COLLAZO FLORENTINO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

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New York City to Impose Retail Worker Scheduling Restrictions

Earlier this year, New York City Mayor Bill de Blasio signed two bills into law that will tightly regulate New York City employers' scheduling of retail workers (the "Retail Scheduling Law").[1]

The Retail Scheduling Law will take effect on November 26, 2017, and will apply to non-unionized employees starting on that date. Employees working under a collective bargaining agreement on the law's effective date will become subject to the law when their agreement expires, unless the collective bargaining agreement addresses scheduling practices, and the employer and union expressly agree to waive application of the Retail Scheduling Law. Non-unionized employees may not waive the Retail Scheduling Law's requirements.

Who is covered by the law?

The law regulates all "retail businesses" (businesses primarily selling "consumer goods", meaning products primarily for personal, household, or family use) with 20 or more employees in New York City. The law counts full-time, part-time, and temporary employees all as single employees for these purposes, rather than grouping them into full-time equivalents, and chain retailers should consider the total number of employees across all New York City locations. If an employer's workforce varies seasonally, coverage is determined by the average weekly number of employees in the preceding calendar year.

The requirements imposed by the Retail Scheduling Law apply to all employees within a "retail business", regardless of duties or job title, with limited exceptions for specified government employees or enrollees in certain vocational programs. Notably, the Retail Scheduling Law's definition of "retail employees" does

[1] Although not the subject of this Client Alert, it should be noted that the "Fair Workweek" laws also establish separate, greater restrictions on scheduling practices for fast food workers.

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not expressly exclude salaried employees or those who are classified as exempt from minimum wage and overtime requirements under federal law. It does not apply to consultants or individuals properly classified as independent contractors.

What does the law require?

The Retail Scheduling Law requires covered employers to do the following:

- Provide each retail employee with a written work schedule at least 72 hours prior to the first shift on that schedule;
- Conspicuously post the work schedule (which must be accessible and visible to all covered employees) for all retail employees at a given work site at least 72 hours in advance of any shift covered by that schedule;
- Update the posted schedule and directly notify affected employees of any changes to the schedule; and
- If the employer has a regular practice of communicating scheduling information to employees electronically (for example, emailing employees regarding open or cancelled shifts), the employer must also distribute its posted work schedules electronically.

In addition, employers must document and retain records of their compliance with the law for three years, and, upon any employee's request, provide the employee with a copy of his or her posted work schedule for any week in the past three years and/or the most current version of the work schedule for the employee's work location(s).

Covered employers will also be required to post a notice of rights, forthcoming from the city's Office of Labor Policy & Standards ("OLPS"), in English and any primary language spoken by at least five percent of employees at a given work location, if the OLPS has published a notice in that language.

What does the law prohibit?

The Retail Scheduling Law prohibits covered employers from engaging in certain scheduling practices, including:

- Scheduling a retail employee for any "on-call" shift, meaning periods of time in which the employee is required to be available to work (other than a regular work shift), regardless of whether he or she is required to report to a work location and/or actually works;
- Requiring an employee to call in (or otherwise contact the employer) to confirm whether or not he or she should report for work less than 72 hours before the start of a shift;
- Canceling a retail employee's shift, or requiring him or her to work, with less than 72 hours' notice.

Employees may consent in writing to working a shift with less than 72 hours' notice.

Notwithstanding the above, the law does not prohibit granting time off pursuant to an employee's request, voluntary shift-trading, and cancelling shifts on short notice if the employer cannot operate due to utility failures, transit shutdowns, fire, floods, natural disasters, an official state of emergency, or threats to employees or the employer's property.

How will the law be enforced?

Both employees and the OLPS may file civil lawsuits under the Retail Scheduling Law, and the statute permits the OLPS to bring administrative enforcement actions based on complaints from employees or outside entities. Although individuals cannot simultaneously pursue a civil action and an OLPS complaint, the Agency can independently commence an investigation while a private lawsuit is pending. The statute of limitations for filing lawsuits and administrative complaints will be two years from the time the complainant knew or should have known of the alleged violation.

Among other relief, employees can recover actual damages, attorney's fees (in private actions), and/or civil penalties (in administrative enforcement actions) ranging from $300-$500 per employee for each instance of a violation. While it remains to be seen how broadly the OLPS and courts will construe damages under the law's "make whole" remedy, many employees may choose not to plead or prove damages and instead simply seek recovery of civil penalties that are available as an alternative to damages for certain violations of the law. Noncompliant employers may also be liable for civil penalties to the city for each violation, ranging from $500 for a first offense to $1,000 for the third and subsequent violations within a two-year period (all imposed on a per-employee, per-violation basis). The OLPS may also bring a civil action alleging a pattern or practice of violations, and seek civil penalties of up to $15,000.

The Retail Scheduling Law prohibits taking adverse action against any employee who exercises their rights under the law. Employees suffering unlawful retaliation may be entitled to reinstatement, rescission of any unlawful discipline, back pay, and benefits. Civil penalties between $500 and $2,500 may also be imposed.

Potential State Regulation

Last week, Governor Cuomo directed the New York State Department of Labor ("NYSDOL") to hold public hearings on potential statewide rules governing worker scheduling practices in advance of the formal rulemaking process. While these pending statewide regulations could preempt the requirements of the Retail Scheduling Law in whole or in part, the NYSDOL hearings are currently scheduled to

conclude on November 14, 2017. Accordingly, employers should prepare for the Retail Scheduling Law to take effect in full on November 26, 2017 as anticipated.

Retail employers should review their scheduling practices to ensure compliance with the Retail Scheduling Law. In particular, the provisions requiring a covered employee's written consent to working a shift with less than 72 hours' notice and imposing a three-year recordkeeping requirement have significant implications where managers communicate with employees about scheduling changes via text message or telephone. Employers would do well to train supervisors and managers to follow up on oral conversations in writing to confirm an employee's willingness to take shifts on short notice, and to develop recordkeeping protocols to ensure that text-message records are properly maintained. Employers may also wish to consult with counsel regarding more surprising aspects of the Retail Scheduling Law, such as the broad range of employees that it purports to cover.

If you have any questions or would like detailed information about the law, please contact Nick Bauer at (212) 758-7793, or any other attorney at the Firm.