new laws. While [the agency's] focus in these initial months will be on outreach and education, [it] will investigate any complaints [it] receive[s]." Employers should revise their written policies in accordance with the Fair Workweek Law, and may receive questions from employees about the newly implemented law.

We will continue to track developments related to the Law and advise of any updates.

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