COUNSEL'S CORNER

NYC FAIR WORKWEEK LAW
EFFECTIVE NOVEMBER 26, 2017

By

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With the New York City Fair Workweek Law (the "Law") taking effect on November 26, 2017, New York City retail employers[1] – which may include staffing firms that place employees[2] at retail businesses – now face significant restrictions when it comes to assigning and changing the work schedules of their retail employees.[3] In general, retail employers are now prohibited from:

1. Scheduling a retail employee for an "on-call shift" (i.e., any time period other than an employee's regular shift[4] when the employer requires the employee to be available to work, regardless of whether the employee actually works and regardless of whether the employer requires the employee to report to a work location).
2. Cancelling a retail employee's regular shift within 72 hours of the shift's scheduled start time.
3. Requiring[5] a retail employee to work with fewer than 72 hours' notice, unless the employee consents in writing (which may be by text or email) to such specific scheduling change. (A one-time, general or "on-going" consent is not sufficient).
4. Requiring a retail employee to contact the retail employer to confirm whether or not such employee should report for a regular shift fewer than 72 hours before the start of such shift.

A "retail employer" is one that employs a retail employee working at a "retail business", meaning any entity with 20 or more employees that is engaged primarily in the sale of consumer

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[1] NYC has passed certain other predictive scheduling requirements applicable to fast food establishments as well.

[2] The Law excludes from coverage public employers such as the U.S. government; New York State including any office, department, agency, authority, institution or other body of the state; New York City or any local government, municipality or county; and public employees employed by such public employers.

[3] "Retail employee" is defined as any employee who is employed by a retail employer.

[4] "Regular shift" is defined as a span of consecutive hours starting when an employer requires an employee to report to a work location and ending when such employee is free to leave the work location. It does not include hours worked by an employee who is called into work while on an on-call shift.

[5] Given the nature of the staffing industry, it is unclear whether this will apply as staffing firms typically do not "require" that employees work on an assignment, but rather the employee has the discretion of whether or not to accept an assignment.

goods[6] at one or more stores in New York City. Based on the foregoing definition and Frequently Asked Questions[7] on the Law published by the City's Department of Consumer Affairs, which discusses the possibility of retail employees being jointly employed by more than one business, a retail employer could include a temporary staffing firm that places employees on assignments at retail businesses – regardless of the temporary employee's job responsibilities. However, the Law is unclear as to which obligations would fall on the staffing firm and which would fall on the retail business. Moreover, the Law does not appear to account for employers that operate both retail and other businesses. For example, if a staffing firm places workers at a retail business but also places workers at other non-retail businesses, the Law may conceivably be construed to require that such workers placed at non-retail businesses are also covered by the protections of the Law. NYSA finds this unlikely but intends to attempt to clarify this point with the City.

Pursuant to the Law, retail employers are also required to provide retail employees with a written work schedule (including dates, times, and locations of all shifts) at least 72 hours prior to the first shift on their schedule and conspicuously post the work schedule of all retail employees at that work location at least 72 hours before the beginning of the scheduled work hours. Such work schedules must span a period of at least seven days. Accordingly, staffing firms will need to provide their temporary employees that they place at retail businesses with their work schedules 72 hours in advance. Staffing firms will also need to ensure the retail business posts the work schedule of all its temporary employees at the work location. Presumably, however, an employee who consented to working a shift with less than 72 hours' notice would not need to be given a written work schedule 72 hours in advance of his or her first shift, though the Law is silent on this issue. The work schedule that is required to be posted at the work location likely must still be posted in advance since it covers all employees' work schedules (not just those who consented to working with less than 72 hours' notice).

Notably, the work schedule of a retail employee who has been granted an accommodation based on such employee's status as a survivor of domestic violence, stalking, or sexual assault must never be posted or disclosed, if such disclosure would conflict with the employee's accommodation. The work schedule must also be updated if any changes are made and the staffing firm must deliver the changed schedule to those individual employees affected by such changes.

If the staffing firm regularly uses a form of electronic means to communicate employee work schedules, then the schedules must be transmitted by such electronic means as well. For example, if a staffing firm has a practice of emailing work schedules to employees that it places at retail businesses, the work schedules must be sent by email and also posted at the work locations as described above. Moreover, if requested by a retail employee, the staffing firm must provide the employee with (i) his or her work schedule in writing for any week worked within

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[6] "Consumer goods" are defined as products that are primarily for personal, household, or family purposes, including but not limited to appliances, clothing, electronics, groceries, and household items.

[7] The following is a link to the Frequently Asked Questions published by the New York City Department of Consumer Affairs – http://www1.nyc.gov/assets/dca/downloads/pdf/workers/FAQs-FairWorkweek-Deductions.pdf.

the previous three years within 14 days of such request, and/or (ii) the most current version of the work schedule for all retail employees at that work location within one week of such request.

Retail employers may still:

1. grant an employee's request for time off;
2. allow employees to trade shifts; and
3. make changes to work schedules with less than 72 hours' notice if the employer's operations cannot begin or continue due to (a) threats to employees or the employer's property, (b) failure of public utilities or the shutdown of public transportation, (c) a flood, fire or other natural disaster, or (d) a state of emergency declared by the President, New York State Governor or New York City Mayor.

Staffing firms will need to ensure retail businesses where their temporary employees are placed post the notice of employee rights under the Law – "You Have A Right To A Predictable Work Schedule" notice – published by the City.[8] The notice must be posted on 11x17 inch paper in English and any language spoken as a primary language by at least 5% of the employees at that retail business, provided the notice is available in such language(s).

Staffing firms must also maintain, in electronically accessible format, records documenting compliance with the Law for a period of three years. Such records must include documents showing (i) actual hours worked by each retail employee each week (including dates, times, and locations of shifts), (ii) written consents to any schedule changes, where required, and (iii) each written schedule provided to a retail employee.

Employers can face significant monetary penalties for failing to comply with these requirements, including (among others) significant fines and penalties for violations determined as a result of an investigation by the City and reasonable attorneys' fees if an employee is successful in a private action against the employer. Accordingly, staffing firms that place retail employees on assignments at retail businesses will need to communicate and work closely with their clients to coordinate retail employees' work schedules and ensure compliance with the Law. For example, staffing firms will need to consult with their retail business clients to ensure the work schedule of all retail employees is conspicuously posted at the work location, as is required by the Law, and coordinate with such clients to ensure the proper distribution of accurate and current work schedules. Staffing firms and retail employers should consult with employment counsel to assist with the implementation of compliant policies and practices, while also considering the potential for unexpected staffing issues and needs that could arise.

Moreover, NYSA members should be aware that there are currently pending New York State regulations on predictive scheduling, which will have a broader impact affecting industries other than just retail and fast food. NYSA members should be on the lookout for the adoption of such regulations and, of course, NYSA will provide updates with respect to such state regulations.

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[8] The following is a link to the required notice – http://www1.nyc.gov/assets/dca/downloads/pdf/workers/Retail-FairWorkweek-Notice-English.pdf.

Given certain uncertainties and difficulties in the application of the Law to the staffing industry, NYSA intends to meet with City officials to discuss, among other issues, the impact of the Law on staffing firms, operational and practical challenges for the staffing industry in complying with the Law, and the potential for making certain common-sense amendments to the Law with the goal of benefiting staffing firms and their employees.

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