

DEPARTMENT OF CONSUMER AFFAIRS

Notice of Adoption of Rule

Notice of Adoption of Amending of Title 6 of the Rules of the City of New York by adding chapter 10.

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Commissioner of the Department of Consumer Affairs by Section 2203(f) of the New York City Charter and in accordance with the requirements of Section 1043 of the New York City Charter, of the adoption by the Department of an amendment to Title 6 of the Rules of the City of New York by adding a chapter 10 to clarify provisions in Local Law 11 of 2016, establish requirements to implement the law and meet its goals, and provide guidance to employers and employees.

The rule was proposed and published on May 16, 2016. The required public hearing was held on June 15, 2016.

Statement of Basis and Purpose of Rules

In January 2016, the City Council passed Local Law 11 of 2016, which requires successor employers in the grocery industry to retain eligible employees for a transitional employment period. The City Council determined that protecting grocery workers would have a positive effect on the local economy, the grocery industry, and the financial security of grocery store employees' families, and result in a more prosperous city.

These rules clarify provisions in the law, establish requirements to implement and meet the goals of the law, and provide guidance to covered grocery establishments and protected employees. Specifically, these rules:

- Define “confidential employee;”
- Describe the means by which an incumbent grocery employer may comply with the requirement to post employee notices;
- Provide a method for determining the seniority of eligible grocery employees;
- Clarify the record keeping requirements regarding grocery employer maintenance and provision of records, and the consequences for failing to maintain, retain, or produce such records;
- Describe the circumstances in which the Department will issue a Notice of Violation to an employer;
- Describe the circumstances in which a grocery employer must give the Department access to records, and define “appropriate notice” of the need for such access by the Department;
- Require the Department, prior to settling any complaint, to give complainants notice of the proposed settlement; and

- Describe the method by which a complainant may opt out of a Department settlement and describe the method by which a complainant may withdraw their complaint with the Department.

Rule

Section 1. A new chapter 10 of Title 6 of the Rules of the City of New York is added to read as follows:

CHAPTER 10 DISPLACED GROCERY WORKERS

§ 10-01 Definitions.

(a) As used in this chapter, the following terms have the same meanings as set forth in section 22-507 of the Administrative Code: “change in control,” “city,” “department,” “eligible grocery employee,” “grocery establishment,” “incumbent grocery employer,” “person,” “successor grocery employer,” and “transitional employment period.”

(b) As used in this chapter, the following terms shall have the following meanings:

“Appropriate notice” means 30 days’ written notice to the grocery employer, unless the grocery employer agrees to a lesser amount of time or the department has reason to believe that:

(i) the grocery employer will destroy or falsify records;

(ii) the grocery employer is closing, selling, or transferring its business, disposing of assets, or is about to declare bankruptcy;

(iii) the grocery employer is the subject of a government investigation or enforcement action or proceeding related to wages and hours, unemployment insurance, workers’ compensation, discrimination, or paid sick leave; or

(iv) more immediate access to records is necessary to prevent retaliation against employees for exercising their rights under the Grocery Worker Retention Act.

“Continuous employment” means uninterrupted employment. Separations from employment six months or less in duration for any reason, including, but not limited to, transfer from a grocery establishment that is subject to a change in control to a grocery establishment with the same incumbent grocery employer, paid or unpaid leaves of absence, paid or unpaid time off, and work schedule changes, shall not constitute interruptions in employment.

“Grocery employer” means incumbent grocery employers and successor grocery employers.

“Grocery Worker Retention Act” means section 22-507 of the Administrative Code.

§ 10-02 Eligible Grocery Employees.

- (a) For purposes of the definition of “eligible grocery employee” in section 22-507(a) of the Administrative Code, “a period” means “a period of continuous employment.”
- (b) For purposes of section 22-507(a) of the Administrative Code, “confidential employee” means “confidential employee” as defined in the federal Labor Management Relations Act, 22 U.S.C.A. § 4102(6).
- (c) An employee’s length of continuous employment at a grocery establishment with the same incumbent grocery employer as the grocery establishment subject to a change in control preceding an employee’s transfer to the grocery establishment subject to a change in control shall count towards that employee’s continuous employment at the grocery establishment subject to the change in control.

§ 10-03 Incumbent grocery employer’s posting of notice of change in control.

