

NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS

Notice of Adoption

Notice of Adoption of Amendment of Title 6 of the Rules of the City of New York by reorganizing chapter 7 and adding a new subchapter F.

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Commissioner of the Department of Consumer Affairs by Sections 20-a, 1043, and 2203(f) of the New York City Charter, and local law numbers 99, 100, 106, and 107 for the year 2017 and in accordance with the requirements of Section 1043 of the New York City Charter, of the adoption of an amendment to Title 6 of the Rules of the City of New York by reorganizing chapter 7 and adding provisions that implement Chapter 12 of Title 20 of the New York City Administrative Code (“Fair Work Practices”).

The rule was proposed and published on October 18, 2017. The required public hearing was held on November 17, 2017.

Statement of Basis and Purpose of Rules

In May 2017, Mayor de Blasio signed into law local law numbers 99, 100, 106 and 107, adding chapter 12 to Title 20 of the Administrative Code, which regulates scheduling for fast food and retail workers in New York City. Collectively, these local laws have been referred to as the “Fair Workweek Law.” Specifically, the Fair Workweek Law requires that fast food employers provide employees with two weeks of notice of schedule and pay premiums to employees for changes made to their schedules, and offer open shifts to existing fast food employees. The Fair Workweek Law also bans “clopenings” for fast food employees, bans on-call scheduling for retail employees, and requires that retail employees receive 72 hours advance notice of schedules.

Chapter 7 of Title 6 of the Rules of the City of New York, entitled “Earned Sick Time,” previously contained only the rules implementing the Earned Sick Time Act. This rulemaking renames chapter 7, assigns the Earned Sick Time rules to a new subchapter B of chapter 7, and adds a new subchapter F to implement the Fair Workweek Law. Specifically, this rulemaking:

- Changes the title of chapter 7 to “Office of Labor Policy and Standards.”
- Organizes chapter 7 into subchapters, including the Earned Sick Time rules under a new subchapter B.
- Adds a new subchapter F containing the rules necessary to implement the Fair Workweek Law.

These rules:

- Define a “long term or indefinite change” in reference to a good faith schedule estimate.
- Establish a violation for failing to provide an updated good faith estimate when there is a long term or indefinite schedule change.
- Establish when an employer does not need to post a notice of an employee’s schedule.
- Establish that an employer must inform fast food employees of the method by which additional shifts will be posted.
- Establish which employees a fast food employer must notify of an additional shift if the employer has 50 or more fast food establishments in the City.
- Establish when a fast food employer can temporarily offer additional shifts to current fast food employees while a posting to current fast food employees is pending of additional shifts.
- Establish that a fast food employer must communicate to its employees that a shift has been filled.
- Establish that a fast food employer must pay a schedule change premium for changes of more than 15 minutes in the time of a scheduled shift.
- Clarify that a fast food employer is not required to pay a schedule change premium to an employee who uses sick time.
- Establish that a fast food employer does not need to award a shift to an employee who accepts part of the shift if the remaining part of the shift is under 3 hours or has not been filled by another employee.
- Establish that, when a fast food employee accepts an offered shift that overlaps with the fast food employee’s existing shift, the fast food employer may not give the offered shift to a new employee.
- Establish that, when a fast food employee accepts a shift that would entitle the employee to overtime, the fast food employer must give the employee only the portion

- of the shift that would not entitle the employee to overtime.
- Specify the records an employer has to maintain.
- Specify the procedure for filing a private cause of action.
- Establish that rights pursuant to the Fair Workweek Law cannot be waived prospectively.

Sections 20-a, 1043 and 2203(f) of the New York City Charter and local law numbers 99, 100, 106 and 107 of 2017 authorize the Department of Consumer Affairs to make these proposed rules.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this Department, unless otherwise specified or unless the context clearly indicates otherwise.

