

Fair Workweek Laws: Coming Soon to a Neighborhood Near You

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Fair workweek laws generally require large food and retail establishments to provide predictable work schedules and additional compensation for certain types of schedule changes and shifts. Due to the significant number of franchise businesses in the industries covered by these laws, understanding and complying with them is important for franchisors and franchisees alike.

Franchisors and franchisees: Beware of the “fair workweek laws” coming to city or state where you operate. The failure to comply could cost your business millions of dollars in fines, not to mention additional wages for the affected employees. Fair workweek laws, also known as “predictive scheduling laws,” are relatively new phenomena throughout the United States. These laws generally require large food and retail establishments to provide predictable work schedules and additional compensation for certain types of schedule changes and shifts. They are particularly designed to address problems associated with “on-call scheduling,” a workforce management method that requires hourly workers to work unpredictable schedules to accommodate influxes of customers at irregular times.

New York City’s version of fair workweek laws became effective on Nov. 26, 2017. In addition to New York City, franchisors and franchisees in the San Francisco, Emeryville and San Jose, Calif., the state of Oregon, Seattle and SeaTac, Wash., and Chicago, Ill., are facing new complexities with wage and hour compliance due to fair workweek laws. Los Angeles and Boston are currently considering fair workweek legislation, and Illinois, Maine, Massachusetts and Pennsylvania have also seen fair workweek legislation proposed at the state level. Other jurisdictions, however, such as Arkansas, Georgia, Iowa and Tennessee, have passed laws preempting fair workweek legislation.

At the federal level, the [Schedules That Work Act, which was first introduced in 2015, but not passed](#), includes a requirement to give schedules two weeks in advance for employees of retail, cleaning, and food service companies (with compensation if shifts are changed). It is anticipated that Sen. Elizabeth Warren and Rep. Rosa DeLauro will reintroduce the Schedules That Work Act in coming weeks.

Similar to many employment laws, fair workweek laws vary from jurisdiction to jurisdiction. The most significant variation in fair workweek laws typically relates to the size and industry of a “covered employer.” As mentioned above, most fair workweek laws apply to large food and retail establishments. However, Chicago’s Fair Workweek Ordinance, which goes into effect on July 1, 2020, also applies to large businesses in the health care industry.

There are, however, common requirements and prohibited practices among most fair workweek laws, including:

- Providing employees with advance notice of schedules, ranging from 72 hours to two weeks in advance;
- Prohibiting or limited the use of on-call scheduling;
- Presenting new employees with good faith estimates of work schedules at the time of hiring;

- Paying employees premiums over their scheduled rate of pay if the hours are changed or cancelled without requisite notice; and
- Providing employees with a private right of action for violations including compensatory damages, and attorneys' fees, and imposing civil fines for certain types of violations.

A Case Study: New York City's Fair Workweek Employment Standards Ordinance.

Pertinent for practitioners here in New York is that New York's fair workweek law is made up of four ordinances that focus specifically on fast food establishments and retail businesses. Requirements vary for these two types of employers. Specifically, under the New York fair workweek law, covered employers include: (1) fast food establishments that are part of a chain that have 30 or more locations nationally; and (2) retail businesses that have 20 or more employees in the city, and are engaged primarily in the selling of consumer goods.

Covered fast food employers in New York must provide new employees with a good faith estimate in writing setting forth 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 dates, times and locations of those hours. If a long-term or indefinite change is made to the estimate, written notice must be provided. For existing employees, the fast food employer must provide such notice no later than 14 days before the first day of any new schedule. Premium pay must be paid by covered fast food employers if any changes or cancellations occur within seven days of the scheduled work time.

The New York fair workweek law also requires at least 11 hours between shifts for fast food employees. If an employee consents to work a shift that is within 11 hours of the last shift, the fast food employer must pay the employee an additional \$100.00 in each instance. Finally, before hiring new employees, a fast food employer must offer additional hours to current employees.

For covered retail employers, employees must be provided a written work schedule no later than 72 hours before the first shift on the work schedule. On-call scheduling of employees by covered retail employers is prohibited. The New York fair workweek law prohibits the cancellation of any regular shift for a retail employee within 72 hours of the scheduled start of a shift, or to require a retail employee to work with fewer than 72 hours' notice.

Fines ranging from \$200 to \$2,500 per violation may be assessed for certain violations of the New York fair workweek law.

