

# Fair Workweek Law in Fast Food: Frequently Asked Questions

The Department of Consumer and Worker Protection (DCWP) enforces NYC's Fair Workweek Law. This document answers many common questions about the law and how DCWP enforces it. The workplace protections described in this document apply to fast food employees only. For questions about the law or to file a complaint, contact DCWP at [OLPS@dcwp.nyc.gov](mailto:OLPS@dcwp.nyc.gov) or call 311 and say "Fair Workweek Law."

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## I. Overview of Fair Workweek Law for Fast Food Workers

### a. General

#### ***What are the protections available to fast food workers?***

Under NYC's Fair Workweek Law, fast food workers in NYC have a right to predictable work schedules and the chance to pick up more hours before new workers are hired. Fast food workers also have a right to progressive discipline before being fired or losing work hours, and priority for reinstatement after a layoff. The law covers:

- **Regular Scheduling:** Employers must give fast food workers a regular schedule and 14 days' advance notice of each weekly schedule.
- **Consent to Changes:** Workers can say no to working additional hours before hours are added to the schedule.
- **Schedule Change Premiums:** Employers must pay between \$10-\$75 for each change to a scheduled shift made less than 14 days before the first day on that work schedule.
- **Clopenings:** Employers cannot schedule a worker for back-to-back closing and opening shifts with less than 11 hours between the shifts without the worker's permission. If a worker consents in writing and works a clopening, the employer must pay the worker a \$100 premium.
- **Access to Hours:** Employers must offer newly available shifts to current employees before hiring new employees.
- **Progressive Discipline:** Employers must address most job performance problems through progressive discipline so that workers have an opportunity to improve and are not unjustly fired.

- **Layoffs:** Workers who are laid off or whose hours are reduced when a business closes, downsizes, or reorganizes in response to financial difficulties have priority over current employees for available shifts if the business begins hiring or scheduling more hours again.

**When did employers have to start complying with the law?**

Protections regarding advance scheduling, consent to additional hours, premium pay, clopenings, and access to hours took effect on November 26, 2017.

Protections regarding regular schedules, progressive discipline, hours reductions, and layoffs took effect on July 4, 2021.

**b. Who is a Fast Food Employee?**

**Who is considered an employee covered by these protections?**

**Employees** are workers at **fast food establishments** in NYC who perform at least one of the following functions:

- cleaning
- cooking
- customer service
- delivery
- food or drink preparation
- routine maintenance duties
- security
- stocking supplies or equipment

Workers may be employees of the fast food restaurant, the owner, or another company or individual that provides services at the fast food establishment.

Salaried workers who are exempt from overtime requirements under New York State law are not covered by NYC’s Fair Workweek Law.

**Scenario:**

*Mary and Lester work for Sandra’s Sweepers, a company that provides custodial services to restaurants, including fast food establishments, in Queens. Are Mary, Lester, and Sandra’s Sweepers covered by NYC’s Fair Workweek Law?*

Yes. Mary and Lester are fast food workers because they clean fast food establishments. Sandra’s Sweepers is a fast food employer because its workers perform covered functions at fast food establishments.

**Scenario:**

*Pearl is a bookkeeper for Rose’s Roasts, a chain of chicken restaurants with 35 locations in New York and New Jersey. Pearl works in an office above the chain’s flagship restaurant in Jackson Heights. In March 2018, Pearl starts filling in as a part-time cashier in the restaurant at her location. Is Pearl a fast food employee?*

Before March 2018, Pearl is not a fast food employee. Once Pearl starts working in the restaurant providing customer service, she is a fast food employee.

**Does immigration status limit or change a worker’s rights under the law?**

No. Workers have the same rights and protections under the law regardless of immigration status. DCWP does not collect any information about a worker’s immigration status to pursue a complaint.

**Are employees who work in NYC but live outside of NYC covered by the law?**

Yes. It does not matter where an employee lives as long as the employee works at a location in NYC.

**Are workers who are hired by other companies to perform work at a fast food establishment covered by the law?**

Yes. Even if workers are hired by a subcontractor, temp firm, or another third party to work at a fast food establishment, they are covered by the law as long as they meet the definition of a fast food employee.

**Scenario:**

*Marcia is employed as a security guard by Safer Security. She provides security services to two fast food restaurants and an office building. Is Marcia a fast food employee?*

Yes. Marcia is considered a fast food employee because she performs security for two fast food restaurants.

**c. Who is a Fast Food Employer?**

**Which fast food employers are required to comply with NYC’s Fair Workweek Law?**

Under the law, **fast food employers** are employers who hire **fast food employees** to work at **fast food establishments**.

**What is a fast food establishment?**

A **fast food establishment** is a business that is part of a chain, primarily serves food and beverages, offers limited service, and is one of 30 or more such establishments nationally. Customers order food or drinks and pay before they sit down to eat or take their food to go, or they place an order for delivery off-site.

If the total number of a franchise brand’s fast food establishments is greater than 30, separately owned franchises must comply with the law.

Two or more “integrated entities” (related companies) that together own or operate 30 or more establishments qualify as fast food establishments.

Finally, fast food establishments located within other types of establishments, such as food courts in a mall or airport, may also be covered by the law.

**Scenario:**

*A small business owner in NYC is the franchise owner of two fast food restaurants that are part of a chain headquartered in California with 300 national locations. Are the small business owner’s two NYC restaurants fast food establishments?*

Yes. The two restaurants are part of a chain, serve fast food and drinks, offer limited service, and are among more than 30 establishments.

**Scenario:**

*Java Juice Coffee and Juice Bar is a chain of over 30 establishments nationally with the primary purpose of serving coffee, juice, and snacks. Customers order their food or drinks and pay before sitting or taking their order to go. Maria works at a Java Juice Coffee and Juice Bar that operates within the Ditmas Plaza Mall in Brooklyn. Is Java Juice Coffee and Juice Bar a fast food establishment?*

Yes. Even though Java Juice Coffee and Juice Bar is located within another establishment, it is covered by the law.

**What is a chain?**

A **chain** is a group of employers that share a brand or standardized options for décor, marketing, packaging, products, and services. To be covered by NYC's Fair Workweek Law, a fast food establishment must be part of a chain.

**What is an integrated enterprise?**

An **integrated enterprise** is two or more business entities that share some degree of operations, ownership, management, and control of labor relations.

**Scenario:**

*Britney owns 25 Sandwichville restaurants that share décor, marketing, packaging, products, and services. She also owns 10 Sandwichville Express kiosks that share marketing, packaging, products, and services with the Sandwichville establishments. Britney owns a restaurant called Sushi Town that does not share branding with any other establishment. Which of Britney's restaurants are fast food establishments?*

Sandwichville and Sandwichville Express may be fast food establishments. They are part of a chain because they share a brand. Together, they total more than 30 establishments. However, they must meet the other requirements under the law.

Sushi Town is not a fast food establishment. It is not part of a chain despite also being owned by Britney because it has a different brand and does not use standardized décor, marketing, packaging, products, or services.

**Does the law apply to employers that are not based in NYC?**

Yes. The law applies to all employers that fit the definition of a fast food employer and that employ workers in NYC. The employer can be based outside of NYC.

For example, a national fast food chain's establishments in NYC will be covered if they otherwise meet the requirements.

**How do employees know who their employer is if more than one company is involved in the management of their job?**

Multiple individuals or businesses may be treated as a single employer based on how interrelated the businesses are and how much they share management and control of their workforce. A worker may also be jointly employed by more than one individual or business at the same time. Therefore, all employers involved in the management of fast food workers may have obligations to those workers under NYC's Fair Workweek Law.

## II. Predictable Scheduling

*This section includes the terms “discharge,” “just cause,” bona fide economic reason.” See III. Progressive Discipline, Layoffs, and Retaliation for more detail about the just cause provisions of the law.*

### a. Regular Schedules and Advance Scheduling

#### ***What is a regular schedule?***

A regular schedule is stable week to week so employees know when they are expected to work. It should provide long-term scheduling predictability for employees and employers.

#### ***What is a baseline regular schedule?***

An employee’s baseline regular schedule is the regular schedule with the highest total hours in the previous 12 months.

Some exceptions apply:

- If an employee requested or agreed to a reduction in regularly scheduled hours, then the reduced schedule is the baseline.
- If an employer reduced an employee’s schedule for just cause or a bona fide economic reason, then the reduced schedule is the baseline.

#### ***How is the regular schedule documented?***

Employers must give the regular schedule to employees in writing, either on paper or electronically. The regular schedule must include:

- number of hours an employee can expect to work per week for the duration of the employee’s employment;
- expected days, times, and locations of hours; and
- date the regular schedule takes effect.

#### ***Who should receive a regular schedule?***

As of July 4, 2021, each employee must get a written regular schedule from the employer.

#### ***When must an employer update the regular schedule?***

When an employee’s regular schedule changes for any reason, the employer must give a written updated copy of the regular schedule to the affected employee as soon as possible and before the employee receives the first work schedule following the change.

#### ***Are there any restrictions on which shifts can be in a new hire’s regular schedule?***

Yes. Before placing available shifts in a new hire’s regular schedule, employers must offer the shifts to current employees first. It is not sufficient to offer available shifts to current employees on a temporary basis before awarding them to a new hire on a regular basis. Current employees must have the chance to add newly available shifts to their regular schedules first. *See II. d. Access to Hours on page 24.*

#### ***Is the regular schedule requirement different from the previous “Good Faith Estimate” requirement?***

Yes.

Before July 4, 2021, employers had to give employees a “Good Faith Estimate” of the hours, days, and times they could expect to work during their employment.

As of July 4, 2021, the regular schedule requirement replaces the “Good Faith Estimate” requirement and puts new limitations on an employer’s ability to reduce the total hours in an employee’s regular schedule and to reduce, increase, or change the total hours in an employee’s work schedule.

**What is the difference between a regular schedule and a work schedule?**

The **regular schedule** contains a worker's recurring weekly shifts on a long-term and indefinite basis and does not correspond to any particular workweek.

The **work schedule** contains a worker's specific shifts in a given workweek. The work schedule for a given week may not always match the regular schedule.

**What differences are allowed between the regular schedule and the work schedule?**

An employer may give an employee a work schedule that is different from the regular schedule, but if the difference in weekly scheduled hours is more than 15% over the whole workweek, the employer must ask for the employee's written consent to the differences.

An employer may also give an employee a work schedule that is different from the regular schedule if the employee has requested the changes in writing.

**What is considered a difference between the regular schedule and the work schedule?**

A difference between the regular schedule and the work schedule occurs when:

- the start time of a shift on the regular schedule is before or after the start time of a shift on the work schedule;
- the end time of a shift on the regular schedule is before or after the end time of a shift on the work schedule;
- a shift that is on an employee's regular schedule is *not* on the work schedule;
- a shift that is *not* on an employee's regular schedule is on the work schedule.

Calculation of the 15% difference is based on the whole regular schedule, not on an individual shift, so an employer may be under the 15% limit even if there are substantial changes to individual shifts. Note that premium pay and other requirements for schedule changes may still apply independent of the difference between a regular schedule and a work schedule.

Visit [nyc.gov/dcwp](https://nyc.gov/dcwp) for a [schedule difference calculator tool](#).

See Scenarios on the following pages.

**Scenario:**

*Margot's regular schedule is Mondays through Thursdays from 9:00 a.m. to 3:00 p.m., a total of 24 hours a week. When she gets her work schedules for two upcoming workweeks 15 days in advance, she sees that her manager scheduled her to work on a Tuesday from 11:00 a.m. to 3:00 p.m. the first workweek and on a Friday from 11:00 a.m. to 2:00 p.m. the second workweek. Otherwise, the shifts on her work schedules are the same as the shifts on her regular schedule. Her manager did not seek her consent to the differences between the regular schedule and the work schedules. Was this lawful?*

Yes. The differences between the work schedules and the regular schedule were not more than 15%. Margot's manager was not required to seek her consent for the differences.

The difference for the first workweek was 8.3%. To calculate the difference, divide **2** by **24**.

- The Tuesday start time differed from Margot's regular schedule by **2 hours** (11:00 a.m. versus 9:00 a.m.).
- Margot's regular schedule totals **24 hours**.

The difference for the second workweek was 12.5%. To calculate the difference, divide **3** by **24**.

- Margot's regular schedule does not include a shift on Fridays, so the Friday hours (11:00 a.m. to 2:00 p.m.) differed from Margot's regular schedule by **3 hours**.
- Margot's regular schedule totals **24 hours**.

**Scenario:**

*Juana's regular schedule is Wednesdays through Sundays from 4:00 p.m. to 11:00 p.m., a total of 35 hours a week. Before issuing the work schedule for a workweek, Juana's manager asked her to start work on Wednesday at 9:00 a.m. Juana agreed, gave her consent in writing, and worked the Wednesday morning shift in addition to the Wednesday evening shift. Otherwise, the shifts on her work schedule were the same as the shifts on her regular schedule. Was this lawful?*

Yes.

