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New York City Enacts Laws Limiting Employers' Flexibility To Staff Employees

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On May 24, 2017, the New York City Council passed five bills – collectively called the "Fair Workplace" legislative package – four of which significantly restrict the ability of fast food and retail employers to schedule their staff. On May 30, 2017, Mayor de Blasio signed these bills into law, making their effective date November 26, 2017. As discussed below, these laws severely impact the ability of fast food and retail employers to create and modify their employees' schedules and impose harsh penalties for changes, despite employers' legitimate scheduling needs. A final bill passed with this package requires fast food employers to deduct voluntary contributions to not-for-profit organizations from employees' pay.

Which Establishments Are Covered?

The legislation defines a "fast food establishment" as any establishment (i) that has as its primary purpose serving food or drink items; (ii) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out or delivered to the customer's location; (iii) that offers limited service; (iv) that is part of a chain (a set of establishments that share a common brand or that are characterized by standardized options for decor, marketing, packaging, products and services); and (v) that is one of 30 or more establishments nationally, including (a) an integrated enterprise that owns or operates 30 or more such establishments in the aggregate nationally,[1] or (b) an establishment operated pursuant to a franchise where the franchisor and the franchisees of such franchisor own or operate 30 or more such establishments in the

1 An integrated enterprise is defined as two or more entities sufficiently integrated so as to be considered a single employer as determined by application of the following factors: (i) degree of interrelation between the operations of multiple entities; (ii) degree to which the entities share common management; (iii) centralized control of labor relations; and (iv) degree of common ownership or financial control.

aggregate nationally.[2] This is the same definition as the one governing applicability of the state's recent fast food minimum wage rate regulations.

The legislation defines a "retail business" as any entity with 20 or more employees engaged primarily in the sale of consumer goods at one or more stores within the city. "Consumer goods" means products that are primarily for personal, household, or family purposes, including but not limited to appliances, clothing, electronics, groceries, and household items. In determining the number of employees who work for a retail business, the law requires counting all full-time, part-time and temporary employees. If the number of employees fluctuates, the number of employees is determined for the current calendar year based upon the average number of employees who worked for compensation per week during the preceding calendar year. Finally, if the employer operates a chain business, then the total number of employees in that group of establishments has to be counted.

Scheduling Restrictions For Fast Food Establishments

Before employees receive their first work schedule, fast food employers will be required to provide employees with a good-faith estimate, in writing, setting forth the number of hours they can expect to work per week for the duration of their employment. The estimate must include the expected dates, times and locations for the scheduled work hours. If a long-term or indefinite change is made to that good-faith estimate, the fast food employer will be required to update the estimate as soon as possible following the change.

Then, before fast food employees' first day of work, employers will also have to provide employees a written work schedule that identifies their regular and on-call shifts. The schedule must span a period of at least seven days. All subsequent schedules must be provided with at least 14 days' notice.

Fast food employers will have to post schedules in a conspicuous area at the workplace and transmit them to each employee in hard copy (and by electronic means if such methods are regularly used to communicate scheduling information). If the employer needs to make a change to the schedule, the employer has to provide the updated schedule to the affected employees and re-post the schedule at the worksite within 24 hours of the employer's knowledge of the change.

Fast food employers will also be required, upon request, to provide the requesting employee's schedule within the last three years and to provide a requesting employee with the most current version of the work schedule for all fast food employees who work at the same fast food establishment.

Fast food employers will not be able to force employees to work or to be available to work hours not included in their initial written work schedules. If a fast food employee agrees to work hours that are not scheduled, the employee's written consent must be obtained.

Finally, if a fast food employee's schedule varies from the original written schedule, the employee will now be entitled to certain premiums:

- $10 for each change to the work schedule provided with at least 7 but less than 14 days' notice where: (i) additional hours or shifts are added to the schedule; or (ii) the date or start or end time of a regular shift or on-call shift is changed with no loss of hours.
- $20 for each change to the work schedule provided with at least 7 but less than 14 days' notice where: (i) hours are subtracted from a regular or on-call shift; or (ii) a regular or on call shift is cancelled.

2 In other words, a franchisee can own a limited number of locations, but if the franchisor has granted at least 30 licenses to operate the franchise, that franchisee is covered by the new law.

