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'Fair Work Week' Legislation Will Significantly Impact Fast Food and Retail Employers

By Carolyn D. Richmond, Glenn S. Grindlinger and Raquel A. Gutiérrez

On May 24, 2017, the New York City Council passed a legislative package of five bills, known as the "Fair Work Week" legislation. On May 30, 2017, Mayor Bill de Blasio signed the legislative package into law. These new laws are primarily concerned with scheduling and workplace management practices in fast food and retail establishments. The legislation gives the New York City Department of Consumer Affairs (DCA) authority to impose monetary penalties on employers who violate its provisions, and, in certain circumstances, it permits employees to file claims in court. The legislation also explicitly prohibits employers from retaliating against employees seeking to enforce their rights. The new laws will take effect on November 26, 2017.

The following definitions are applicable to the provisions of the Fair Work Week legislation:

- A "fast food establishment" is one: (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; and (v) that is one of 30 or more establishments nationally (including franchisors and franchisees if they own or operate 30 or more establishments in the aggregate).
- A "fast food employee" refers to any person employed or permitted to work at or for a fast food establishment by any employer that is located within the city where such job duties include at least one of the following: customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning or routine maintenance.
- A "retail business" refers to any entity with 20 or more employees that is engaged in the sale of consumer goods at one or more stores within the city. For the purposes of this definition, "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.

A summary of each law is set forth below.

Intro. 1396-A: Fast Food Employees Must Receive 14 Days' Notice of Schedule

This law is intended to make the workweek of fast food employees more predictable. It requires a fast food employer to give each new hire a "good faith" estimate of the employee's schedule and subsequently provide each employee (whether a new hire or not) with his or her schedule at least 14 days in advance. Each provided work schedule must span a period of at least seven days and contain all anticipated regular shifts and on-call shifts the employee will work or be required to be available to work. In addition to providing the work schedule to each employee, fast food employers must also post the work schedule in a conspicuous place at least 14 days in advance. Further, upon an employee's request, fast food employers must provide a copy of an employee's work schedule for the past three years.

Once posted and provided to employees, if any change is made to the schedule, the employer is required to update it within 24 hours and provide the revised written schedule to the employee. However, a fast food employee is entitled to decline working additional hours that were not included in

the original schedule. If the employee consents to work additional hours, the consent must be recorded in writing at or before the start of the shift.

If a fast food employer makes a schedule change after the 14-day notice period has expired, the employee will be entitled to a "schedule change premium," as follows:

- With less than 14 days' notice, but at least seven days' notice, $10 for each instance where additional hours or shifts are added or the date or start or end time of a shift is changed with no loss of hours;
- With less than 14 days' notice, but at least seven days' notice, $20 for each instance where hours are subtracted from a shift or a shift is cancelled;
- With less than seven days' notice, $15 for each instance where additional hours or shifts are added or the date or start or end time of a shift is changed with no loss of hours;
- With less than seven days' notice but at least 24 hours' notice, $45 for each instance in which hours are subtracted from a shift or a shift is cancelled; and
- With less than 24 hours' notice, $75 for each instance in which hours are subtracted from a shift or a shift is cancelled.

Employers do not need to pay the above listed "schedule change premiums" in the following circumstances:

- The employee requests the change in writing or voluntarily trades shifts with another employee;
- The employer is required to pay the employee overtime for a changed shift; or
- An event occurs prohibiting the employer's ability to operate, such as:
    - threats to the employees or employer's property;
    - failure of public utilities or the shutdown of public transportation;
    - a fire, flood or other natural disaster; or
    - a state of emergency declared by the federal, state or city government.

The Office of Labor Standards, currently operating under the DCA, has the authority to impose civil penalties of $500 for the first violation of this regulation and up to $1,000 after multiple violations. This law also gives an employee the right to file a private civil action within two years of an alleged violation for damages and attorneys' fees.

Intro. 1384-A: Employees May Authorize Employers To Remit Contributions to Nonprofits Through Payroll Deductions

This legislation gives a fast food employee the ability to make a voluntary contribution to a not-for-profit organization of their choosing through payroll deductions. Upon written authorization from an employee and upon receipt of a registration letter from the selected not-for profit organization, a fast food employer will be required deduct contributions from the employee's pay and remit them directly to the not-for-profit organization requested by the employee.

Within five days of receipt of such authorization, an employer must provide a copy of the authorization to the covered not-for profit organization. The employer will be required to make the first deduction no later than the first pay period after 15 days of receipt of the authorization and must remit the deductions to the not-for-profit no later than 15 days after the deduction is taken.

An employer is not required to honor an employee's authorization for a contribution unless that contribution is at least three dollars per week (if paid weekly) or six dollars biweekly (if paid biweekly). Upon request by the employer, the not-for-profit organization is responsible for reimbursing the employer for the costs associated with the deduction and remittance, as calculated pursuant to the rules of the DCA.