The difference between the work schedule and the regular schedule was 20%, which meant Juana's manager had to seek her consent before assigning Juana the Wednesday morning shift. To calculate the difference, divide **7** by **35**.

- The Wednesday start time differed from Juana's regular schedule by **7 hours** (new 9:00 a.m. to 4:00 p.m. shift).
- Juana's regular schedule totals **35 hours**.

Juana agreed to work the additional time and gave her consent in writing before her employer made the change.

**Scenario:**

Sam's regular schedule is Mondays from 9:00 a.m. to 2:00 p.m., Tuesdays from 11:00 a.m. to 8:00 p.m., and Fridays from 6:00 a.m. to 2:00 p.m. For an upcoming workweek, Sam sees that he is scheduled to work on Friday from 10:00 a.m. to 3:00 p.m. Otherwise, the shifts on his work schedule are the same as the shifts on his regular schedule. After the schedule is posted, Sam's manager tells him to sign a consent form about the difference. Sam signs the form. Is this lawful?

No.

The difference between the work schedule and the regular schedule was 22.7%, which meant Sam's manager had to seek his consent before changing Sam's work schedule. To calculate the difference, divide **5** by **22**.

- The Friday start and end times differed from Sam's regular schedule by **5 hours** (10:00 a.m. versus 6:00 a.m.; 3:00 p.m. versus 2:00 p.m.).
- Sam's regular schedule totals **22 hours**.

Sam did not request the difference and did not consent to the difference as the law requires. Sam's signature on the form does not meet the law's requirement for written consent for two reasons:

1. his manager told him to sign the form without first giving him the opportunity to say no; and
2. his manager sought written consent *after* posting the schedule, not beforehand.

***Can an employer change the regular schedule without an employee's input?***

Generally, an employer may change an employee's regular schedule as long as the total hours stay the same, increase, or decrease by no more than 15% from the baseline regular schedule. The employer must give the employee an updated copy of the regular schedule at least 14 days before the first day on the first work schedule following the change.

When making changes, an employer must follow its own policies regarding scheduling around employee availability.

See Scenarios on the following pages.



**Scenario:**

*Carlos tells his employer that he is available to work seven days a week. His employer gives him a written regular schedule totaling 24 hours a week: Mondays, Tuesdays, 6:00 a.m. to 12:00 p.m.; Wednesdays, 7:00 a.m. to 12:00 p.m.; Fridays, 5:00 a.m. to 12:00 p.m. After three months, Carlos's employer gives him a new regular schedule totaling 35 hours a week: Tuesdays, Wednesdays, 12:00 p.m. to 10:00 p.m.; Fridays, 4:00 p.m. to 12:00 a.m.; Saturdays, 5:00 p.m. to 12:00 a.m. Carlos received the new regular schedule by email on Sunday, November 7, 2021. He also received a work schedule by email on Sunday, November 7 for the workweek beginning Monday, November 22 with shifts that reflect the new regular schedule. Carlos did not request the schedule changes, and he is unhappy about them. Although he had indicated open availability, he prefers to work mornings. Did Carlos's employer violate NYC's Fair Workweek Law?*

No.

Carlos's employer did not need to get Carlos's written consent to increase the total hours in his new regular schedule. However, the employer would need Carlos's written consent to give him a new regular schedule that *reduced* his total hours by more than 15%.

Carlos's employer gave him the new regular schedule and the corresponding work schedule 14 days before the first day on the work schedule.

Carlos's baseline regular schedule is now 35 hours.

**Scenario:**

*Fast Food Express schedules its employees to work Monday-Sunday work shifts. Stacy's regular schedule is Wednesday through Friday, 10:00 a.m. to 3:00 p.m. On Tuesday, July 26, 2022, Stacy's manager gives her a copy of a new regular schedule. Beginning the week of Monday, August 8, Stacy will no longer work Wednesdays; instead, she will work Thursday through Saturday, 10:00 a.m. to 3:00 p.m., a time she is available to work. Can Fast Food Express make this schedule change without Stacy's consent?*

No. Even though the total hours on her new regular schedule will remain the same, Stacy's employer made the change with less than 14 days' notice. By law, Stacy's employer must give her the chance to say no or get her consent to the schedule change in writing.

Stacy's employer would not need her written consent if the new regular schedule took effect on Monday, August 15, more than 14 days after the employer's notification on July 26.

## Can an employer reduce the hours on an employee's regular schedule?

Yes, within limits.

By law, employees have a right to a regular schedule that has at least 85% of the work hours in their *baseline regular schedule* (defined on page 5).

An employer can reduce the hours in an employee's regular schedule in the following instances only:

- An employee requests or consents to a reduction from the highest hours in the previous 12 months. In this situation, the reduced regular schedule is the new baseline. **An employer cannot require an employee to request or consent to a reduction.**
- The employer has just cause or a bona fide economic reason to make the reduction.

### Scenarios:

*Rebecca, a Fast Food Express employee, has a regular schedule totaling 25 hours a week. After a month, Fast Food Express gives Rebecca a new regular schedule totaling 23 hours a week, a reduction of 8%. Rebecca did not request the reduction and does not want it because it reduces her income. Was the reduction in Rebecca's hours legal?*

Yes. Rebecca's employer can reduce her hours by less than 15% without her consent.

Rebecca's baseline regular schedule remains 25 hours because she did not request the change or consent to the change.

*After two more months, Fast Food Express gives Rebecca a new regular schedule totaling 21 hours a week, a reduction of 16% from her baseline regular schedule of 25 hours a week. Her employer does not give her a notice of discharge to indicate if the reduction of hours was for a bona fide economic reason or just cause. Rebecca did not request the reduction and is unhappy about it. Was the reduction in Rebecca's hours legal?*

No. Fast Food Express reduced Rebecca's regular schedule by more than 15% without just cause or a bona fide economic reason and without her consent.

Rebecca's baseline regular schedule remains 25 hours because she did not request or consent to the change, which was illegal.

***Important:** In either scenario, if Fast Food Express instructed Rebecca to sign a form consenting to the reductions and she did so, her signature would not be consent because she did not want the reductions and she was not free to decline them.*

## ***Is an employer required to keep updated information on file about the times an employee is available to work?***

No.

Asking employees about their hours of availability is a common practice in fast food restaurants. It can make scheduling easier for employers and employees. However, it is not required by law.

***If an employer typically collects availability information from employees, can the employer change the regular schedule to times employees are unavailable?***

No.

If an employer maintains information about employees' availability to work, the employer may not add or change a recurring shift on the regular schedule to when an employee is unavailable unless the employee consents in writing. An employer can ask employees to change their availability, but the employer cannot require it and cannot schedule a conflicting shift without employee consent. Without consent, assigning a shift to an employee when the employee is unavailable is a constructive discharge, which is illegal.

***If employees change their availability, is an employer required to give them new recurring shifts on the regular schedule to keep their total hours the same?***

No.

If an employee informs the employer in writing that the employee is no longer available to work a shift on the regular schedule, then the employee has consented to the resulting reduction in hours. The employer may reduce the employee's regular schedule to only the shifts the employee can still work. Because the employee requested and consented to the schedule change, the reduction is not a discharge.

If an employee is no longer available to work part of a shift on the regular schedule, the employer can decide to remove the entire shift or just the conflicting hours. This is a decision for the employer to make. Because the employee requested the schedule change, the reduction is not a discharge.

The employer can add new shifts to the employee's regular schedule when the employee is available. Also, the employee must have the opportunity to work newly available shifts before the employer offers shifts to new hires. See *II. d. Access to Hours on page 24*.

## Scenarios:

*According to the Fast Food Express employee handbook, employees must give at least 30 days' notice of a change in availability. Martha's regular schedule totals 27 hours a week. Six weeks before she needs to change her schedule, Martha informs her employer in writing that she will no longer be able to work a five-hour recurring shift on Tuesday evenings because it conflicts with a college class. She also requests a new recurring shift within her new availability to keep her total hours at 27. Fast Food Express updates Martha's regular schedule to remove the Tuesday evening shift but does not add another shift. Did Fast Food Express violate the law?*

No. Martha requested the reduction. Fast Food Express is not required to accommodate Martha's request for a new recurring shift within her new availability. Martha's baseline regular schedule is now 22 hours.

*After one month, Fast Food Express posts a notice about an available six-hour recurring shift on Saturdays. Martha accepts it. Her employer awards it to her and adds it to her updated regular schedule. What is the impact to Martha's regular schedule?*

Martha's baseline regular schedule is now 28 hours.

*Another month passes. Fast Food Express removes the recurring six-hour Saturday shift from Martha's regular schedule and adds a new recurring six-hour shift on Tuesday evenings. Did Fast Food Express violate the law?*

Yes. Fast Food Express scheduled Martha to work at a time she had told them she was unavailable in accordance with the employer's policy. In addition, Fast Food Express reduced Martha's hours by 21%\*. Unless the employer has a bona fide economic reason, the reduction is a wrongful discharge since it reduced Martha's hours by more than 15%.

\*To calculate the difference, divide **6** by **28**.

- The change to Martha's schedule is **6 hours**.
- Martha's regular schedule totals **28 hours**.

*Instead of removing the Saturday shift from Martha's regular schedule, Fast Food Express adds a new recurring six-hour shift on Tuesday evenings. Did Fast Food Express violate the law?*

Yes. Her employer still scheduled Martha to work at a time she had told them she was unavailable in accordance with the employer's policy. If Martha does not work the newly scheduled Tuesday evening recurring shift, Fast Food Express cannot cite her absence as just cause for a discharge.

## ***If a change in availability means an employee is no longer available to work any of the shifts on the regular schedule, what is the employee's status?***

As long as the employee worked at least eight hours in the previous 30 days, the employee remains a current employee covered by NYC's Fair Workweek Law. This means that the employer must continue to offer the employee available shifts at the employee's work location before the employer can hire new employees. (See *II. d. Access to Hours on page 24.*)

Important: After 30 days, the employer is no longer required to offer available shifts to the employee. If the employee has not accepted any available shifts or otherwise informed the employer that the employee wants to remain employed, the employee is considered to have quit the job.

**Scenarios:**

*Fran works at Fast Food Express. Her regular schedule includes shifts on Mondays, Tuesdays, and Fridays. Following her employer's policy, Fran gives five weeks' notice that she will be available to work on Saturdays only. Fast Food Express removes all recurring shifts from Fran's regular schedule which now totals 0 hours. Over the next month, Fast Food Express posts notice about available shifts. Fran does not accept any recurring shifts. What is Fran's status?*

Because Fran did not work at least eight hours in the past 30 days, did not accept any available shifts, and did not otherwise inform her employer of her intent to remain employed, she is considered to have quit her job. She is no longer a "current" employee entitled to offers of available shifts.

*Instead of notifying Fast Food Express that she is no longer available any day but Saturday, Fran gives Fast Food Express five weeks' notice that she will be unavailable for the entire month of December 2022 and informs her manager that she would like to return to her current schedule on January 2, 2023. What is Fran's status on January 1, 2023?*

Because Fran did not work at least eight hours in the past 30 days, she is no longer entitled to offers of available shifts as of January 1, 2023. However, since she'd informed Fast Food Express of her intent to remain employed, she is not considered to have quit. Nonetheless, Fast Food Express may have just cause to discharge Fran if her leave violates its policies and it follows required procedures (see Section III).

**What does worker "consent" mean in the context of a change in regular schedule total hours or a variation between the regular schedule and the work schedule?**

Consent means an employee agreed to a change after having the opportunity to say no and without any pressure from the employer. Consent must be in writing, and the written consent must show it was obtained before the change.

It is illegal for employers to require employees to give written consent to an increase or reduction in hours on the regular schedule or a variation between the regular schedule and the work schedule without giving employees a chance to say no. Employers must discuss changes with employees *before* posting work schedules. Employers must make clear to employees that there are no negative consequences for saying no.

**Does NYC's Fair Workweek Law allow employers to set minimum hours requirements for employees?**

An employer may require employees to be available to work, or to actually work, a minimum number of hours a week, but this is not required by law.

If employers have a minimum hours requirement, they must apply the policy in the same way for all employees. For example, an employer does not have just cause to discipline or discharge an employee who is unavailable to work the minimum number of hours if the employer allows other employees to work less than the minimum without consequence.

***If an employee regularly works more than 15 minutes past the scheduled end time of a shift, must the employer increase the hours on the regular schedule to match the variation?***

It depends. The regular schedule should anticipate the work schedule. Employers should monitor frequent schedule changes and consider whether changes to the regular schedule are necessary to meet their ongoing labor needs.

***What other notice must employers give employees about scheduling?***

Employers must give workers their work schedules at least 14 days before the first day of each work schedule. New hires must receive the work schedule on or before the first day of work. The work schedule must cover at least seven calendar days. For each shift, the work schedule must contain a date, location, start time, and end time.