- $15 for each change to the work schedule provided with less than 7 days' notice where: (i) additional hours or shifts are added to the schedule; or (ii) the date or start or end time of a regular shift or on-call shift is changed with no loss of hours.
- $45 for each change to the work schedule provided with less than 7 days' notice but at least 24 hours' notice where: (i) hours are subtracted from a regular or on-call shift; or (ii) a regular or on call shift is cancelled.
- $75 for each change to the work schedule provided with less than 24 hours' notice where: (i) hours are subtracted from a regular or on-call shift; or (ii) a regular or on call shift is cancelled.

These premiums are due on the fast food employees' regularly scheduled pay day. The only itemized exceptions to this rule are when the employers' operations cannot begin or continue because of: (i) threats to the employees or the employer's property, (ii) utility failure or shutdown of public transportation, (iii) fire, flood, or natural disaster, (iv) a declared state of emergency, or (v) severe weather conditions that pose a threat to employee safety, although when a fast food employer adds shifts to an employee's schedule to cover for or replace another employee who cannot safely travel to work, the replacing or covering employee is entitled to the schedule pay premiums. Other exceptions to the requirement to pay these premiums include where an employee requests a schedule change in writing, or when two employees voluntarily trade shifts with one another pursuant to an existing policy allowing for the exchange of shifts.

Notably, despite penalizing fast food employers for adding new and unscheduled shifts to existing employees' schedules, another law in the Fair Workplace legislative package will also require employers to offer regular or on-call shifts to currently employed employees and prohibit employers from hiring new employees to fill these shifts. This requirement to offer shifts to a fast food employer's existing employees extends to employees who work at *all* fast food establishments owned by the same employer and is not limited to the employees at a single location.

Furthermore, when shifts become available that must be offered to current fast food employees, the employer will be required to post a notice that states (i) the number of shifts being offered; (ii) the schedule of the shifts; (iii) whether the shifts will occur at the same time each week; (iv) the length of time such fast food employer anticipates requiring coverage of the shifts; (v) the number of fast food employees needed to cover the shifts; (vi) the process, date and time by which employees may notify their employer of their desire to work the shifts; (vii) the criteria that the employer will use for the distribution of the shifts; (viii) a notice that an employee may accept a subset of the shifts offered but that shifts will be distributed according to the criteria described in the notice; and (ix) an advisement that while employees working at all locations owned by the employer may accept offered shifts immediately, shifts will be distributed first to fast food employees currently employed at the location where the shifts will be worked. The fast food employer will be required to post this notice for three consecutive calendar days in a conspicuous and accessible location where notices are customarily posted and provide the notice in writing directly to each fast food employee electronically.[3]

Finally, a third law in the Fair Workplace legislative package will prevent fast food employers from requiring any employee "to work two shifts with fewer than 11 hours between the end of the first shift and the beginning of the second shift" where the "first shift ends the previous calendar day or spans two calendar days," unless the fast food employee requests or consents in writing. If a fast food employer schedules an employee to work such shifts, it has to pay the employee a $100 premium for each instance they occur.

3 *This* electronic notice requirement is not subject to the caveat that notices regularly be provided electronically.

Scheduling Restrictions For Retail Employers

The Fair Workplace legislative package also includes scheduling restrictions for retail employers that are not fast food establishments. Retail employers will no longer be permitted to: (i) schedule an employee for any on-call shift, (ii) cancel any regular shift for a retail employee within 72 hours of the scheduled start of such shift, (iii) require a retail employee to work with fewer than 72 hours' notice, unless the employee consents in writing; and (iv) require a retail employee to contact a retail employer to confirm whether or not the employee should report for a regular shift fewer than 72 hours before the start of such shift.

Notwithstanding these new prohibitions, a retail employer will still be able to (i) grant an employee time off pursuant to an employee's request, (ii) allow an employee to trade shifts with another employee; and (iii) make changes to employees' work schedules with less than 72 hours' notice if the employer's operations cannot begin or continue due to: (a) threats to the retail employees or the retail employer's property, (b) a failure of public utilities or the shutdown of public transportation, (c) a fire, flood or other natural disaster, or (d) a state of emergency declared by the president of the United States, governor of the state of New York or mayor of the city.

The law will also require retail employers to provide employees with written schedules no later than 72 hours before the first shift on the work schedule and to conspicuously post the schedule at least 72 hours before the beginning of the scheduled hours of work. They will be required to update the schedule and directly notify affected employees after making changes to the work schedule, and also transmit the work schedule by electronic means, if such means are regularly used to communicate scheduling information.

Upon request, a retail employer will also have to provide an employee with (i) his or her work schedule, in writing, for any week the employee worked within the prior three years, and (ii) the most current version of the work schedule for all retail employees at that work location, whether or not changes to the work schedule have been posted.

