

NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS

Notice of Proposed Hearing and Opportunity to Comment

What are we proposing?

The Department of Consumer Affairs Office of Labor Policy and Standards is proposing rules to implement Chapter 12 of Title 20 of the NYC Administrative Code, "Fair Workweek Law," and provide guidance to covered employers and protected workers.

When and where is the Hearing? The Department of Consumer Affairs will hold a public hearing on the proposed rule. The public hearing will take place at 10:00 AM on Friday, November 17. The hearing will be held in the 5th Floor hearing room at 42 Broadway, New York, NY 10004.

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Department of Consumer Affairs through the NYC rules Web site at <http://rules.cityofnewyork.us>.
- **Email.** You can email written comments to rulecomments@dca.nyc.gov.
- **Mail.** You can mail written comments to Casey Adams, Deputy Director of City Legislative Affairs, Department of Consumer Affairs, 42 Broadway, 8th Fl. New York, NY 10004.
- **Fax.** You can fax written comments to the Department of Consumer Affairs, 347-778-4689.
- **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling 212-436-0095. You can also sign up in the hearing room before the hearing begins on Friday, November 17, 2017. You can speak for up to three minutes.

Is there a deadline to submit written comments? Yes. Written comments must be submitted on or before 5 PM on Friday, November 17.

What if I need assistance to participate in the Hearing? You must tell the Department's External Affairs Division if you need a reasonable accommodation of a disability at the Hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at 212-436-0095. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by 5 PM on Wednesday, November 15.

This location has the following accessibility option(s) available: Wheelchair accessible.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the Website at <http://rules.cityofnewyork.us/>. A

few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available between the hours of 9 a.m. and 5 p.m. to the public at the office of Casey Adams, Deputy Director of City Legislative Affairs, Department of Consumer Affairs, 42 Broadway, 8th Floor, New York, NY 10004.

What authorizes the Department of Consumer Affairs Office of Labor Policy and Standards to make this rule? Sections 1043, 2203(f) and 20-a of the New York City Charter and local law numbers 99, 100, 106 and 107 for the year 2017 authorize the Department of Consumer Affairs Office of Labor Policy and Standards to make these proposed rules. These proposed rules were not included in the regulatory agenda of the Department of Consumer Affairs for this Fiscal Year.

Where can I find the Department of Consumer Affairs' rules? The Department of Consumer Affairs' rules are in Title 6 of the Rules of the City of New York.

What laws govern the rulemaking process? The Department of Consumer Affairs must meet the requirements of Section 1043 of the New York City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

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, offer open shifts to existing fast food employees, ban “clopenings” for fast food employees, ban on-call scheduling for retail employees, and require that retail employees receive 72 hours advance notice of schedules.

These rules add a new Chapter 14 to Title 6 of the Rules of the City of New York to clarify the Fair Workweek Law. Specifically, these rules:

- Provide a definitions section.
- Define a “long term or indefinite change” in reference to a good faith estimate of schedule.
- Include a violation of failing to provide an updated good faith estimate when there is a long term or indefinite 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 that an employer does not need to post additional shifts three days in advance if it does not have notice of the need to fill a shift three days in advance due to an employee being unable to work a scheduled shift.
- Establish which employees a fast food employer must notify if the employer has 50 or more fast food establishments in the City.
- Establish that a fast food employer must communicate to its employees that a shift has been filled.
- Establish that a fast food employer needs to pay a schedule change premium for changes that change the time of a scheduled shift by more than 15 minutes.
- Clarify that a fast food employer is not required to pay a schedule change premium to an employee who uses sick time.
- Clarify that a subset of shifts may include whole and partial shifts.
- Establish that a fast food employer does not need to award a shift to an employee who accepts a partial shift if the remaining part of the shift is under 3 hours or has not been filled by another employee.
- Establish that a fast food employer may not offer a shift to a new employee when a fast food employee accepts a shift that overlaps with the fast food employee’s existing shift.
- Establish that a fast food employee that accepts a shift that would entitle the employee to overtime, the employer must award the portion of the shift that would not entitle the employee to overtime.
- Clarify the records an employer has to maintain.
- Clarify the procedure for filing a private cause of action.

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 Office of Labor Policy and Standards 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.

Proposed Rule

Section 1. A new Chapter 14 of Title 6 of the Rules of the City of New York is added to read as follows:

CHAPTER 14 FAIR WORKWEEK

§ 14-01 Definitions

(a) As used in Title 20, Chapter 12 of the New York City Administrative Code and these rules or except as otherwise provided, the following terms have the following meanings:

“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.