***How must employers notify employees about their work schedules?***

Employers must give workers their work schedules in two ways:

1. Physically post work schedules at workplaces in a location where workers will see them.
2. Give workers their work schedules in writing. Employers must send work schedules electronically—for example, by text or email—if they normally communicate with workers in that way.

***When must employers notify employees about their work schedules?***

Employers must give workers their work schedules at least 14 days before the start of the workweek.

For example, if the workweek starts on Monday, July 26, 2021, the employer must post the schedule for that workweek and also give each worker the schedule for that workweek on or before midnight on Sunday, July 11, 2021.

***How must an employer calculate 14 days' notice of a schedule change?***

"14 days" means at least 336 hours before the first day on the work schedule. The first day is considered to begin at 12:00 a.m.

***What information must employers include in the work schedule?***

A work schedule must include the dates, times, and locations of shifts and cover a seven-day period.

***What must employers do if they change the work schedule?***

Employers must update the work schedule within 24 hours of finding out about the need for the change, or as soon as possible, and provide notice to workers by posting the updated work schedule and providing it to all affected employees directly. An employer must pay employees premium pay for schedule changes made by the employer with less than 14 days' notice.

***If an employer gives employees work schedules that always match the regular schedule, does the employer still have to give employees work schedules 14 days in advance?***

No; however, the employer must have written documentation showing that the employer informed employees that their regular schedule will be their weekly work schedule.

***Can an employer ask for an employee's consent to a variation of more than 15% from the regular schedule after posting the work schedule?***

No. The employer must discuss the proposed variation with the employee *before* the 14-day deadline for posting the work schedule. It is illegal to post a work schedule that contains a variation of more than 15% without first giving the employee an opportunity to consent or say no.

***If a fast food establishment is closed for a holiday, or for an unexpected emergency like severe bad weather, is a variation of more than 15% between the regular schedule and the work schedule considered a discharge or otherwise illegal without the employee's consent or request for the change?***

No. A variation is not considered a discharge and is not counted as a variation between the regular schedule and the work schedule if it was caused by:

- threats to employees or the employer's property;
- failure of a public utility or shutdown of public transportation;
- fire, flood, or other natural disaster;
- government-declared state of emergency; or
- severe weather conditions that pose a threat to employee safety.

***Can an employer let an employee take a day off if it causes a variation of more than 15% between the employee's regular schedule and the work schedule?***

Yes. If an employee requests a variation of more than 15% from the regular schedule, then the employer may grant it. In this circumstance the reduction of hours is not considered a discharge.

***What happens if employers violate regular schedule or work schedule requirements?***

Employers who violate these requirements may be required to pay each affected worker \$200 for each violation for each workweek until the employer comes into compliance.

Employers may be subject to fines of \$500 per violation per worker for first violations, up to \$750 for second violations within a two-year period, and up to \$1,000 for subsequent violations.

## **b. Changes to Work Schedules and Schedule Change Premiums**

***What happens if an employer changes workers' work schedules?***

If an employer changes workers' work schedules less than 14 days before the first day on the work schedule, the employer must pay each worker a schedule change premium. See the table "Schedule Change Premium Amounts" on page 16. Workers can accept or decline additional work time.

If workers *accept* additional work time, the employer must obtain their consent in writing before the work schedule is posted. Workers' consent must relate to a specific shift and cannot be a general or long-term statement of availability.

If workers *decline* additional work time, they do not have to put their refusal in writing. Workers have a right to say no to additional hours without any negative consequences.

If an employer reduces work time, no written consent is required.

***Is a change in shift location considered a schedule change under the premium pay requirement?***

No. Employers do not have to pay a premium if they change a shift location.

***What does worker "consent" mean in the context of additional hours?***

Consent means an employee agreed in writing to work additional hours after having the opportunity to say no and without any pressure from the employer. The written consent must show it was obtained before the change.

It is illegal for employers to require employees to give written consent to work additional time without giving employees a chance to say no. Employers must make clear to employees that there are no negative consequences for saying no.

***Can employees consent in writing after working additional time?***

No. If an employee agrees to work additional time, the employer must obtain the employee's consent in writing no later than 15 minutes after the employee begins to work additional time. The employee's written consent must reflect the date, time, and method used to submit consent to the employer.

If an employer uses a **scheduling application or software** to obtain records of employee consent to work additional time, the software must record the date and time of transmission.

If an employer uses a **paper system**, the document must reflect the date and time consent was given. Employers cannot backdate an employee's written consent to the date of the relevant schedule change.

***Can employers collect employees' written consent to work additional time all at once, such as at the end of the workweek?***

No.

***When must an employer obtain an employee's written consent when an employee unexpectedly works late?***

An employer must give the employee an opportunity to leave on time, regardless of whether the employee has completed all work assignments at the end of a scheduled shift.

If the employee chooses to work past the end of a scheduled shift, the employer must obtain the employee's written consent no later than 15 minutes after the employee begins to work the additional time. It is a violation of the law if the employee gives written consent more than 15 minutes after the scheduled end time of the shift.

To comply with the law, employers can ask employees at the beginning of a shift if they want to work extra time at the end of the shift, if needed. Employees can choose to say yes or no. For employees who agree, the employer should get their advance written consent at the shift start time. If extra time is needed, employees who gave consent can continue to work. If no extra time is needed, the employer can send employees home at the scheduled end time.

***Does an employee's written consent to a schedule change waive any premium owed?***

No. Employees cannot waive the right to a schedule change premium that is owed them. An employee's consent to a schedule change does not create any exception to the requirement that employers pay a schedule change premium.

**Schedule Change Premium Amounts**

<b>Amount of notice</b> <i>(before first date on work schedule)</i>	<b>Rate for additional hours</b>	<b>Rate if no impact on total hours</b>	<b>Rate for reduced hours</b>
Less than 14 days' notice	\$10 per change	\$10 per change	\$20 per change
Less than 7 days' notice	\$15 per change	\$15 per change	\$45 per change
Less than 24 hours' notice	\$15 per change	\$15 per change	\$75 per change

***Are premium amounts calculated based on the date of the changed shift or the start of the work schedule?***

The notice requirement for schedule changes refers to the first date on the work schedule, not the date or times of individual shifts in the work schedule. A worker must have 14 days' advance notice of the full work schedule for the week. To calculate schedule change premium amounts, employers should count the days from when the employee was notified of the schedule change to the first day on the work schedule. Employers must pay a premium for any changes they make to the schedule with less than 14-day, 7-day, or 24-hour notice. Any change that occurs on or after the day before the first day on the work schedule is a change with less than 24 hours' notice.

For example, the first day on a work schedule is Monday, July 27, 2020. The employer cancels a shift originally scheduled for Thursday, July 30, 2020 (the fourth day of that workweek).



<b>If notice of cancellation is given:</b>	<b>Required premium is:</b>
On or before Sunday, July 12	no premium
Between Monday, July 13 and Sunday, July 19	\$20
Between Monday, July 20 and Saturday, July 25	\$45
On or after Sunday, July 26	\$75

***Are there circumstances when an employer is not required to give an employee a work schedule?***

An employer does not have to give an employee a work schedule when:

- the employee will be on leave for the entire period covered by the work schedule; or
- the employer communicated to employees in writing that the regular schedule is the work schedule under the employer's policy and the employer consistently follows the regular schedule.

***Are there any exceptions to the schedule change premium requirements?***

Yes. There are four exceptions to the premium pay requirement.

**1. Employers are not required to pay premiums for schedule changes if they are unable to operate due to:**

- Threats to employees or the employer's property
- Failure of a public utility or shutdown of public transportation
- Fire, flood, or other natural disaster
- Federal, state, or local state of emergency
- Severe weather conditions that pose a threat to employee safety

**2. Employers are not required to pay premiums when workers request or initiate schedule changes.**

Examples of schedule changes that workers request or initiate include:

- Asking for time off
- Calling out
- Using safe and sick leave
- Arriving late
- Leaving early due to a personal need

For this exception to apply, the employer must keep written documentation with enough information to show the date of the shift and that the employee initiated or requested the change.

*Employers must pay premiums for the following types of schedule changes because they are not employee requests:*

- Manager makes a change to the written schedule that the employee did not request.
- Manager asks an employee to arrive early for a scheduled shift or to work an additional unscheduled shift.
- Employee continues to perform work past the end of the scheduled shift.
- Employee leaves early at management's request.
- Manager asks an employee to fill in for, or trade a shift with, another employee.
- Management or workforce management software—for example, a scheduling app used by the employer—asks for volunteers to work more or less time and an employee volunteers.
- Employee picks up an open shift (not a voluntary shift trade) that the employer posted in a scheduling application.
- Employee accepts an offer of available shifts.
- Employee is fired or laid off.

In these situations, the employer must pay premiums even if the employee consented in writing to the schedule change. Employers may not ask employees to sign documentation that falsely describes these types of changes as employee requests.

**3. Employers are not required to pay premiums for scheduling changes when employees voluntarily trade shifts with one another.**

Examples of voluntary shift trades include:

- An employee posts or “drops” a scheduled shift in a scheduling application and another employee “picks up” the shift in the scheduling application.
- Employees make an offline agreement to trade shifts and inform their manager. The manager must change the work schedule and also record in writing that the reason is a voluntary trade and identify the shifts and the employees who traded.

**4. Employers are not required to pay premiums for adding time to the work schedule when the employer must pay overtime for the changed shift.**

**Scenario:**

*Ashley normally works weekends but texts her manager, “Hi, I’d love to work some weekday shifts in the future. Please let me know if anything opens up.” The next month, when she’s at work on a Saturday, the manager tells Ashley she is scheduled to work that coming Tuesday. Ashley is pleased and provides written consent for the Tuesday shift. Is Ashley entitled to a schedule change premium?*

Yes. Ashley is entitled to a \$15 premium because she received less than seven days’ notice to work an additional shift. Although she had requested more weekday shifts, the employer made the schedule change, so there is no exception to the premium pay requirement. Ashley’s general, open-ended request for “weekday shifts” cannot be taken to mean consent for any schedule change; the employer would have to get written consent for any specific schedule change, as it did in this situation.

**Scenario:**

*It is a rainy day and Yo FroYo, a fast food establishment, is having a slow day because of it. Pam, the manager, asks for volunteers to go home early. Pete agrees and leaves two hours before the end of his shift. Does Yo FroYo need to pay a premium to Pete?*

Yes. Even though Pete “volunteered” to leave his shift early, he did so at the request of his employer. Because the change is a reduction in hours—not additional hours—the employer does not have to get written consent. However, the employer must pay a \$75 premium because it reduced Pete’s work time with less than 24 hours’ notice.

**Scenario:**

*Donut Street is a fast food restaurant covered by the law. Maya and Lila are both working 8:00 a.m. to 4:00 p.m. shifts. Sonia is scheduled to work 4:00 p.m. to 12:00 a.m., but she calls in to Donut Street at 3:00 p.m. to say that she's going to need to use sick leave to care for her son who is home sick. She won't arrive to work until 6:00 p.m. The manager asks Maya and Lila if either of them would like to volunteer to stay late and cover for Sonia. Maya volunteers and consents to working the additional two hours in writing. Does Donut Street need to pay a schedule change premium?*

Yes. Donut Street needs to pay Maya a \$15 premium in addition to any regular pay for working additional time with less than 24 hours' notice. Even though the manager asked for "volunteers," the employer initiated the schedule change, so there is no exception to the premium pay requirement. Sonia is not entitled to a premium because she voluntarily took time off. (But Sonia may have accrued paid sick leave, which she would be entitled to use in this situation.)

**Scenarios:**

*Pollos Locos is a fast food restaurant covered by the law. On the schedule posted on Sunday, May 30, 2021 for the week of Monday, June 14 through Sunday, June 20, Claudia was originally scheduled to work shifts on Monday, Tuesday, and Sunday. On Wednesday, June 2, Claudia receives a notification through the Pollos Locos scheduling app that a new shift on Friday, June 18 has been added to her schedule. Claudia tells her manager that she cannot work that Friday because she cannot find a babysitter on short notice. Her manager responds that she has to work or she will be considered a no-call, no-show. Claudia responds that she cannot work the new shift. After she does not report to work on Friday, her manager terminates her employment. Has there been a violation of NYC's Fair Workweek Law?*

Yes. Pollos Locos added the time to Claudia's schedule without her advance consent and with less than 14 days' notice. Claudia has a right to decline to work the Friday shift, which her manager rejected. Claudia is entitled to \$200 in damages and a schedule change premium of \$10. If the employer doesn't pay the schedule change premium, she is entitled to an additional \$300 in damages.

Also, by terminating her employment, Pollos Locos illegally retaliated against Claudia for exercising her rights. Claudia is entitled to have her discipline erased, reinstatement, back pay, and \$2,500 in additional damages.

*If, after talking with her manager, Claudia works the Friday shift, has there been a violation and does her manager owe her premium pay?*

Yes to both.