Payroll Deductions for Voluntary Contributions to Not-For-Profit Organizations

As a final measure, the Fair Workplace legislative package also includes a requirement that fast food employers, upon employee request, to set up payroll deductions for voluntary contributions to certain authorized not-for-profit organizations, and remit them *directly* to those organizations.

The legislation defines a "not-for profit" organization as any entity organized under any state's not-for-profit laws, but explicitly excludes "labor organizations" – i.e., unions – as that term is defined by federal and state law. However, such organizations could include groups like Fight for $15 or Make the Road New York, which were influential in lobbying for the Fair Workplace legislation and the state fast food minimum wage protections.

Under this new law, fast food employers will be required to create a written authorization to provide to its employees that includes the following information: (i) the employee's name, address, and signature; (ii) the amount, frequency and start date of the contribution; (iii) the entity's name, address, email, web address (if applicable), phone number, and contact person; and (iv) a "statement notifying the fast food employee that contributions are voluntary and that the authorization to deduct is revocable at any time by submitting a written revocation to the not-for-profit." An employer will also have to begin/end the requested deductions no later than the first pay period after 15 days of its receipt of the authorization or revocation. Employers must remit the contributions within 15 days after the payroll deduction.

Notice and Recordkeeping Provisions

The Fair Workplace legislative package directs the creation of an office of labor standards. The director of that office is required to publish posters that outline all of the rights and protections created by this package. These notices will be available on the New York City website for download. Every fast food and retail employer is required to post a copy of these notices in a conspicuous location, provided that any employee works at a job site covered by the new laws. For the scheduling laws, the employer will also be required to post the notice in English and in any other language spoken by at least five percent of the employees at that job site.

Affected employers will need to retain records demonstrating compliance with the scheduling laws for at least three years, and records demonstrating compliance with the contributions law for at least two years. The newly created department of labor standards will be permitted access to those records with appropriate notice in furtherance of an investigation of an employer. The law provides that a failure to maintain, retain, or produce these records creates a rebuttable presumption that a claimed violation is true.

Not-for-profit organizations also have certain disclosure and registration obligations under the law.

Anti-Retaliation Provisions

The Fair Workplace legislative package also contains anti-retaliation provisions that make it unlawful to take any adverse action against an employee who attempts to exercise their rights under the new laws. Adverse actions include "threatening, intimidating, disciplining, discharging, demoting, suspending or harassing an employee, reducing the hours or pay of an employee, informing another employer that an employee has engaged in activities protected by this chapter, and discriminating against the employee, including actions related to perceived immigration status or work authorization."

Enforcement

There are three enforcement mechanisms for the Fair Workplace legislative package. First, it provides for administrative enforcement by the director of the newly created labor standards division. Second, it empowers the NYC corporation counsel to bring lawsuits against fast food and retail employers for violations of the scheduling laws only. Finally, the Fair Workplace legislative package also creates a private right of action of individuals to sue employers under certain laws directly.

Administrative Investigations by the Labor Standards Division

Administrative investigations can be commenced by the filing of a complaint, but the labor standards division may also open investigations on its own initiative. Upon receiving a complaint, the labor standards division will investigate the complaint. The law requires the entity under investigation to provide the labor standards division "with information or evidence that the office requests." The labor standards division is also required to keep the name of any complainant confidential to the extent possible.

The division of labor standards is authorized to grant the following forms of relief when investigating violations of the scheduling laws: (i) "[a]ll compensatory damages and other relief required to make the employee or former employee whole," and (ii) an order directing the employer to post the required posters and provide the required notices.

For any investigation of the anti-retaliation provisions of the scheduling laws, the division of labor standards is authorized to (i) rescind any discipline the employer imposed (e.g., the division may reinstate any employee terminated and offer back pay for any loss resulting from discipline that violated the anti-

retaliation provisions), (ii) levy a penalty of $500 for each violation of the anti-retaliation provision that does not include termination, and (iii) levy a penalty of $2,500 for each violation involving termination.

For any violation of the advance scheduling requirement found in section 20-1221 of the new law, the director of labor standards is authorized to issue a penalty of $200 per order directing compliance with the provision.

For any violation of the requirement to provide schedule change premium pay found in section 20-1222 of the new law, the director of labor standards is authorized to issue a penalty of $500 per order directing compliance with the provision.