Rules

Section 1. The title of chapter 7 of Title 6 of the Rules of the City of New York is amended to read as follows:

CHAPTER 7 [EARNED SICK TIME] OFFICE OF LABOR POLICY AND STANDARDS

§ 2. Chapter 7 of Title 6 of the Rules of the City of New York is amended by adding new subchapters A, B, C, D, E and F, moving all rules relating to earned sick time to subchapter B as added by this rule, and amending section 7-01, subdivision (c) of section 7-12 and subdivisions (a) and (c) of section 7-13, to read as follows:

SUBCHAPTER A [RESERVED]

SUBCHAPTER B: EARNED SICK TIME

§ 7-01 Definitions

- (a) As used in this [chapter] subchapter, the terms “calendar year,” “domestic worker,” “employee,” “employer,” “health care provider,” “paid sick time,” and “sick time” shall have the same meanings as set forth in section 20-912 of the Administrative Code.
- (b) As used in this [chapter] subchapter, the term “temporary help firm” means an organization that recruits and hires its own employees and assigns those employees to perform work or services for another organization to: (i) support or supplement the other organization’s workforce; (ii) provide assistance in special work situations including, but not limited to, employee absences, skill shortages or seasonal workloads; or (iii) perform special assignments or projects.

§ 7-12 Written Sick Time Policies

....

- (c) Nothing in this [chapter] subchapter shall prevent an employer from making exceptions to its written sick time policy for individual employees that are more generous to the employee than the terms of the employer’s written policy.

....

§ 7-13 Employer Records

- (a) Employers must retain records demonstrating compliance with the requirements of the Earned Sick Time Act, including records of any policies required pursuant to this [Chapter] subchapter, for a period of three years unless otherwise required by any other law, rule or regulation.

”””

- (c) If the department issues a subpoena or document demand, an employer shall provide the department with access to records documenting its compliance with the requirements of the Earned Sick Time Act and the provisions of this [chapter] subchapter, upon appropriate notice, at the department’s office.

....

SUBCHAPTER C [RESERVED]

SUBCHAPTER D [RESERVED]

SUBCHAPTER E [RESERVED]

SUBCHAPTER F: FAIR WORKWEEK

§ 7-601 Definitions

(a) As used in Title 20, chapter 12 of the New York City Administrative Code and this subchapter, the following terms have the following meanings, except as otherwise provided:

“Actual hours worked” means the number, dates, times and locations of hours worked by an employee for an employer, whether or not such hours differ from the work schedule provided in advance.

“Additional shift” is a shift not previously scheduled that would be offered to a new fast food employee but for the requirements of section 20-1241 of the Fair Workweek Law.

“Clopening” means 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 calendar day or spans two calendar days.

“Current fast food employee” as that term is used in section 20-1241 of the Fair Workweek Law and these rules means a fast food employee who has worked at least eight hours in the preceding 30 days or is otherwise currently on the fast food employer’s payroll.

“Dates” as that term is used in subdivision (a) of section 20-1221 of the Fair Workweek Law means days of the week.

“Directly notify” as that term is used in subdivision (b) of section 20-1252 of the Fair Workweek Law means to deliver to an individual employee.

“Engaged primarily in the sale of consumer goods” as that term is used in the definition of “retail employer” in section 20-1201 of the Fair Workweek Law means greater than fifty percent of sale transactions in a calendar year at one or more locations in the City are to retail consumers.

“Fair Workweek Law” means chapter 12 of Title 20 of the Administrative Code of the City of New York.

“Good faith estimate” means the number of hours a fast food employee can expect to work per week for the duration of the employee’s employment and the expected days, times, and locations of those hours.

“New fast food employee” means an employee who has not worked at least eight hours in the preceding 30 days for the fast food employer.

“Overtime pay” means payment (i) at a rate not less than one and one-half times the fast food employee’s regular rate of pay under subsection (a) of section 207 of title 29 of the United States Code; or (ii) at a rate governed by the overtime requirements of the labor

law or the overtime requirements of any minimum wage order promulgated by the New York commissioner of labor pursuant to labor law article 19 or 19-A.

“Premium pay” means a schedule change premium required pursuant to section 20-1222 of the Fair Workweek Law or the payment a fast food employer is required to pay to a fast food employee who works a “clopening” pursuant to section 20-1231 of the Fair Workweek Law.

“Retail consumer” means an individual who buys or leases consumer goods and that individual's co-obligor or surety. Retail consumer shall not include manufacturers, wholesalers, or others who purchase or lease consumer goods for resale as new to others.

“Salaried” means not covered by the overtime requirements of New York state law or regulations.

“Shift” means an on-call shift or a regular shift.

“Shift increment” means a portion of a shift.

“Subset of shifts” means one or more shifts or shift increments.

“Time” as that term is used in section 20-1221(a) of the Fair Workweek Law regarding good faith estimate means start and end times of shifts.