Claudia has a right to decline to work the Friday shift, which her manager violated by pressuring her to work.

Also, because her manager added the Friday shift to Claudia's schedule with less than 14 days' notice, Pollos Locos owes Claudia \$10 in premium pay.

**Does an employer owe premium pay when it issues a work schedule with less than 14 days' notice?**

Yes in most instances.

Under NYC's Fair Workweek Law, if an employer has not issued a work schedule 14 days before the first day on the work schedule, then the regular schedule is the work schedule. As a result, if the employer issues a late work schedule that is different from the regular schedule, each difference between the two is a schedule change.

In addition, if the employer has not issued a regular schedule, then each shift on the late work schedule is a schedule change.

*Exception:* If an employer's policy is that a regular schedule is the work schedule and the employer provided both the policy and the regular schedule in writing, then the employer does not need to issue employees separate work schedules each week.

**Scenario:**

*Brandon's regular schedule includes shifts on Mondays, Tuesdays, Wednesdays, and Saturdays from 6:00 a.m. to 2:00 p.m. At 5:00 p.m. on Tuesday, November 9, 2021, Brandon's employer posts and electronically transmits the work schedule for the workweek beginning Monday, November 22. The work schedule differs from the regular schedule in two ways: there is no Monday shift, and Brandon is scheduled to start work at 9:00 a.m. on Tuesday, November 23. Is Brandon owed schedule change premium pay?*

Yes. Brandon's employer owes him \$40 in premium pay: \$20 for canceling his Monday shift with less than 14 days' notice and \$20 for reducing the hours of his Tuesday shift with less than 14 days' notice.

In addition, Brandon's employer violated the law. The difference between the work schedule and the regular schedule was 34.3%\*, which meant Brandon's employer had to seek his consent before changing Brandon's work schedule. Brandon did not agree to or request the reduction.

\*To calculate the difference, divide **11** by **32**.

- The cancelled Monday shift and Tuesday start time (9:00 a.m. versus 6:00 a.m.) differ from Sam's regular schedule by **11 hours**.
- Brandon's regular schedule totals **32 hours**.

**Scenario:**

*Jimmy works for Fast Food Express. He never received a regular schedule. His employer usually posts the following week's work schedule about six days before the first day on the schedule. Jimmy is unpredictably scheduled to work anywhere from two to six shifts a week. Is Jimmy owed schedule change premium pay?*

Fast Food Express must give Jimmy a written regular schedule and his work schedules at least 14 days in advance. Because Jimmy did not receive a regular schedule, Fast Food Express owes him a schedule change premium of \$15 for each shift on each of his work schedules. In addition, Jimmy is entitled to other relief under the law.

**Does an employer need to get written consent and pay a premium to a worker filling in for another worker who called out unexpectedly?**

Yes, if the employer asked the employee to fill in.

If the workers agreed offline to a voluntary shift trade, then the employer has no premium pay requirements. However, the employer must obtain written documentation of the workers' agreement to the trade, which shows consent by the worker who is filling in to work the additional time.

**Do employers need to get written consent and pay a premium to workers awarded a shift when they respond to a posted notice about last-minute newly available shifts?**

Yes. Even though the notice of the available shift may not have mentioned premium pay, if there are changes to a worker's schedule within a 14-day period, the employer owes the worker premium pay.

**Are employers required to obtain written consent and pay workers a premium if the schedule changes by just a few minutes?**

No. An employer does not need to pay a premium or obtain written consent if neither the start time nor the end time changes by more than 15 minutes.

**Scenario:**

*Burger Barn provides Rashid with a schedule that includes a shift on Tuesday from 12:00 p.m. to 5:00 p.m. Rashid arrives to his Tuesday shift 16 minutes late. At approximately 5:00 p.m., Rashid's manager asks Rashid to work a few minutes more to assist with a large tour group that just came to the fast food establishment. Rashid agrees and finishes work at 5:22 p.m. Does Burger Barn need to pay Rashid a schedule change premium?*

Yes, but only for the change to his end time. Although Rashid's total work time changed by less than 15 minutes, his end time changed by more than 15 minutes.

**Is it possible to owe multiple premium payments for changes to the one shift?**

Yes. An employer owes premium pay for each change to the work schedule. Therefore, if an employer makes multiple changes to the same shift, the employer must pay premium pay for each change.

**Scenario:**

*Rashid receives a work schedule on Sunday, May 30, 2021 for the workweek beginning Monday, June 14, on which he is scheduled to work Thursday, June 17 from 12:00 p.m. to 5:00 p.m. On Tuesday, June 1, Rashid's manager posts and emails a new schedule, changing the end time of the shift on Tuesday, June 15 to 5:30 p.m. Thursday, June 17 is very busy and, at his manager's request, Rashid agrees in writing to work until 6:30 p.m. What premiums is Rashid owed?*

Rashid is owed \$10 for the addition of time made on Tuesday, June 1 and \$15 for the second addition of time made on Thursday, June 17.

**Are managers who control worker schedules entitled to premium pay?**

Hourly managers are entitled to premium pay, but only for schedule changes that their employer makes. The employer must get written consent when managers agree to work hours that are not on their written work schedule even if the managers change their own schedule without the employer asking.

**Are employees entitled to premium pay when they are fired?**

Yes. An employer must pay an employee a schedule premium for shifts the employee was scheduled to work before being fired.

There is no exception to this requirement for employees terminated for just cause, including for egregious misconduct.

**When will workers get paid the premium for schedule changes?**

Employers must pay premiums on payday for the pay period that covers the date the schedule change occurred. Employers must provide a record of the premium either as part of pay stubs or separately. The record of the premium must identify the date of each schedule change corresponding to each premium payment.

**Are premiums paid to workers for schedule changes considered part of workers' wages?**

No. Employers must note premiums separately on pay stubs or in some other written form. The premiums do not affect workers' pay rates, including for overtime purposes.

**What are an employer's premium pay obligations if the employer cancels or subtracts hours from a shift but pays the affected employee for all scheduled hours?**

If the employer pays all wages for all scheduled time, and maintains records to reflect this, then the employer is not required to pay a premium for the schedule change.

**Scenario:**

*Brenda's work schedule at Fast Food Express for the week of August 1, 2022 is Monday, Wednesday, and Friday from 9:00 a.m. to 3:00 p.m. Very few customers come in on Monday, and Brenda's manager decides that there are more staff working than necessary. At 1:00 p.m., Brenda's manager tells her she can go home and Brenda leaves. Brenda's next pay stub does not show a \$75 premium payment for Monday August 1, but it does show that she was paid at her regular rate of pay for the remaining two hours of her shift. Did Fast Food Express violate NYC's Fair Workweek Law by failing to pay Brenda a \$75 premium?*

No. Even though the employer cancelled a portion of Brenda's shift at the last minute, the employer paid Brenda for the entire shift. Therefore, Brenda is not also entitled to premium pay.

**What happens if employers do not pay workers a premium for changing a work schedule?**

Employers who fail to pay schedule change premiums owed may be liable to the worker for the unpaid premium plus \$300 for each failure to pay a required premium.

**c. Minimum Time Between Shifts (Clopennings)**

**Can employers require employees to work "clopennings" shifts?**

Employers cannot schedule employees to work two shifts over two days with less than 11 hours between shifts when the first shift ends the previous calendar day or spans two calendar days (a "clopennings") unless:

- The employee has an opportunity to decline to work the clopennings.
- The employee consents and puts consent in writing. AND
- The employer pays the worker a \$100 premium per clopennings worked.

**Scenario:**

Ana works 11:00 a.m. to 7:00 p.m. Monday through Wednesday for Pizzuh, a fast food restaurant. Her employer texts a group of employees to see if anyone wants to work a 5:00 a.m. to 1:00 p.m. shift on Thursday. Ana responds with a text, "Sure, I'll work that shift." Ana works the shift. Is Pizzuh responsible for paying Ana a premium to work the shift?

Yes. Ana is working a clopening because her Thursday shift begins less than 11 hours after the end of her Wednesday shift. Ana consented to work the shift in writing. Pizzuh must pay Ana the \$100 clopening premium or the employer will be in violation of the law.

**Scenario:**

Ben's regular schedule at Jill's Place, a fast food establishment, is 10:00 p.m. to 5:00 a.m. Monday, Wednesday, and Thursday. A few weeks ago, he told his supervisor, Niki, that he wants to work some daytime shifts. One day at work, Niki tells Ben that he can start working the Friday 9:00 a.m. to 4:00 p.m. shift, as long as he continues to work his regular schedule. Must Jill's Place pay Ben a premium? What responsibilities does Jill's Place have to Ben under NYC's Fair Workweek Law?

Ben's Thursday night shift coupled with the new Friday daytime shift would be a clopening because they are two shifts over two days (Thursday and Friday) with only four hours between the first shift ending and the next shift beginning. Ben did not specifically request a Friday 9:00 a.m. to 4:00 p.m. shift. Jill's Place must give Ben an opportunity to decline to work the 9:00 a.m. to 4:00 p.m. shift. If he agrees, it must be in writing, and Jill's Place must pay him a \$100 premium each time he works the clopening shift.

**What does worker "consent" mean in the context of a clopening?**

Consent means an employee has agreed to work a clopening after having the opportunity to say no and without any pressure from the employer. Consent must be in writing, and the written consent must show it was obtained before the employee worked the clopening

It is illegal for employers to require employees to give written consent to work a clopening without giving the employee a chance to say no. Employers must make clear to employees that there are no negative consequences for saying no.

**When a clopening is unscheduled, when must the employer obtain the employee's consent?**

Unscheduled clopenings commonly occur when there are more than 11 hours between two shifts on a schedule over two consecutive days, but the employee unexpectedly works late at the end of the first shift, resulting in less than 11 hours between the two shifts. When this happens, the employer must give the employee an opportunity to start the second shift at least 11 hours later, so that the employee has enough time to travel home and rest. If the employee consents to start the second shift at the scheduled time, the employee's consent to work a clopening must be in writing and must be obtained at or before the start time of the second shift.

**When a clopening is unscheduled, what premiums does the employer owe?**

If an employee unexpectedly works late, the employer owes \$15 for an addition of time made with less than 7 days' notice.

The employer also owes an additional premium depending on the start time of the second shift.

- If the employee agrees to start the second shift at the scheduled time, resulting in a clopening, the employer must obtain the employee's consent in writing and pay the employee a \$100 clopening premium.
- If the employee chooses or agrees to delay the start time of the second shift and this results in a reduction in hours, the employer must pay the employee a \$75 premium.
- If the employee chooses or agrees to delay both the start and end time of the second shift, resulting in no impact on hours and no clopening, the employer must pay a \$15 premium for the second shift.

***May an employer avoid paying a premium for an unscheduled clopening by instructing an employee not to clock in until 11 hours have passed from the end time of the first shift?***

No. When an employee arrives to work for the second scheduled shift at the scheduled time and there are less than 11 hours between the end of the first shift and the beginning of the second shift, the employee is entitled to a \$100 premium regardless of when the employee clocks in.

If an employee begins working the second shift late at the employer's instruction so there are 11 hours between the end of the first shift and the beginning of the second, the employer owes the employee a \$75 premium for the last-minute reduction in work hours made with less than 24 hours' notice.

***How should an employer record premium payments?***

The employer must separately note the number of premiums paid and their amounts on the wage stub or other written form of documentation provided to the employee for that pay period.

***What happens if employers require an employee to work a clopening without obtaining the employee's written consent or fail to pay the premium?***

Employers must pay workers the required \$100 premium and \$500 in damages for the failure to pay the premium and an additional \$500 for failure to obtain the employee's written consent to work the clopening.

Employers may also be ordered to comply with the law.

Employers may also be subject to fines of \$500 for first violations, up to \$750 for second violations within a two-year period, and up to \$1,000 for subsequent violations.

**d. Access to Hours**

*This section covers current employees only.*

*Under new provisions to the law, employers must also provide access to hours to workers laid off in the past 12 months. Employers must seek to restore hours for laid off workers before they offer shifts to current employees. See III. c. Layoffs for Bona Fide Economic Reasons.*

***What is access to hours?***

The law's access to hours provision requires employers to offer available shifts to current employees when they anticipate hiring new employees. This means giving current employees the opportunity to work an available shift—and, therefore, more hours—for the long term as part of their regular schedules going forward, not just one-off shifts of limited duration and hours.

***What are an employer's scheduling obligations after awarding an available shift to a current employee?***

If the shift is a recurring one, the employer must add it to the employee's regular schedule.

If the shift is a temporary one, the employer must add it to the employee's work schedule.



### ***Do employers need to advertise newly available shifts in a certain way?***

Yes. When employers have new shifts available, before advertising for or hiring a new worker, they must notify current workers who have worked at least eight hours within the past 30 days about available shifts at any of their locations in two ways:

1. Post a notice for three consecutive days at workers' workplaces where workers will see it. AND
2. Provide each worker with information electronically, which may include text or email.