For any violation of the requirement to provide additional shifts to current fast food employees before hiring new fast food employees found in section 20-1241 of the new law, the director of labor standards is authorized to issue a penalty of $500 per order directing compliance with the provision.

For any violation of the prohibition against on-call scheduling of retail employees found in section 20-1251 of the new law, the director of labor standards is authorized to issue a $500 penalty or the employee's actual damages, whichever amount is greater.

For any violation of the requirement to provide retail employees with written work schedules no later than 72 hours before the first shift of the work schedule found in section 20-1252 of the new law, the director of labor standards is authorized to issue a penalty of $300.

For any violation of the contributions law, the director of labor standards is authorized to recover damages equal to the missing remittance amount (s) plus interest on behalf of the not-for-profit. In addition, the director is authorized to issue a civil penalty of $500 per violation, $1,000 if there have been two or more willful violations within any consecutive three year period, and $1,000, plus back pay and reinstatement (if applicable), for violations of the retaliation provision in the law.

All of these penalties can accumulate quickly because they can be imposed on a per-employee basis for each violation.

In addition, the director of the labor standards division can seek a civil monetary penalty of $500 for the first violation of the scheduling laws, payable to New York City. If the agency uncovers a second violation that occurs within two years of the first violation, the employer may be penalized up to $750 for that violation. Each subsequent violation can yield a civil monetary penalty up to $1,000. Like the penalties payable to the employees, these civil monetary penalties can accumulate quickly because they can be imposed on a per-employee basis for each violation. If the labor standards division finds there is a "pattern and practice" of violating the scheduling laws, it can impose a $15,000 civil monetary penalty.

Actions Commenced By Corporation Counsel

NYC's corporation counsel – who heads the city's legal department – or its designee may also initiate in any court of competent jurisdiction a lawsuit in order to secure permanent injunctions, enjoining any acts or practices that constitute such violation, mandating compliance with the provisions of the scheduling laws or such other relief as may be appropriate.

Private Rights of Action

Finally, the Fair Workplace legislative package provides covered employees the right to file their own lawsuits for: (i) alleged violations of the anti-retaliation provisions found in section 20-1204, (ii) alleged violations of the recordkeeping, notice and posting requirements of section 20-1221, (iii) alleged violation of the requirement of pay schedule change premiums in subdivision a and b of section 20-1222, (iv) alleged violation of the requirement to offer open shifts to existing fast food employees in subdivision a, b, d, f, and g

of section 20-1241, (v) alleged violations of section 20-1251 prohibiting on-call scheduling of retail employees, (vi) alleged violations of section 20-1252 requiring written work schedules for retail employees, and (vii) alleged violations of the contributions law. The contributions law also provides a private right of action for not-for-profits and includes the possible imposition of punitive damages.

Employees who file lawsuits under the scheduling laws may seek compensatory damages including back pay and unpaid schedule change premiums. These employees can also seek injunctive and declaratory relief such as rescission of any discipline issued in violation of the anti-retaliatory provisions, reinstatement if the employee was terminated in violation of the anti-retaliatory provisions, and an order directing the employer to post notices or maintain records required under the laws. An employee can also seek reasonable attorneys' fees. There is a two-year statute of limitations and a requirement that an employee who files a lawsuit notify the labor standards division. Employees who file complaints with the labor standards division are prohibited from filing lawsuits unless the complaint with the labor standards division is withdrawn or dismissed without prejudice.

Publicity For The Fair Workplace Legislative Package

The director is also charged with publishing an annual report on the New York City website that addresses the effectiveness of the Fair Workplace legislative package. The report is required to identify the number of complaints received pursuant to these laws, the number of complaints not substantiated, the amount of notices of violation issued, the number and nature of adjudications, the amount of complaints resolved, and the average duration of time from processing of a complaint through resolution.

Conclusion

The Fair Workplace legislative package represents a fundamental paradigm shift in retail and fast food employers' ability to schedule staff in a flexible manner in order to meet day-to-day needs of a business. It also gives certain not-for-profit organizations a fast and easy way to raise funds to support their efforts to increase fast food workers' entitlements under the law.

At the present time, there are reports that Governor Cuomo may take steps to supersede the law, but to date, no steps have been announced. Moreover, it is unclear whether businesses will file litigation to enjoin the implementation of any or all of these new laws. Nevertheless, under the assumption that this Fair Workplace legislative package will take effect, New York City retail and fast food employers should consider evaluating and analyzing prior years' sales and scheduling data to determine long-term scheduling and staffing needs, in order to prepare for the advance scheduling requirements of the new laws.