(b) As used in this subchapter, the following terms have the same meanings as set forth in section 12-1201 of the Fair Workweek Law: “fast food employee,” “fast food employer,” “fast food establishment,” “on-call shift,” “regular shift,” “retail employee,” “retail employer,” “schedule change premium,” “work schedule.”

§ 7-602 Notice of Rights

The notice of rights required to be posted pursuant to section 20-1205 of the Fair Workweek Law shall be printed on and scaled to fill an 11x17 inch sheet of paper.

§ 7-603 Good Faith Estimate

- (a) If a fast food employer makes a long-term or indefinite change to the good faith estimate that has been provided to a fast food employee, the fast food employer shall provide an updated good faith estimate to the fast food employee as soon as possible and before the fast food employee receives the first work schedule following the change.
- (b) For purposes of this section and section 20-1221 of the Fair Workweek Law, “long-term or indefinite change” includes, but is not limited to:
- i. Three work weeks out of six consecutive work weeks in which the number of actual hours worked differs by twenty percent from the good faith estimate during each of the three weeks;
 - ii. Three work weeks out of six consecutive work weeks in which the days differ from the good faith estimate at least once per week;

- iii. Three work weeks out of six consecutive work weeks in which the start and end times of at least one shift per week differs from the good faith estimate by at least one hour and the total number of hours changed for the six week period is at least six hours; or
 - iv. Three work weeks out of six consecutive work weeks in which the locations differ from the good faith estimate at least once per week.
- (c) Each occurrence of a long-term or indefinite change for which a fast food employer fails to provide an updated good faith estimate before such employee receives the first work schedule following the change constitutes a violation of section 20-1221(a) of the Fair Workweek Law.

§ 7-604 Work Schedules

- (a) On or before a fast food employee's first day of work, a fast food employer must provide such fast food employee with written notice of an initial work schedule containing all regular shifts and all on-call shifts the fast food employee will work until the start of the first shift of the next subsequent work schedule. The fast food employer must also issue an updated work schedule as required in paragraph (2) of subdivision (c) of section 1221 of the Fair Workweek Law.
- (b) A work schedule provided pursuant to section 20-1252 of the Fair Workweek Law must span a period of no less than seven days.

§ 7-605 Posted Notice of Schedules

A fast food or retail employer may not post or otherwise disclose to other fast food or retail employees the work schedule of a fast food or retail employee who has been granted an accommodation based on the employee's status as a survivor of domestic violence, stalking, or sexual assault, where such disclosure would conflict with such accommodation.

§ 7-606 Employee Consent and Minimal Changes to Shifts

- (a) Where a fast food employee's written consent is required to work additional hours pursuant to subdivision (d) of section 20-1221 of the Fair Workweek Law or where a retail employee's written consent is required to work an additional shift with less than 72 hours' notice pursuant to paragraph (3) of subdivision (d) of section 20-1251 of the Fair Workweek Law, such written consent must be provided in reference to a specific schedule change; general or ongoing consent is insufficient to meet such requirements.
- (b) A fast food employer may change a previously scheduled regular shift by 15 minutes or less without being obligated to pay the fast food employee a schedule change premium. A fast food employer will be obligated to pay the fast food employee a schedule change premium if total changes made to one shift exceed 15 minutes.

Example: A fast food employer provides a fast food employee with a schedule that includes a shift on Tuesday from 12 pm to 5 pm. At approximately 5:00 pm on Tuesday, the fast food employer asks the fast food employee to work a few minutes more to assist

with a large tour group that just came to the fast food establishment. She agrees in writing and finishes the work at 5:12 pm. The fast food employer need not pay her the schedule change premium.

§ 7-607 Notice and Offer of Additional Shifts

- (a) A fast food employer must notify a fast food employee in writing of the method by which additional shifts will be posted in accordance with section 20-1241 of the Fair Workweek Law upon commencement of a fast food employee's employment with the fast food employer and within 24 hours of any change to or adoption of a method.
- (b) The fast food employer must post notice of additional shifts for three consecutive calendar days. When a fast food employer has less than three days' notice of a need to fill an additional shift, the fast food employer shall post notice of the additional shift for three consecutive calendar days as soon as practicable and not more than 24 hours after finding out about the need to fill the shift. Where there is less than three days' notice, any existing fast food employee may be offered, on a temporary basis, additional shifts that take place prior to the conclusion of the three-day notice period.