### ***Are employers required to follow the access to hours procedures to award any available shifts to current employees?***

An employer is only required to offer available shifts to current employees following the law's access to hours procedures before it hires new employees or if it anticipates hiring new employees.

If an employer does not anticipate hiring new employees, it is not required to offer available shifts to all current employees before offering or assigning them to a specific current employee. An employer may award shifts to current employees at the same business location in any nondiscriminatory manner it chooses.

#### ***Scenarios:***

*A fast food employer posts and emails a notice about available recurring shifts from 4:00 p.m. to 12:00 a.m. on Friday, Saturday, and Sunday. No current employee accepts any of the recurring shifts. The employer hires a new employee, Brandon, whose regular schedule includes only recurring shifts from 4:00 p.m. to 12:00 a.m. on Friday, Saturday and Sunday. Has the employer violated the law?*

No. The employer offered the available shifts to current employees first. When no current employee accepted, the employer hired a new employee. The new employee's schedule matches the shifts advertised in the notice.

*After a few weeks, the employer schedules Brandon to work additional hours to meet increased demand or fill in for absent employees. The employer pays the appropriate premiums. Has the employer violated the law?*

No. Brandon worked at least eight hours in the past 30 days and, therefore, is a current employee. The employer can offer or assign him more hours without following the law's access to hours procedures.

### ***Who qualifies as a current worker (i.e., a current employee) at a fast food establishment?***

For the purpose of access to hours, fast food workers are considered to be current workers if:

- they worked at least eight hours within the past 30 days at any location; or
- they are on the payroll when the new shifts are posted.

Depending on the circumstances, fast food employees who have not worked at least eight hours within the past 30 days may still be protected by other parts of NYC's Fair Workweek Law, but they are not entitled to offers of available shifts.

### ***What information must employers include in the notice of available shifts?***

Notices of available shifts must include the following information for each shift:

1. Location
2. Start time
3. End time

4. Whether the shift is permanent or temporary and, if temporary, for how long the employer will need a worker to work the shift
5. The number of workers needed to cover each shift
6. How and when workers can accept any of the shifts of interest to them
7. The employer's procedure for awarding shifts, including:
  - a. The criteria the employer will use to award shifts; for example, "*Priority will be given to those with cashier's experience.*"
  - b. A statement that the employer will give priority to employees working at the location where shifts are available.

***What if workers who accept the offered shifts don't meet priority criteria?***

If multiple workers who currently work at the location where shifts are available accept offered shifts, the employer must prioritize awarding shifts to those who meet the stated criteria over those who do not. However, the employer may *not* deny workers a shift they accept because they do not meet the stated criteria if no other workers who meet the criteria accepted the shift. In other words, the employer must prioritize awarding a shift to a current employee over any new hire.

***Can an employer comply with the access to hours requirements by only posting shifts made vacant by employees who quit?***

No. This approach to the requirement would be insufficient. A shift is "available" and must be offered to current employees any time an employer anticipates hiring a new employee to work a shift whether or not an employee previously worked the shift.

***Scenario:***

*Yummies Fast Food in the Bronx posts a notice of open shifts. It states that priority will be given to employees with cashier experience and employees who live in the Bronx. Leah is the only worker from the location where the shifts are open who accepts the shifts. Leah does not have cashier experience and does not live in the Bronx. Must Yummies Fast Food award the open shifts to Leah?*

Yes. Although Leah did not meet the criteria, no worker who meets the criteria accepted the shifts. Leah works at the location where shifts are available and, therefore, gets priority.

***Before employers can hire a new worker, what must they do to offer and award available shifts?***

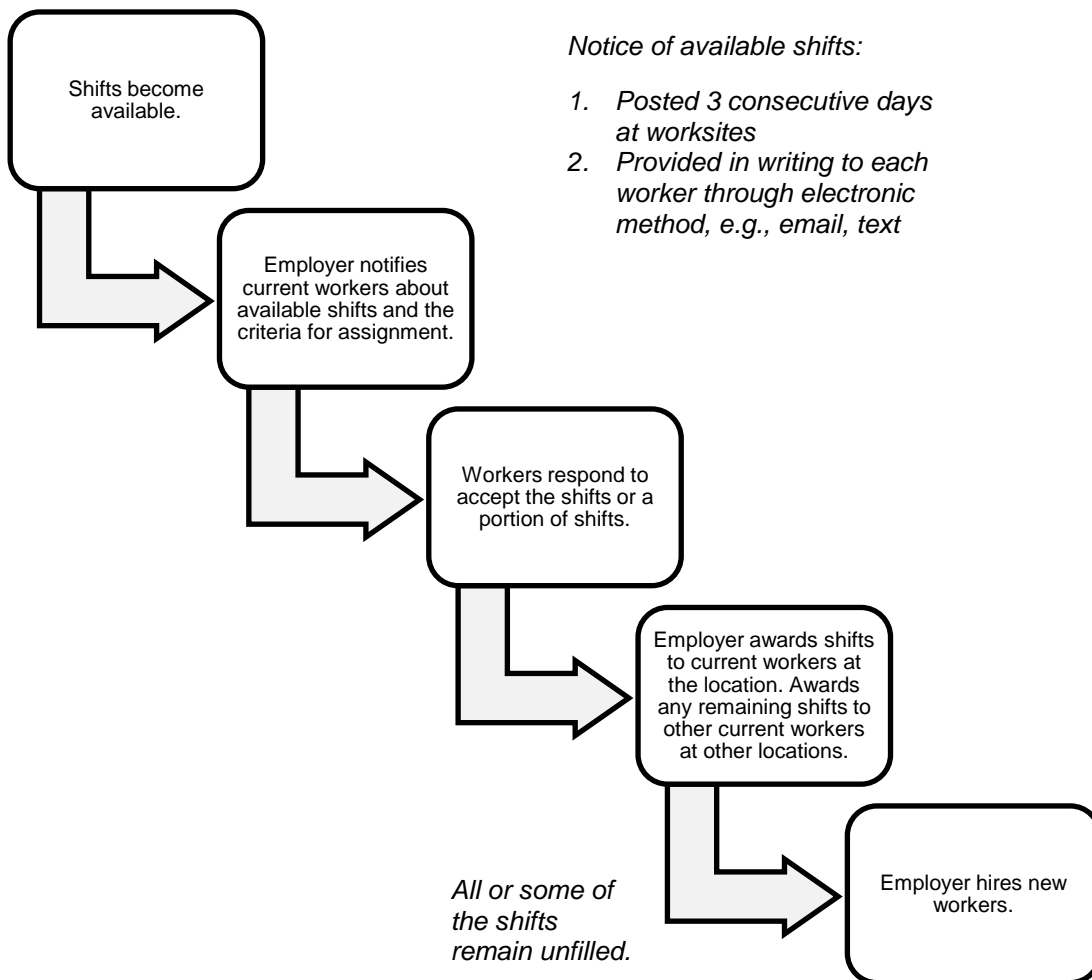
Before employers can place available shifts in a new hire's regular schedule, they must offer the shifts to current employees first. Employers must follow all of the requirements to advertise available shifts, including the length of offer. It is not sufficient to offer available shifts to current employees on a temporary basis before awarding them to a new hire on a regular basis. Current employees must have the chance to add newly available shifts to their regular schedules first. Employers must award shifts to workers at the location where shifts are available before awarding them to workers from other locations.

**Scenario:**

A fast food employer posts and emails a notice about available recurring shifts from 4:00 p.m. to 12:00 a.m. on Friday, Saturday, and Sunday. No current employee accepts any of the recurring shifts. The employer hires three new employees: Amalia, Brandon, and Christina. The employer places in Amalia's regular schedule recurring shifts from 4:00 p.m. to 12:00 a.m. on Friday, Saturday and Sunday. The employer places in Brandon's and Christina's regular schedules recurring shifts from 9:00 a.m. to 2:00 p.m. on Friday, Saturday, and Sunday. Has the employer violated the law?

Yes. The hours in the notice do not match the hours in Brandon's and Christina's regular schedules. The employer assigned new shifts to these new employees without first offering the shifts to current employees.

**Process to Offer and Award Available Shifts**



***Are there exceptions for fast food chains with numerous fast food establishments in NYC in advertising newly available shifts?***

An employer that owns 50 or more fast food establishments in NYC may offer additional shifts to all current workers in NYC or just to current workers in the same borough as the establishment where the shifts are available.

***How may employers with any number of establishments take geography into consideration when offering newly available shifts?***

While workers at the establishment where the new shifts are available get first priority, employers may set criteria for awarding shifts that take geography into consideration.

For example, if additional shifts are available at a location in Queens, an employer may give priority to workers who live or work in Queens. If no current workers at the Queens worksite accept the offered shifts, the employer can award shifts to interested workers from other locations in Queens before awarding those shifts to workers from outside of Queens.

***If a worker accepts a new shift that overlaps with an existing shift, does an employer have to award the new shift to the worker?***

Yes. If an employer completes its process for awarding shifts and an available shift remains which a worker with an overlapping shift accepted, the employer must award the new shift in place of the worker's existing shift. The employer may allow the worker to continue to work the nonoverlapping hours of the original shift. Or, the employer may choose to assign the original shift to another current employee or to advertise it.

***Scenario:***

*Natasha works at Caliente Dogs, a fast food establishment. Her regular schedule includes a shift on Mondays from 7:00 a.m. to 3:00 p.m. Caliente Dogs posted a notice to all of its employees about an additional recurring shift at her worksite on Mondays from 9:00 a.m. to 5:00 p.m., a shift that overlaps with Natasha's existing recurring shift. Natasha accepts the 9:00 a.m. to 5:00 p.m. shift because it will allow her to drop her child off at school in the morning without reducing her overall hours. No other worker requests the shift. Is Natasha entitled to the new recurring shift?*

Yes. Caliente Dogs must award the new recurring shift to Natasha. In this case, Natasha is an existing worker at the location where the recurring shift is available. Since an existing worker accepted the shift, Caliente Dogs cannot hire a new fast food worker to work the shift even if it prefers not to change Natasha's regular schedule.

***If more than one worker accepts an available shift, what criteria can an employer use to determine how to award shifts when multiple workers accept the same shift?***

The employer can use any criteria it wants, as long as the criteria are not discriminatory or otherwise unlawful.

For instance, an employer can choose to rely on job tenure, performance, or training concerns. However, employers must put in the posted notice the criteria for awarding available shifts. If no employees who meet the criteria accept the shifts, the employer must award shifts to employees who do not meet the criteria but accepted the shifts.

***If a worker accepts a new shift that would put the worker's weekly hours into overtime, does an employer need to award the shift to the worker?***

No. Employers do not need to award available shifts to workers when it would require the employer to pay that worker overtime. However, employers do need to award the greatest number of hours possible without triggering the overtime requirement.

If a worker accepts a new shift that would entitle the worker to an extra hour of pay for working a long day under New York State law, the employer must still award the shift to the worker.

**Scenario:**

*An employer advertises a shift on Wednesday from 12:00 a.m. to 6:00 a.m. to its employees. The notice states that the employer will give priority in awarding the shift to workers who work less than 32 hours a week. A worker whose regular schedule totals 37 hours is the only worker who accepts the shift. Does the employer have to award the worker the shift?*

No. The employer does not have to award the six-hour shift to the employee because working more than 40 hours would make the employee eligible for overtime pay.

On the other hand, if a worker with a regular schedule of 34 hours or less had accepted the shift, the employer would have to award the shift to that worker.

***If an employee who accepts a shift offer is on a leave of absence, must the employer award the shift to that employee?***

No, unless the employee is scheduled to return to work within 14 days of the date of the offer.

***If an employee accepts a shift offer and is awarded the available shift on a regular, recurring basis, should the employer add the shift to the employee's regular schedule?***

Yes.

***If an employee accepts a shift offer and is awarded the available shift on a temporary, nonpermanent basis, should the employer add the shift to the employee's regular schedule?***

No. A shift that is temporary is not considered part of an employee's regular schedule. However, the access to hours procedures apply: an employer may not include the shift in a new hire's regular schedule without first offering the shift to current employees.

**Scenario:**

*A fast food employer posts and emails current employees a notice about available shifts on specific dates only. No current employee accepts the temporary shifts. The employer hires three new employees and includes in their regular schedules recurring shifts, not the temporary ones advertised in the notice. Has the employer violated the law?*

Yes. The employer hired new employees and included in their regular schedules recurring shifts that the employer did not offer to current employees. The employer misrepresented the available shifts in the notice to current employees.

***Do an employer's responsibilities change if the employer hires a new worker through a subcontractor?***

No. The requirements to advertise available shifts to current employees remain the same as long as the new worker is considered a fast food worker under the law. See *l. b. Who is a Fast Food Employee?* on page 2.