“Clopensing” 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.

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

“Directly notify” as that term is used in Section 20-1252(b) 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.

“New fast food employee” means an employee who has not worked for the fast food employer at any point in the six months prior to commencing employment with 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.

“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.

- (b) As used in this chapter, 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.”
- (c) As used in this chapter, “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.

§ 14-02 Notice of Rights

The notice of rights required to be posted pursuant to Section 20-1205 of the Fair Workweek Law shall be on 11x17 inch paper and in font no smaller than 12 point.

§ 14-03 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 locations differ from the good faith estimate at least once per week; or
 - iv. Three work weeks out of six consecutive work weeks in which morning, afternoon, or night shifts differ from the good faith estimate at least once per week. Morning, afternoon, or night shifts differ from the good faith estimate when a shift that was a morning shift is changed to an afternoon or night shift; a shift that was an afternoon shift is changed to a morning or night shift; or a shift that was a night shift is changed to a morning or afternoon shift. For purposes of this subdivision:
 - i. Morning means 4:00 am to 11:59 am.
 - ii. Afternoon means 12:00 pm to 7:59 pm.
 - iii. Night means 8:00 pm to 3:59 am.

A shift shall be considered a morning, afternoon, or night shift based on when at least 50% of the shift is worked or scheduled to be worked.

- (c) For purposes of applying the definition of “long-term or indefinite change,” a change in the time of shifts that is earlier or later by fifteen minutes or less shall not be considered.
- (d) Each occurrence of a long-term or indefinite change for which a fast food employer fails to provide an updated good faith estimate constitutes a violation of Section 20-1221(a) of the Fair Workweek Law.

§ 14-04 Posted Notice of Schedules

A fast food or retail employer shall 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.

§ 14-05 Minimal Changes to Shifts

A fast food employer may change a work schedule by 15 minutes or less without being obligated to pay the fast food employee a schedule change premium.

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 and finishes the work at 5:12 pm. The fast food employer need not pay her the schedule change premium.

§ 14-06 Notice and Offer of Additional Shifts

- (a) A fast food employer shall 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 shall 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 as soon as practicable after finding out about the need to fill the shift. In such circumstance, any existing fast food employee may be temporarily assigned to work a shift that is during 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 assign another existing fast food employee to 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 shift to its existing fast food employees in accordance with its criteria in accordance with Section 20-1241 of the Fair Workweek Law and these rules 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 (f) and (g) of Section 20-1241 of the Fair Workweek Law and subdivision (b) of Section 14-07 of these rules, 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 that complies 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.

§ 14-07 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 fast food employees currently employed at the location where the shifts will be worked, regardless of the employer's other criteria prescribed pursuant to Section 20-1241(b) 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, the fast food employer shall award the fast food employee the offered shift in lieu of the fast food employee's scheduled shift. The fast food employer shall 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 and worked by

the fast food employee, would entitle the fast food employee to overtime pay, a fast food employer is not required to award the fast food employee the shift but, before hiring a new fast food employee, 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.

§ 14-08 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 shall 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 shall 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.

§ 14-09 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 Section 20-1211(d)(2) 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.

NEW YORK CITY LAW DEPARTMENT

DIVISION OF LEGAL COUNSEL

100 CHURCH STREET

NEW YORK, NY 10007

212-356-4028

CERTIFICATION PURSUANT TO

CHARTER §1043(d)

RULE TITLE: Implementation of the Fair Workweek Law

REFERENCE NUMBER: 2017 RG 075

RULEMAKING AGENCY: Department of Consumer Affairs

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN

Date: October 16, 2017

Acting Corporation Counsel

NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS

253 BROADWAY, 10th FLOOR

NEW YORK, NY 10007

212-788-1400

CERTIFICATION / ANALYSIS

PURSUANT TO CHARTER SECTION 1043(d)

RULE TITLE: Implementation of the Fair Workweek Law

REFERENCE NUMBER: DCA-62

RULEMAKING AGENCY: Department of Consumer Affairs

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) No cure period/mechanism is provided under the proposed rules because the implementing laws do not provide for a cure period. However, the rules provide for resolution prior to a hearing via settlement.

/s/ DARIUS L. CALLIER

Mayor's Office of Operations

October 16, 2017

Date