The incumbent grocery employer may meet the posting requirement of section 22-507(b)(1)(B) of the Administrative Code by posting the required notice of change in control conspicuously in prominent and accessible places customarily frequented by the employees at the grocery establishment subject to a change in control. Each incumbent grocery employer must take reasonable steps to ensure that such notice is not altered, defaced, or covered by other material.

§ 10-04 Determining Seniority.

For purposes of section 22-507(b)(3) of the Administrative Code, an employee attains seniority as a result of that employee’s length of continuous employment in the grocery establishment subject to a change in control, regardless of job position and regardless of full-time or part-time status, or, in the case of an employee transferred to a grocery establishment subject to a change in control, that employee’s total length of continuous employment in any of the incumbent grocery employer’s grocery establishments.

§ 10-05 Recordkeeping.

- (a) Grocery employers must retain records demonstrating compliance with the requirements of the Grocery Worker Retention Act for a period of three years unless otherwise required by any other law, rule, or regulation.
- (b) Incumbent grocery employers must maintain, in an accessible format, contemporaneous, true, and accurate records that document:
 - (1) The list of eligible grocery employees required under section 22-507(b)(1)(A) of the Administrative Code, the date the list was provided to the successor grocery

employer, and written proof that the list was provided to the successor grocery employer; and

- (2) The notice of change in control required under section 22-507(b)(1)(B) of the Administrative Code, the date it was posted, and proof of posting.
- (c) Successor grocery employers must maintain, in an accessible format, contemporaneous, true, and accurate records that document:
 - (1) The list of eligible grocery employees received by the successor grocery employer pursuant to section 22-507(b)(1)(A) of the Administrative Code and the date it was received, and the names of those eligible employees retained for the transitional employment period pursuant to section 22-507(b)(2) of the Administrative Code;
 - (2) The preferential hiring list required under section 22-507(b)(3) of the Administrative Code, the date eligible employees on the preferential hiring list were given the right of first refusal to jobs that become available during the transitional employment period, and proof that the right of first refusal was given; and
 - (3) The written performance evaluations as required under section 22-507(b)(5) of the Administrative Code.

§ 10-06 Enforcement.

- (a) If the department issues a subpoena or document demand upon appropriate notice, a grocery employer must provide the department with access to records documenting its compliance with the requirements of the Grocery Worker Retention Act and the provisions of this chapter at the department's office.
- (b) If the grocery employer fails to timely respond to the subpoena or document demand issued, a grocery employer must provide the department with access to records and at a mutually agreeable time of day at the employer's place of business.
- (c) The department will make two attempts by any combination of letter, email, or telephone to arrange a mutually agreeable time of day for the grocery employer to provide access to its records in accordance with subdivision (b) of this section. If these attempts are not successful, the department may set a time to access records at the grocery employer's place of business during regular business hours, upon two days' notice to the grocery employer.
- (d) A grocery employer's failure to maintain, retain, or produce pursuant to a subpoena or document demand by the department any record otherwise required to be maintained under these rules that is relevant to a material fact alleged by the

department in a notice of violation issued pursuant to the Grocery Worker Retention Act or these rules will create a reasonable inference that such fact is true.

- (e) The department, after conducting an investigation pursuant to section 22-507(d)(1)(A) of the Administrative Code, may issue a notice of violation for any violation of the Grocery Worker Retention Act.
- (f) Additionally, the department may issue a notice of violation to a grocery employer who fails to provide records or access to records as required by section 10-05 of this chapter, provided that the department notifies the grocery employer that failure to provide requested information, records, or access to records may result in a notice of violation charging the grocery employer with failure to maintain, retain, or produce records as required by the Grocery Worker Retention Act.
- (g) A grocery employer who fails to respond to the notice of violation issued under subdivision (f) of this section on or before the hearing date is subject to a penalty of five hundred dollars, in addition to any penalties or remedies imposed as a result of the department's investigation of the complaint.
- (h) The grocery employer may cure a notice of violation issued in accordance with subdivision (f) of this section without penalty by producing the requested information or records on or before the first scheduled hearing date.
- (i) The department may settle a complaint at any time prior to the conclusion of an adjudication. Prior to settling any complaint, the department shall provide each complainant with notice of the proposed settlement.
- (j) A complainant who intends to opt out of a settlement pursuant to section 22-507(d)(1)(E) of the Administrative Code must do so in writing to the department.
- (k) A complainant who intends to withdraw his or her complaint with the department pursuant to section 22-507(d)(2) of the Administrative Code must do so in writing to the department prior to bringing a civil action.