Industry groups, including the International Franchise Association (the IFA), have stated that fair workweek laws, including specifically New York City's fair workweek law, unfairly target franchise and multi-location employers who are required to comply with the laws, as opposed to smaller businesses. In December 2018, the IFA, along with New York Restaurant Association and the National Restaurant Law Center, brought a lawsuit challenging the legality of New York City's fair workweek law, asserting that the law exceeds New York City's legislative authority. See *Int'l Franchise Ass'n v. City of N.Y.*, No. 655987/2018 (N.Y. Sup. Ct. filed Dec. 3, 2018). The complaint specifically asserts that New York City's fair workweek law has "discriminated from its inception against the franchise industry, one of the largest providers of business opportunities for small business entrepreneurs in the State, and nationwide." Matt Haller, the IFA's senior vice president of government relations and public affairs, has stated: "While well-intentioned, this law places unaffordable costs on New York restaurants, which jeopardizes the livelihoods of the very employees it's designed to protect. The IFA hopes that the court will follow legal precedent and common sense to strike down this misguided policy." [IFA Leads](#)

[Business Groups' Lawsuit Against New York City Over Predictive Scheduling Law](#), Int'l Franchise Ass'n (Dec. 3, 2018). Additional challenges to fair workweek laws are expected in other jurisdictions.

On Sept. 9, 2019, the New York City's Department of Consumer and Worker Protection filed a lawsuit seeking \$1 million, including restitution for workers and penalties against Chipotle Mexican Grill, a fast food company with over 2,000 locations nationwide and 80 locations in New York City, for allegedly violating New York City's fair workweek law. Dep't of Consumer Affairs v. Chipotle Mexican Grill, No. 2018-00094-ENF (OATH filed Sept. 9, 2019). In the lawsuit, Chipotle has been accused of violating nearly every aspect of the law including failing to provide good faith estimates of work schedules, failing to provide schedules two weeks in advance, failing to get consent or pay premiums for last-minute schedule changes or working consecutive shifts with fewer than 11 hours between shifts, and failing to notify and offer newly available shifts to current employees before hiring workers to fill those shifts. The National Restaurant Law Center commented that New York City's Department of Consumer and Worker Protection's lawsuit against Chipotle should be found to be premature because the legitimacy of the New York fair workweek law is still under review by New York courts. Heather Lalley, [Chipotle Hit With Fair Workweek Lawsuit in NYC](#), Restaurant Bus. (Sept. 10, 2019).

A critical question for many franchisors is whether they are responsible for their franchisees' compliance with local city/state/federal fair workweek laws. In other words, what actions, if any, should franchisors take to mitigate risks of fair workweek violations by their franchisees? Although helping franchisees navigate fair workweek legislation may have strong appeal to franchisors, franchisors that seek to control directly employment practices of their franchisees, or even provide scheduling software or other tools to assist franchisees in managing their work force, do so at their own peril. There have been court decisions and legislation enacted over the past several years that make it far easier to hold a franchisor liable as a joint employer for wage and hour, employment, discrimination and other aspects of a franchisee's employment relationships. See Marc Lieberstein, [Is the Franchise Model Under Attack?](#), NYLJ (Sept. 5, 2019). This is particularly true for franchisors that are involved with day-to-day employment matters of their franchisees.

Fair workweek laws neither impose any express duties on franchisors to police compliance by franchisees, nor do they expressly impose liability on franchisors for violations by franchisees. But it is possible that, if a franchisor meets the legal definition of "employer" under the applicable labor laws, a franchisor could be held liable for its franchisees' violations of fair workweek laws. Different states incorporate varying definitions of employer, which complicates this matter for franchisors in assessing risk and liability.

Although there has not been significant litigation on the issue, New York courts have found that to be liable for wage and hour violations as an employer, the employer must meet the definition of employer under the Fair Labor Standards Act (the FLSA). See *Vasto v. Credico (USA)*, No. 15 CIV. 9298 (PAE), 2016 WL 4147241, at *5 (S.D.N.Y. Aug. 3, 2016) (citing *Inclan v. N.Y. Hosp. Grp.*, 95 F. Supp. 3d 490, 511 (S.D.N.Y. 2015)). And, although the Second Circuit (encompassing New York) has not directly applied the joint employer test to determine whether a franchisor can be liable for wage and hour violations as a joint employer, at least one New York federal court has been reluctant to find such violations. See *In re Domino's Pizza*, No. 16CV2492AJNKNF, 2018 WL 4757944, at *4 (S.D.N.Y. Sept. 30, 2018). In Domino's Pizza, the court refused to find a joint employer relationship between the franchisor and its franchisees despite the fact that the franchisor provided a payroll and scheduling system for use by its franchisees.

Due to the significant number of franchise businesses in the industries covered by the fair workweek laws, understanding and complying with these laws is important for franchisors and franchisees alike. Fair workweek laws raise several interesting questions in the context of franchising. For franchisor-owned and operated locations, franchisors should evaluate their scheduling and payment practices, as well as prepare the required notices to employees. Currently, there are dozens of software programs designed for franchise systems that can assist with wage and hour compliance, including fair workweek law compliance. The most practical advice for franchisors to avoid being found liable for their franchisees' violations of fair workweek laws is not to impose, directly or indirectly, requirements on franchisees with respect to the work schedules of their employees. Instead, franchisors are best advised to provide franchisees with "best practices" in this area of the law and a list of available software companies compatible with the franchisor systems.

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