***How long do employees have to accept open shifts?***

After an employer has provided notice of open recurring shifts to existing workers, those workers have three days to accept the shifts.

***What are employers' responsibilities when they learn they need to fill a newly open shift in less than three days?***

When an employer has less than three days' notice to fill an open shift, the employer must post notice of the shift as soon as practicable (possible), but no less than 24 hours after learning of the need. The employer may

offer an existing employee the opportunity to work the shift temporarily during the three-day notice period. In this situation, the employer will need to pay the worker any applicable schedule change premiums and get written consent. See *II. b. Changes to Work Schedules and Schedule Change Premiums* on page 15.

***Can employers transfer workers between stores to cover shifts?***

Yes, if certain conditions are met. Workers at all locations managed by the employer may express their willingness and availability to work available shifts. However, the employer must first award shifts to workers who responded in time and already work at the location where shifts are available. If shifts still remain open, the employer must award them to workers from other locations who responded in time to accept shifts.

If an employer wants to transfer existing employees *before* the end of three days (or the time in which workers had to respond), all existing workers at the location of the available shift(s) must have either accepted or turned down the opportunity in writing.

The law applies regardless of whether the employer would normally transfer workers between fast food locations.

***If employers receive timely confirmation from all current workers at the location that they don't want the available shifts, do employers still have to wait until the posting deadline before they can award the open shifts to workers from other locations or to new workers?***

No. If all of the workers at the location with open shifts confirm in writing that they do not want the shifts before the posting deadline, the employer may immediately award the shifts to workers from other locations who accepted. If existing workers at all other locations provide written confirmation that they do not want the available shifts, the employer may immediately hire new workers.

***If no current workers accept an open shift, can employers reconfigure the shift or change the job they are looking to fill when they hire a new employee?***

No. The employer must offer new employees the shifts and the jobs that were advertised in the notice to existing workers.

***What are an employer's responsibilities once they fill available shifts?***

Employers must notify all employees who accepted shifts that the shifts are filled as soon as possible after awarding them in the same way they had advertised open shifts.

Upon awarding a recurring shift to an employee, the employer must include the shift in the employee's updated regular schedule and transmit the updated schedule to the employee in a timely manner.

Upon awarding a temporary shift to an employee, the employer must include the shift in the relevant work schedule and post and transmit the updated work schedule at least 14 days before the first shift on the work schedule. If the employee receives notice of the awarded shift less than 14 days before the shift begins, the employer must pay the employee a schedule change premium.

***What happens if employers do not offer available shifts to current workers?***

Employers may be obligated to pay current workers \$300 for each shift that was not genuinely offered to them, and they may be ordered to comply with the law.

Employers may also be obligated to pay compensatory damages to current workers.

Employers may also be subject to fines of \$500 for first violations, up to \$750 for second violations within a two-year period, and up to \$1,000 for subsequent violations.

### **Scenario:**

*Jill's Place, a chain of fast food establishments, is extending their hours for the summer and will be adding more shifts. Niki, the manager of the Brooklyn location, posts notices about two available shifts at the Brooklyn location and sends the notice to all Jill's Place workers throughout the city, telling them that they have one day to respond. Steve, an employee at the Manhattan Jill's Place, responds within a day, telling Niki that he would like one of the shifts. Sam, an employee at the Brooklyn Jill's Place location, responds after two days to accept both available shifts. Ingrid, another Brooklyn employee, did not see the notice until the next day, but she did not respond because she believed it was too late. Steve, Sam, and Ingrid all meet the criteria established in Niki's notice. Niki gives one available shift to Steve and hires Peter, a new worker, for the other shift. Did Jill's Place violate NYC's Fair Workweek Law?*

Yes. Jill's Place failed to give existing workers, including Ingrid, three days to respond to the notice of available shifts before hiring a new worker. The employer also violated the law by not giving Sam first priority to work the open shifts.

## **III. Progressive Discipline, Layoffs, and Retaliation**

### **a. Overview**

#### **What is a "discharge" under the law?**

The law defines a discharge broadly and includes:

1. any time an employer ends an employee's employment for any reason (termination, firing, layoff, suspension);
2. "constructive" discharges (when certain working conditions make continuing to work intolerable or impossible, forcing an employee to quit); and
3. reductions of more than 15% to an employee's hours compared to the baseline regular schedule or a work schedule.

A reduction in hours is *not* a discharge when an employee requests or consents to it.

#### **When is it legal to fire an employee?**

Once an employee has been employed for 30 days, an employer may only fire the employee if:

1. there is just cause to fire the worker; or
2. the business is suffering financially and employees with the least seniority are laid off as a result.

#### **When is it legal to reduce an employee's hours?**

Reductions in hours are treated the same way as terminations from employment. After 30 days of employment, an employer cannot reduce an employee's hours by more than 15% without just cause or unless the business is suffering financially and employees with the least seniority have their hours reduced first.

#### **When an employee is fired or laid off, does the employer have to explain the reason?**

Yes. Whenever an employee is discharged, the employer must give the employee a notice of discharge in writing. The notice must include:

- The date the employer gave the notice to the employee and the date of discharge
- Whether the discharge was for just cause or a bona fide economic reason
- The precise reason for the discharge
- Each instance of progressive discipline issued, if any, and the dates

- *(if the discharge was for a bona fide economic reason only)*  
A statement informing the employee of the right to reinstatement or restoration of hours if new shifts become available; the employee's last-known phone number and email address which the employer will use to notify the employee about new shifts; contact information if the employee needs to update the phone number or email address on file

If the employee challenges the discharge, the reasons that appear in the notice are the only ones that can be considered in court or arbitration. The employer cannot give a different justification for the discharge later.

**Scenario:**

*Maria joined Fast Food Express in January. One day in August, her manager hands her a piece of paper titled "Notice of Discharge." The notice states that Maria is being terminated because she "does not fit in with the work culture at Fast Food Express." Maria immediately files a lawsuit claiming that Fast Food Express failed to use progressive discipline before terminating her. In its response to the suit, Fast Food Express alleges that Maria was terminated because she was late to work 27 times and had received multiple warnings about her lateness. Fast Food Express includes timekeeping records to show Maria's persistent lateness and copies of the warnings. Has Fast Food Express proved that Maria's discharge was lawful?*

No. Fast Food Express's termination of Maria was unlawful. Even though Fast Food Express appears to have used progressive discipline to address Maria's lateness, the Notice of Discharge did not cite Maria's lateness as the reason for her termination. Instead, the notice gave the vague reason that she did "not fit in with the work culture," something for which Maria never received progressive discipline.

***When and how must an employer provide a notice of discharge to an employee?***

The employer must give written notice to the employee within five days of the discharge. It is best practice to provide the notice by email. However, the employer may provide notice using any method that will reasonably ensure the employee receives it; for example, in person or Certified Mail.

***What happens if a worker's hours are cut unlawfully or a worker is fired unlawfully?***

Employers may be required to return workers to their prior schedule and pay workers money, including lost wages and benefits. Employers may be required to erase any unlawful discipline, as well.

***What are an employer's obligations to employees when selling a fast food location?***

If an employer sells a fast food location, its obligations to the employees depend on:

- the terms of its agreement with the buyer; and
- whether it owns other fast food locations in New York City.

*If the buyer hires some or all of the employees as part of the sale agreement:*

- The seller (original employer) has no further obligations to the transferred employees under NYC's Fair Workweek Law.

*If the buyer does NOT hire some or all of the employees AND the seller has other fast food locations in New York City:*

- The seller (original employer) must offer these employees available shifts at its other New York City locations.
  - Employees with the most seniority must have the first opportunity to accept available shifts, so that the least senior employees are the first ones discharged.



- Any employee not offered shifts at another location at the time of the sale is considered discharged, and the original employer must offer that employee any shifts that become available at its other New York City locations within the next 12 months.

*If the buyer does NOT hire some or all of the employees AND the seller does NOT have other fast food locations in New York City:*

- The seller (original employer) must offer to rehire the discharged employees if it opens or buys any fast food locations in New York City within the next 12 months.

See page 41 for FAQs that cover the process an employer must follow to reinstate discharged employees.

**Scenario:**

*Jaime, Bart, and Majid are employed at Duke Burger, a national fast food chain restaurant with multiple locations in New York City. Duke Burger decides to sell one store to franchisee Empire Food. Duke Burger retains ownership of its other New York City locations. Empire Food hires Jamie, but not Bart or Majid. Bart worked for Duke Burger for three years, and Majid worked for Duke Burger for one year. Does Duke Burger have any responsibilities to Bart or Majid under NYC's Fair Workweek Law?*

Yes. Duke Burger must offer Bart and Majid shifts that become available at its other New York City locations within 12 months. Duke Burger must give priority to Bart because he has more seniority. As discharged employees, Bart and Majid have priority for reinstatement over other Duke Burger employees.

**Scenario:**

*Aishah and Zach work for Jasmine Dragon, a bubble tea chain with one location in New York City. Following a decrease in business, Jasmine Dragon decides to sell its café to Pao's Teas. Pao's Teas hires Aishah, but not Zach. After nine months, Jasmine Dragon opens a new location in Queens. Does Jasmine Dragon have any responsibilities to Zach upon opening its new location?*

Yes. Because Jasmine Dragon opened a new fast food location within 12 months of the sale, Jasmine Dragon must offer to rehire Zach at the new Queens location.

**b. Just Cause and Progressive Discipline**

***What is just cause for a discharge?***

There is just cause to fire an employee, or reduce the employee's total hours, when the employee repeatedly fails to perform job duties or engages in misconduct. However, unless an employee does something egregious, the employer must give the employee an opportunity to improve. If the employee does not improve, the employer can only fire the employee after giving multiple disciplinary warnings within a one-year period.

***What is a progressive discipline policy?***

It is a policy that contains a series of disciplinary responses when an employee fails to perform job duties. The disciplinary measures must range from mild to severe, depending on the frequency and degree of the failure to perform duties. Every employer must have a written progressive discipline policy that complies with the law and that the employer follows. Visit [nyc.gov/dcwp](https://nyc.gov/dcwp) for [Progressive Discipline Policies: What Fast Food Employers Need to Know](#).

### **What must a progressive discipline policy include?**

The progressive discipline policy must:

- let employees know what conduct will lead to discipline under the policy;
- describe graduated steps or responses (accrual of points, strikes) and how the employer applies them to different types of conduct and subsequent infractions.

#### **Scenario:**

*Fast Food Express' written progressive discipline policy describes two categories of infractions: minor and major. Examples of minor infractions include lateness of one hour or more, cash register undercounts or overcounts of less than \$50, and improper cleaning. Examples of major infractions include insulting customers, refusing to perform an assigned task, and missing a scheduled shift for a reason unrelated to safe and sick leave. Minor infractions result in 1 point. Major infractions result in 3 points. An employee may be terminated after receiving 6 points. The policy requires a manager to document in writing all points in the employee's personnel file, and the employee has an opportunity to respond. Does Fast Food Express' progressive discipline policy comply with the law?*

Yes. The policy is written and gives employees reasonable notice of what conduct will lead to discipline and how the employer applies points and graduated responses to different types of conduct and subsequent infractions.

However, if the employer did not distribute the written policy to all employees, then the employer would be in violation of the law.

### **Do employees have access to the progressive discipline policy?**

Yes. Employers must distribute the written progressive discipline policy to employees when they are hired and within 14 days of changes to the policy. Employees also have a right to request it.

### **Can an employer terminate an employee right away for just cause?**

Except in cases of egregious misconduct or egregious failure to perform job duties or during an employee's probation period, an employer does not have just cause to terminate an employee right away. The employer must first follow the written progressive discipline policy and give the employee an opportunity to improve. If the employee does not improve, then the employer may follow the procedures in the progressive discipline policy to end the employee's employment.

### **How long is a probation period?**

An employer decides the length of the probation period, but it cannot be longer than 30 calendar days from a worker's first day of work.

### **How must an employer use a progressive discipline policy?**

Employers must tell employees why they are being disciplined and the consequence, if any, and they must give employees an opportunity to respond. Employers may not count discipline from more than a year ago toward future disciplinary action, including termination.

**Scenario:**

Muhammad's first day of work at Fast Food Express is June 1. As a new employee, he receives a handbook with his employer's attendance policy and progressive discipline policy. The attendance policy requires employees to give two hours' advance notice when they will miss a shift, unless the absence relates to an unforeseeable need to use safe and sick leave. The progressive discipline policy states that after three written warnings for violating a company policy or procedure, an employee may be terminated for cause.

On August 1, Muhammad does not come to work for his scheduled shift. It is a very busy day and, because of Muhammad's absence, customers have to wait a long time for their orders. Although Fast Food Express has an established progressive discipline policy, it decides it wants to terminate Muhammad right away because of the negative impact his absence had on business. Can Fast Food Express terminate Muhammad?

No. Under Fast Food Express' progressive discipline policy, the company may give Muhammad a first written warning but cannot terminate him.