Example: On Wednesday at 9 am, a fast food employer receives a call from a fast food employee who tells her that she is quitting and she will not report for her regularly scheduled shift on Friday at 9 am. The fast food employer knew of the need to fill the shift 48 hours (or two days) in advance. The fast food employer may offer another existing fast food employee the shift on the first Friday, but must post the available shift with three days' notice to its employees and assign subsequent Friday 9 am shifts to its existing fast food employees in accordance with its criteria in accordance with section 20-1241 of the Fair Workweek Law and this subchapter before hiring a new employee.

- (c) A fast food employer that owns 50 or more fast food establishments in New York City may offer additional shifts, in accordance with subdivisions (a), (b), (f) and (g) of section 20-1241 of the Fair Workweek Law and in compliance with subdivision (b) of this section, to: (1) fast food employees who work at all locations in New York City, or (2) only to its fast food employees who work at its fast food establishments located in the same borough as the location where the shifts will be worked.
- (d) As soon as possible after a fast food employer has filled an additional shift, and using the same method compliant with section 20-1241 of the Fair Workweek Law by which the fast food employer communicated the offer of additional shifts, the fast food employer must notify all accepting fast food employees when the offered shift has been filled.

§ 7-608 Accepting and Awarding Additional Shifts

- (a) A fast food employee may accept a subset of additional shifts offered by a fast food employer pursuant to section 20-1241 of the Fair Workweek Law.
- (b) A fast food employer must first award shifts or shift increments to current fast food employees at the location where the shifts will be worked, regardless of the employer's

other criteria prescribed pursuant to subdivision (b) of section 20-1241 of the Fair Workweek Law.

- (c) A fast food employee may accept an entire shift offered by a fast food employer or any shift increment. A fast food employer is not required to award a fast food employee a shift increment accepted by the fast food employee when the remaining portion of the shift is three hours or less and was not accepted by another fast food employee or other fast food employees.

Example: A fast food employer notified employees of an additional shift on Saturdays from 1 pm to 9 pm, an eight-hour shift. A fast food employee informs the employer that she can work from 3 pm to 9 pm, a six-hour shift increment. Two hours remain in the additional shift and no other employee accepted the remaining two hours. Therefore, the employer need not award the six-hour increment to the employee.

- (d) When a fast food employee accepts a shift that was offered by a fast food employer pursuant to section 20-1241 of the Fair Workweek Law that overlaps with the fast food employee's existing shift, before hiring a new fast food employee for the offered shift, the fast food employer must award the fast food employee the offered shift in lieu of the fast food employee's scheduled shift. The fast food employer may not condition the award of the offered shift on a fast food employee's willingness to work both the non-overlapping hours of the existing shift and the offered shift.

Example: A fast food employee's work schedule includes a shift on Mondays from 7 am to 3 pm. The fast food employer notifies employees of an additional shift on Mondays from 9 am to 5 pm, a shift that overlaps with the fast food employee's existing shift. The fast food employee accepts the shift because it will allow the employee to drop the employee's child off at school in the morning without reducing the employee's overall hours. The fast food employer must award the additional shift to the fast food employee before hiring a new fast food employee for the additional shift, provided the fast food employee otherwise meets the employer's criteria for distribution of the shift.

- (e) When a fast food employee accepts a shift that was offered by a fast food employer pursuant to section 20-1241 of the Fair Workweek Law that, if awarded to and worked by the fast food employee, would entitle the fast food employee to overtime pay, the fast food employer is not required to award the fast food employee the entire shift but, before hiring a new fast food employee for the entire offered shift, must award the fast food employee the largest shift increment possible that would not trigger overtime pay, provided that the remaining portion of the shift was accepted by another fast food employee or is three hours or more.

Example: A fast food employer offers a shift on Wednesday from 12 am to 6 am to its employees. A fast food employee who is scheduled to work 37 hours during the week accepts the additional shift. The employer must award at least three hours to the fast food employee but is not required to award the entire six-hour shift to the employee

because working more than forty hours would result in the employee becoming eligible for overtime pay.