Employers should remember, however, that under New York law, unless the deduction is legally required (e.g., tax withholdings), employers cannot make voluntary deductions from employee wages that bring the employee's hourly wage rate below the minimum wage rate even if the deduction is authorized by the employee in writing.

Fast food employers who fail to make deductions and remittances to a not-for-profit after receiving authorization from an employee will be subject to civil penalties of up to $500 for each violation and up to $1,000 for repeated violations. Additionally, if there is an alleged violation, an aggrieved employee

can file a claim in court to obtain compensatory and punitive damages as well as reasonable attorneys' fees and costs.

This bill will automatically sunset after two years unless extended by the City Council.

Intro. 1387-A: On-Call Scheduling Prohibited in Retail Businesses

This portion of the legislative package bans "on-call scheduling" for retail employees. On-call scheduling refers to any time that the employer requires the employee to be available to work, to contact the employer or the employer's designee to determine if the employee must report to work or to wait to be contacted by the employer or the employer's designee to determine whether the employee should report to work.

In addition to the outright prohibition of on-call hours, under this law an employer cannot:

- Cancel a shift for a retail employee within 72 hours of the start of a work shift;
- Require a retail employee to work with fewer than 72 hours' notice (unless the employee consents in writing); or
- Require a retail employee to contact an employer to confirm whether the employee should report for a regular shift fewer than 72 hours before the start of such shift.

A retail employer may schedule or cancel shifts within 72 hours of the start of the scheduled shift only under the following circumstances:

- The employee requests time off;
- To allow the employee to voluntarily trade shifts with another employee;
- An event occurs prohibiting the employer's ability to operate, such as threats to the employees or employer's property; failure of public utilities or the shutdown of public transportation; a fire, flood or other natural disaster; or a state of emergency declared by the federal, state or city government.

The employer must post a physical copy of the work schedule of all employees at that location at least 72 hours prior to the beginning of the scheduled shifts in an area accessible and visible to all employees. This bill also requires employers, upon request, to furnish the retail employee's work schedule for the past three years.

Intro. 1388-A: "Clopening" Shifts Prohibited in Fast Food Establishments

This law bans the practice of consecutive work shifts in fast food restaurants where an employee works the closing shift one night and the opening shift the following day ("clopening").

A fast food employer is not permitted to schedule a fast food employee to work two shifts with fewer than 11 hours between the end of the first shift and the beginning of the second shift when the first shift ends the previous day or spans two days. If a fast food employer schedules an employee to work "clopening" shifts, the employer is required to compensate the employee an additional $100.

However, when an employee requests the consecutive shifts or consents to the consecutive shifts in writing, the employer will not be required to pay the $100 penalty.

Intro. 1395-A: Additional Work Shifts Must Be Offered to Existing Fast Food Employees

This law requires a fast food employer, before hiring additional employees, to offer additional work shifts to existing employees at all fast food establishments owned by the fast food employer or at a subset of establishments based on their geographic distribution when the employer owns at least 50 establishments in New York City.

When additional shifts become available, a fast food employer will be required to notify the fast food employees of:

- The total available shifts;
- The schedule of available shifts;
- Whether those shifts occur at the same time each week;
- The length of time the employer needs coverage;
- The process, date and time by which fast food employees may notify the employer of their desire to work the shifts;
- The criteria the employer will use to distribute the shifts;

- An advisement that an employee may accept a subset of shifts but that the shifts will be distributed according to the criteria in the notice; and
- An advisement that shifts will first be distributed to employees currently employed at the location where the shifts will be worked.

The employer must post the notice in a conspicuous and accessible location for three consecutive calendar days and provide the notice electronically to each employee, if the employer generally communicates with its employees electronically.

A fast food employer may hire additional employees to cover the shifts only after existing employees either reject the shifts or if the employer is required to pay existing employees overtime for the additional shift work.

It is evident that this new legislation will impose significant administrative burdens on fast food and retail employers. Further, there is increasing chatter in Albany that the New York State Department of Labor will issue regulations addressing these issues that will apply to all New York employers and/or may supersede the Fair Work Week legislation – but no proposal has been issued and it is, at this time, unclear what, if anything, the NYDOL will issue.

Therefore, New York City employers must be prepared to comply with the Fair Work Week legislation beginning on November 26, 2017, and ensure that they implement record keeping policies and dedicate human resources to comply with these new laws. Moreover, employers will need to keep records of the transactions detailed herein for a period of at least three years or else risk adverse action by the DCA. Employers should work closely with counsel in order to properly comply with the Fair Work Week legislation.

For more information about this alert, please contact Carolyn D. Richmond at 212.878.7983 or crichmond@foxrothschild.com, Glenn S. Grindlinger at 212.905.2305 or ggrindlinger@foxrothschild.com, Raquel A. Gutiérrez at 646.601.7637 or rgutierrez@foxrothschild.com or any member of the firm's Hospitality Practice.