**Can an employer be more lenient with some employees than others?**

No. Employers must apply the progressive discipline policy to all employees consistently.

**What does it mean for a progressive discipline policy to be applied consistently?**

An employer applies a progressive discipline policy consistently when all employees are subject to the same progressive discipline and employees who commit similar infractions receive equal treatment.

**If an employer issues a regular or work schedule that violates NYC's Fair Workweek Law, may the employer discipline or discharge employees who do not comply with the unlawful portions of the schedule?**

No. An employer may not punish an employee who does not follow an unlawful schedule or part of a schedule.

**Scenario:**

Maria's regular schedule at Fast Food Express is Monday, Wednesday, and Friday, 9:00 a.m. to 5:00 p.m. On Monday, August 1, 2022, Maria's manager gives her a work schedule for the week of Monday, August 15 that includes a shift on Thursday, August 18 from 9:00 a.m. to 5:00 p.m. Maria tells her manager that she is not able to work on Thursdays because of her class schedule. Maria's manager informs her that if she wants to keep her job, she better show up to work on Thursday, August 18. Maria does not come to work on August 18, and her manager issues her a warning letter. Has the employer violated the law?

Yes. Because the work schedule varied from the regular schedule by more than 15%, Fast Food Express had to get Maria's written consent before making the schedule change. Maria did not give written consent, so the change was illegal. The discipline Maria received was also unlawful.

**What is the lookback period for discipline?**

Employers may not consider discipline from more than 12 months (365 days) ago as a step toward applying more serious future discipline. An employer must provide an employee with a copy of any discipline issued to the employee within the past 12 months upon the employee's request.

**Scenario:**

*Johannes begins working for Grab and Go, a fast food establishment, on July 1, 2021. In 2021, Johannes is more than one hour late for work on August 15 and again on August 30. Johannes receives 1 point each time. On September 30, 2022, more than a year after his last lateness, Johannes is late again and receives 1 point. Assuming 3 points may lead to termination under Grab and Go’s progressive discipline policy, can Grab and Go count Johannes’ 2 points from 2021 when determining its disciplinary response in 2022?*

No. Grab and Go may not count any lateness that occurred more than 12 months prior toward present discipline. In other words, Grab and Go can only apply the appropriate response for 1 point—not 3 points which could result in termination.

**Scenario:**

*Food in a Flash, a fast food establishment, has a progressive discipline policy with the following steps for employee performance deficiencies:*

- Step 1: oral reprimand for the first occurrence*
- Step 2: written warning for the second occurrence*
- Step 3: mandatory retraining for the third occurrence*
- Step 4: final written warning for the fourth occurrence*

*Alex received an oral reprimand 13 months ago, a written warning 10 months ago, mandatory retraining three months ago, and has again failed to perform as expected. Can Food in a Flash count the Step 1 oral reprimand toward a Step 4 final written warning?*

No. Food in a Flash may not count the oral reprimand since that discipline occurred more than a year ago. Since they cannot consider that step, they cannot proceed to a Step 4 final written warning for Alex.

However, Food in a Flash may consider the written warning as Step 1 and the mandatory retraining as Step 2 to apply another mandatory retraining (Step 3) for Alex. Those disciplines occurred within a year.

***What employee conduct or behavior cannot be included in an employer’s progressive discipline policy?***

An employer cannot discipline employees for exercising rights they have under local, state, or federal law.

**Scenario:**

*Food in a Flash's progressive discipline policy requires an oral reprimand when an employee calls out of work less than two hours before the employee's shift. Fran has worked for Food in a Flash for four months. Her child wakes up sick one morning, and Fran notifies her manager 1 ½ hours before her shift that she needs time off work to care for her child. Can Food in a Flash give Fran an oral reprimand?*

No. Fran has rights under NYC's Paid Safe and Sick Leave Law. Under that law, employers may only require notice of the need to use safe and sick leave for unforeseeable reasons as soon as practicable. Fran provided notice as soon as she became aware that she needed to use sick leave. Food in a Flash cannot discipline Fran for exercising and using a protected right. Visit [nyc.gov/workers](http://nyc.gov/workers) for more information about NYC's Paid Safe and Sick Leave Law.

**Scenario:**

*Fast Food Express's progressive discipline policy authorizes a written warning when an employee is insubordinate to the manager on duty. Heather is finishing up her shift when Alejandro, the manager on duty, tells her that an employee scheduled to work the next day just called out sick. Alejandro tells Heather she needs to report to work the next day at 12:00 p.m. instead of her scheduled start time of 3:00 p.m. Heather says she cannot work the additional hours before her scheduled 3:00 p.m. shift because she has lunch plans with her friends. Can Fast Food Express write up Heather for insubordination?*

No. Heather has rights under NYC's Fair Workweek Law. Under the law, employers may not require employees to work additional hours offered less than 14 days in advance. Heather had the right to decline the additional hours. Fast Food Express cannot discipline her for exercising her rights.

***Are there any exceptions to the requirement to follow a progressive discipline policy when there is just cause to discharge an employee?***

Yes. An employer may fire a fast food worker for just cause for egregious failure to perform job duties or for egregious misconduct. The employer does not have to apply a progressive discipline policy in these circumstances.

***What is egregious failure to perform job duties?***

Egregious failure to perform job duties is when an employee willfully refuses to perform work for the majority of time on a shift.

An employee's lateness or failure to appear for a scheduled work shift is not an egregious failure to perform job duties.

***What is egregious misconduct?***

Egregious misconduct is workplace conduct that is so outrageous, dangerous, or illegal that an employer cannot reasonably expect to correct it through progressive discipline. Depending on the circumstances, examples may include:

- violence or threats of violence;
- theft;

- sexual harassment;
- race discrimination;
- willful destruction of property.

An employee's lateness or failure to appear for a scheduled work shift is not egregious misconduct.

**Scenario:**

*Fast Food Express takes customer relations very seriously. Mica had been working for Fast Food Express for five months when a customer complains that she said, "just deal with it," when the customer reported being given the wrong size soda cup during the lunch rush. Can Fast Food Express terminate Mica right away for egregious misconduct?*

No. Egregious misconduct is workplace conduct that is so outrageous, dangerous, or illegal that an employer cannot reasonably expect to correct it through progressive discipline. If, after conducting a fair and objective investigation, Fast Food Express determines that the customer report is true, Fast Food Express may begin applying its progressive discipline policy. However, it cannot terminate Mica since her conduct did not rise to the level of egregious misconduct.

**Scenario:**

*Jacob, an employee, sexually assaults his colleague, Miranda, after a closing shift. The employer's fair and objective investigation confirms this allegation, but the police investigation is still ongoing. Can Jacob's employer fire him for egregious misconduct? Or must the employer wait for the conclusion of any police investigation?*

Jacob's employer does not have to wait for the conclusion of a police investigation to fire him for egregious misconduct. Jacob's conduct was so outrageous, dangerous, or illegal that his employer cannot reasonably expect to correct it through progressive discipline.

**What factors are considered in an enforcement action or court case when an employee challenges a discharge?**

If the employer claims the discharge was for just cause, factors that are considered include:

- The employee knew or should have known the employer's policy, rule, or practice that is the basis for the discipline. AND
- The employer provided relevant and adequate training to the employee. AND
- The employer's policy, rule, or practice, including the use of progressive discipline, was reasonable and applied consistently. AND
- The employer undertook a fair and objective investigation into the job performance or misconduct. AND
- The employee violated the policy, rule, or practice or committed the misconduct that is the basis for the discipline or discharge.

Other relevant factors may also be considered in a "just cause" determination.

*See III. c. Layoffs for Bona Fide Economic Reasons on page 39 for factors that are considered if the employer claims that the discharge was for a bona fide economic reason.*

### ***What is relevant and adequate training?***

Relevant and adequate training is an initial and ongoing instruction on how the employer expects the employee to perform job duties, to conduct themselves in the fast food establishment, and to comply with workplace policies and procedures. It may include training on:

- preparing and serving food;
- cleaning;
- using tools and equipment;
- handling payments;
- interacting with customers;
- other typical job duties;
- workplace policies and procedures regarding attendance, punctuality, cooperation, and other standards of conduct;
- specific job duties or conduct where the employee failed to meet expectations.

### ***What is a fair and objective investigation?***

A fair and objective investigation requires that an employer issue discipline based on accurate information. The scope of investigation depends on the circumstances of the situation.

In some cases, a conversation with the employee may be enough.

In other cases, the employer may need to take additional relevant steps, such as speaking with other employees, observing the worksite, or reviewing documents.

### ***How can an employer know whether an employee “knew or should have known” of the employer’s policy, rule, or practice?***

Some policies, rules, or practices are written in employee handbooks or other training materials. Others may be conveyed orally. During the progressive discipline process, the employer should make sure the employee understands the relevant policy, rule, or practice that led to the disciplinary response and include a written summary of the conversation in the record of discipline.

## **c. Layoffs for Bona Fide Economic Reasons**

### ***When can an employer lay off an employee?***

An employer can only lay off employees if the employer closes all or part of the business because it is experiencing a drop in profit, sales, or production.

The employer must lay off employees in reverse order of seniority, with longest-serving workers laid off last.

### ***What is a “bona fide economic reason” to lay off an employee?***

An employer has a “bona fide economic reason” to discharge a worker (or reduce a worker’s hours) if the employer can no longer employ the worker because the employer has experienced a downturn in business (i.e., a reduction in volume of production, sales, or profit) and needs to close all or part of the business, downsize, or reorganize.

A discharge due to a bona fide economic reason is also known as a layoff.

### ***How must an employer prove that a discharge was for a bona fide economic reason?***

Employers must use business records to prove that a discharge was the result of a business’s closing, downsizing, or organizational change in response to a reduction in volume of production, sales, or profit. Records may include:

- a. financial records, such as tax returns, income statements, data showing historical trends in the industry, profit and loss statements, monthly gross revenue schedules, and balance sheets;
- b. records showing a reduction in business or a full or partial closing to comply with government-issued orders or health and safety guidelines; or

- c. records showing that operations could not continue due to: threats to employees or the employer's property; failure of a public utility or shutdown of public transportation; fire, flood, or other natural disaster; government-declared state of emergency; severe weather conditions that pose a threat to employee safety.

***Can employers with seasonal business reduce the hours on employees' regular schedules in a slow season?***

An employer must give a single regular schedule to each employee, regardless of how busy the employer is or the seasonality of the business's labor needs. An employer may only reduce an employee's hours by more than 15% in a slow season if:

- the employer has records to show that the employee requested or consented to the change; or
- the employer has a bona fide economic reason; that is, it has fully or partially closed operations or made technological or organizational changes to the business in response to a reduction in volume of production, sales, or profit.

An employer may not lay off employees during its less busy seasons without meeting one of these requirements for reducing employees' hours. An employer who lays off employees for a bona fide economic reason must do so in reverse order of seniority and rehire laid-off employees in order of seniority if it begins hiring again.

***Can an employer give a worker two different regular schedules, one for slow season and another for busy season?***

No.

***When an employer needs to cut shifts from its schedule, which employees may the employer discharge?***

If an employer needs to discharge an employee or reduce an employee's regular schedule for a bona fide economic reason, the employer must choose the employee with the *least* seniority at the affected location.

***What is seniority?***

Seniority is the ranking of workers based on length of employment, starting from the first day of work, including any probation period.

If a worker's employment is interrupted by more than six months, the calculation for seniority restarts when the worker resumes work. However, the following interruptions do *not* restart the calculation:

- military service;
- illness;
- educational leave;
- any other leave protected by law;
- layoff due to a bona fide economic reason;
- unlawful discharge.

Visit [nyc.gov/dcwp](https://nyc.gov/dcwp) for a [seniority tracking tool](#).



**Scenario:**

*Fast Food Express hires Jaysen on January 1, 2022. Jaysen quits on March 1, 2022 and moves to California. After several months, he returns to New York, and Fast Food Express rehires him on July 1, 2022.*

*Fast Food Express hires Anthony on February 1, 2022.*

*Fast Food Express hires Yesenia on June 1, 2022.*

*Fast Food Express has no other employees at the location where Jaysen, Anthony, and Yesenia work. Jaysen works Saturdays and Sundays, Anthony works Mondays and Tuesdays, and Yesenia works Wednesdays and Thursdays. Due to a reduction in revenue on the weekends, Fast Food Express plans to close on Saturdays and Sundays and lay off one employee. Which employee can Fast Food Express discharge?*

Fast Food Express can discharge Yesenia because she is the least senior. Jaysen is the most senior, followed by Anthony, and then Yesenia. Even though Jaysen separated from employment on March 1, 2022, his break from employment was less than six months, so his length of employment is still the longest.

Even though Jaysen had worked weekends, Fast Food Express is not obligated to give Jaysen his regular schedule since it is no longer open on Saturdays and Sundays.

***Who has the burden of proof to show that a discharge was lawful?***

The employer must prove that a discharge was based on just cause or a bona fide economic reason.