§ 7-609 Employer Records

- (a) Fast food and retail employers must maintain and retain, in an electronically accessible format, contemporaneous, true, and accurate records documenting compliance with the requirements of the Fair Workweek Law for a period of three years.
 - 1. Such records shall include documents that show:
 - i. Actual hours worked by each employee each week;
 - ii. An employee's written consent to any schedule changes, where required; and
 - iii. Each written schedule provided to an employee.
 - 2. Additionally, fast food employers must also maintain records in accordance with this subdivision that include documents that show:
 - i. Good faith estimates provided to employees pursuant to section 20-1221(a) of the Fair Workweek Law; and
 - ii. Premium pay to individual fast food employees and the dates and amounts of the payments, whether noted on an employee's wage stub or other form of written documentation.
- (b) Upon request, a fast food or retail employer must provide a fast food or retail employee with such employee's work schedule for any previous week worked for the past three years within 14 days of the employee's request.
- (c) Upon request, a fast food or retail employer must provide a fast food or retail employee with the most current version of the complete work schedule for all employees who work at the same location within one week of the employee's request, provided that an employer not disclose the work schedule of any employee who has been granted an accommodation based on the employee's status as a survivor of domestic violence, stalking, or sexual assault, where such disclosure would conflict with such accommodation.

§ 7-610 Private Right of Action

- (a) A person who filed a complaint with the office pursuant to the Fair Workweek Law and who intends to withdraw the complaint to pursue a civil action shall withdraw the complaint in writing to the office prior to commencing a civil action that includes claims based on the Fair Workweek Law in accordance with paragraph (2) of subdivision (d) of section 20-1211 of the Fair Workweek Law.
- (b) A person who filed a civil action that includes any claims based on the Fair Workweek Law may file a complaint with the office upon a showing that the Fair Workweek Law claims in the civil action have been withdrawn or dismissed without prejudice to further action.
- (c) The withdrawal of a complaint filed with the office or the commencement of a civil action by a person does not preclude the office from investigating the fast food or retail employer, or commencing, prosecuting, or settling a case against the employer based on some or all of the same violations.

§ 7-611 Waiver of Rights

Any agreement by an employee with the intent to prospectively waive or limit the employee's rights pursuant to the Fair Workweek Law shall be invalid as a matter of law.



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Hon. Lorelei Salas
Commissioner of Consumer Affairs

Re: Implementation of Fair Workweek Law

No. 2017 RG 076

Dear Commissioner Salas:

Pursuant to New York City Charter § 1043 subd. c, the above-referenced rule has been reviewed and determined to be within the authority delegated by law to your agency.

Sincerely,

A handwritten signature in cursive script that reads "Steven L. Goulden".

STEVEN GOULDEN
Senior Counsel
Division of Legal Counsel

cc: Liz Vladek
Michael Tiger
Jill Maxwell
Steven Kelly



Lorelei Salas
Commissioner

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FINDING OF SUBSTANTIAL NEED FOR EARLIER IMPLEMENTATION

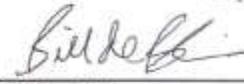
I hereby find, and represent to the Mayor, that there is a substantial need for the implementation, immediately upon its final publication in The City Record, of the rules to implement Chapter 12 of Title 20 of the NYC Administrative Code, "Fair Work Week Law," and Chapter 13 of Title 20 of the Administrative Code, "Pay Deductions Law." Both of these laws go into effect on November 26, 2017. Rules are necessary for the enforcement of these local laws. This declaration is made pursuant to Section 1043(f)(1)(c) of the City Charter.

The proposed rule implementing the Fair Workweek Law is contained in a new Subchapter F of Chapter 7 of Title 6 of the Rules of the City of New York. The rule is necessary upon the local law's effective date or as soon as possible thereafter in order to enable employers to be fully apprised of their legal obligations. The rule, among other provisions, establishes exceptions for when employers need to pay premiums for schedule changes, clarifies circumstances in which employees may accept and must be awarded subsets of shifts offered, and establishes the records employers must maintain.

The proposed rule implementing the Pay Deductions Law is contained in a new Subchapter G of Chapter 7 of Title 6 of the Rules of the City of New York. DCA anticipates receiving registration applications pursuant to the Pay Deductions Law upon the effective date of the local law. The rule must be in effect on this date or as soon as possible thereafter to ensure that not-for-profits and employees authorize deductions in a form satisfactory to DCA. Among other provisions, the rule clarifies the processes by which an employee authorizes deductions, the disclosures a not-for-profit must make to employees, and acceptable forms of proof of not-for-profit status.

In order to avoid a delay in implementation and a lack of timely guidance about compliance with these local laws, there is a substantial need for bringing these rules into effect immediately upon publication in The City Record.


Lorelei Salas, Commissioner
Department of Consumer Affairs

APPROVED: 

Bill de Blasio
Mayor

DATE: 11/22/2017