***What information must the employer collect from employees upon discharge?***

The employer must request updated contact information from all laid-off employees within five days of discharge so the employer can send offers of reinstatement or restoration of hours over the next 12 months.

***If an employer lays off workers and later anticipates hiring new ones, what are the employer's obligations?***

Before an employer can offer newly available regular shifts to current workers or hire new workers, the employer must make reasonable efforts, including by email, text, or phone, to offer the shifts to employees who were laid off within the last 12 months in order of seniority.

***Must employers offer shifts to all employees who were discharged for bona fide economic reasons?***

An employer does not need to offer reinstatement or restoration of hours to employees discharged for bona fide economic reasons who:

- have been discharged for longer than 12 months (365 days);
- notified the employer in writing that they do not want future shifts or, when applicable, do not want shifts for certain days, times, or locations;
- have not provided updated contact information and their phone number and email address on file are no longer operational;
- have already been reinstated or had at least 85% of their baseline regular schedule before discharge restored;
- refused reinstatement or restoration of hours at their previous location.

An employer also does not need to offer reinstatement or restoration of hours to employees discharged for bona fide economic reasons if the available shifts are temporary and not recurring.

**How much time do discharged workers have to accept shifts offered by employers?**

Discharged workers have seven days to accept an offer of reinstatement or restoration of hours.

**How much time do discharged workers have to return to work following an offer of reinstatement or restoration of hours?**

An employer may not condition reinstatement or restoration of hours on an employee’s ability to return to work or work the additional hours less than 14 days from the date of the offer. If necessary, the employer may schedule a current employee to work the shift temporarily.

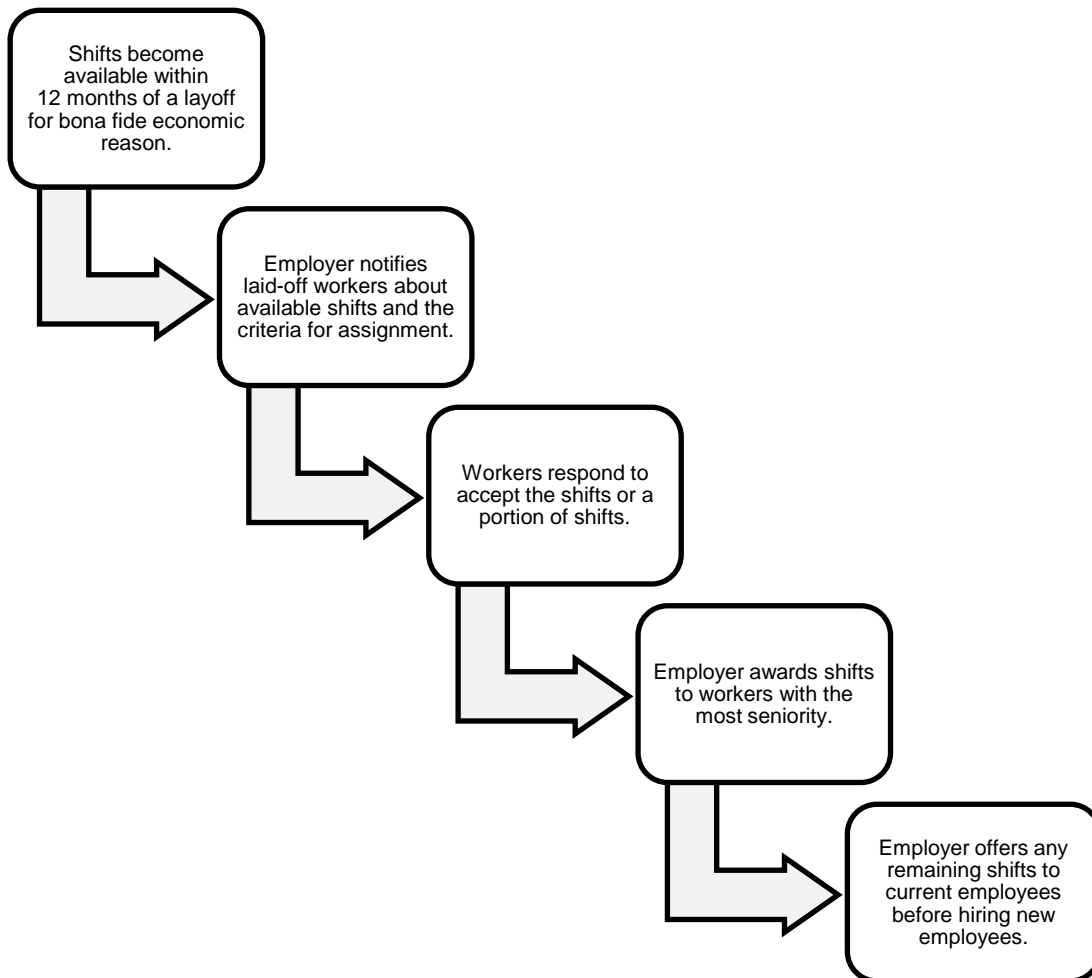
**What information must employers provide when notifying discharged employees of available shifts?**

Employers must include the following in the notification to discharged workers:

- days, times, and locations of the shifts;
- how the worker can accept the shifts;
- that the worker has seven days to accept any of the shifts;
- that shifts will be awarded to the worker with the most seniority who accepts the shifts (if shifts are being offered to more than one worker).

**What efforts must an employer make to offer shifts to an employee who was discharged for a bona fide economic reason?**

Using the most updated contact information employees provided when they were laid off, an employer must email, text, or call employees to offer available shifts.



## d. Retaliation

### **What is retaliation?**

Retaliation is any action by an employer—or on an employer’s behalf—that could penalize or deter a worker or group of workers from exercising or attempting to exercise any right protected by the law. Retaliation includes:

- threats
- intimidation
- discipline
- discharge
- demotion
- suspension
- harassment
- cutting hours
- informing other employers about a worker’s actions under the law
- discrimination
- actions related to immigration status

Retaliation is illegal under the law. Employers may not retaliate against workers exercising their rights under the law, even if workers do not explicitly refer to any specific law.

Retaliation exists when the protected activity was a motivating factor for a retaliatory act, even if other factors also motivated the retaliatory act.

### **Scenario:**

*Stanley manages the Bushwick branch of McDougal’s, part of a chain of fast food restaurants in Connecticut, New York, and New Jersey. Stanley tells Jack that he must work a 12-hour shift the next day. When Jack refuses, Stanley fires Jack and tells him he better leave before Stanley “clocks him one.” Janet and Peggy witness Jack’s firing. Which McDougal’s workers experienced retaliation?*

Jack, Peggy, and Janet all have experienced retaliation. Stanley penalized Jack by firing him and threatened him with physical harm. Janet and Peggy could have been reasonably deterred from exercising their rights after witnessing the incident between Stanley and Jack.

### **What does it mean for a fast food worker to “exercise their rights”?**

Workers may exercise their rights under the law in a variety of ways. This list gives some examples but is not exhaustive:

- Refusing to work a shift that was scheduled in violation of the law, such as:
  - a shift they did not consent to work or for which they were not given 14 days’ advance notice
  - two shifts over two days with fewer than 11 hours between shifts
- Requesting premium pay for a shift that was scheduled with less than 14 days’ notice
- Requesting a copy of their schedule or a current version of all workers’ schedules at the fast food establishment where they work
- Saying NO to a lawful request to take another shift with less than 14 days’ notice
- Asking where the current written schedule is posted
- Pointing out that the required notice of rights isn’t posted
- Filing a complaint with DCWP for alleged violations of the law
- Communicating with any person, including coworkers, about any violation of the law
- Participating in a court or administrative proceeding about an alleged violation of the law
- Informing another person of that person’s potential rights under the law
- Telling an employer that they believe the employer is not applying the progressive discipline policy properly or consistently
- Raising concerns about discrepancies between the regular schedule and the work schedule

***What should employees do if an employer retaliates or the employee fears retaliation?***

Workers should contact DCWP or an attorney if they fear retaliation or have experienced retaliation recently. DCWP takes reports of employer retaliation very seriously. Depending on the circumstances, DCWP may require an employer not to take retaliatory action, to reinstate a worker, and to comply with the law going forward. Workers may also receive payments of back wages, premium pay, and other relief.

***Does the law protect workers from retaliation if workers mistakenly, but in good faith, exercise their rights?***

Yes.

**IV. Notice and Recordkeeping**

**a. Notice of Rights**

***How must covered employers inform workers about NYC’s Fair Workweek Law?***

The required notice “NYC FAST FOOD WORKERS’ RIGHTS” is available on the DCWP website at [nyc.gov/workers](http://nyc.gov/workers). Covered employers must post the notice where employees can easily see it at each NYC workplace. Notices should be printed on and scaled to fill an 11” x 17” paper.

***In which language must an employer post the notice?***

Employers must post the notice in English and in any other language that is the primary language of at least 5% of the workers at a workplace (1 out of 20, 5 out of 100, 10 out of 200, etc.), if the notice is available in that other language on the DCWP website.

**Scenario:**

*There are 10 workers at a fast food establishment. Four workers speak Spanish primarily, and one worker speaks Polish primarily. All have limited English ability. In which languages must the employer post the required notice?*

Forty percent (40%) of the workers primarily speak Spanish, and 10% of the workers primarily speak Polish. Because Spanish and Polish are the primary languages of more than 5% of the workers at the worksite, the employer must get the required notice in English, as well as Spanish and Polish (if available), from the DCWP website and post the notices where workers can see them.

**b. Recordkeeping**

***What records must employers keep under the law?***

Covered employers must retain electronic records documenting their compliance with each of the requirements of NYC’s Fair Workweek Law. Employers should carefully review [Section 7-603](#) of the Rules of the City of New York to ensure they are creating and keeping all required records.

***How long must employers maintain records under the law?***

Covered employers must retain records for a period of three years.

***Must an employer provide its records to DCWP?***

Yes. If DCWP requests records as part of an investigation into compliance with or violations of NYC’s Fair Workweek Law, employers must provide the records.

***What happens if a covered employer does not maintain records as required by the law?***

An employer’s failure to maintain or produce records to DCWP may result in a “rebuttable presumption” against the employer in the event of a lawsuit or enforcement action. This means that the burden will be on the employer to show that the employer did not violate the law.

### ***May employers maintain required records electronically?***

Yes. Employers may create or maintain any of the required records in a scheduling application or other electronic recordkeeping system. Employers must ensure that:

- electronically stored records are maintained in their original format for three years;
- records can be exported to a nonproprietary, machine-readable data format;
- there are no restrictions in the recordkeeping system that would limit the employer's ability to produce required records to DCWP; and
- the electronic recordkeeping system does not overwrite or destroy any of the records an employer is required by law to maintain.

For example, scheduling applications must be configured so that when an employer makes updates to a work schedule, the system retains and does not overwrite the original version of the work schedule and the date it was provided to employees.

## **V. Enforcement**

### ***Who enforces NYC's Fair Workweek Law?***

DCWP enforces the law. Workers can contact DCWP to:

- File a complaint.
- Find out more about the law.
- Get a referral for other resources to protect and enforce their rights under the law.

DCWP is committed to maintaining the confidentiality of complainants.

### ***Who can file a complaint about a potential violation of NYC's Fair Workweek Law?***

Any person, including fast food workers and their representatives, or related organizations, may file a complaint about a possible violation of the law.

### ***Where can I file a complaint?***

You can file a complaint with DCWP. To reach DCWP:

- Call 311 (212-NEW-YORK outside NYC). Ask for "Fair Workweek Law."
- Email [OLPS@dcwp.nyc.gov](mailto:OLPS@dcwp.nyc.gov)
- Visit [nyc.gov/workers](http://nyc.gov/workers)

DCWP can also give complainants information about employee rights or how to bring a private legal action in court against an employer.

### ***How long do I have to file a complaint?***

You must file a complaint within two years of when you learned (or should have learned) of the violation of the law.

### ***What happens after I file a complaint?***

DCWP investigates the complaint. DCWP may request information or documents from an employer under investigation and interview witnesses. If DCWP determines that an employer violated the law, the employer may be responsible for money damages and other forms of relief to affected workers, as well as fines to the City.

### ***Are complainants' identities kept confidential?***

DCWP will keep the identity of complainants confidential unless disclosure is required by law. DCWP will notify complainants before disclosing their identity whenever possible and generally attempts to keep identities of workers confidential unless the worker consents.

***Does my immigration status affect my ability to file a complaint?***

No. All workers have the same rights and protections under NYC's Fair Workweek Law, regardless of immigration status. DCWP does not collect any information about a worker's immigration status to pursue a complaint.

***Must DCWP receive a complaint in order to investigate an employer?***

No. DCWP can also investigate employers on its own initiative.

***What does DCWP do to ensure that employers comply with the law?***

DCWP conducts investigations that may include document requests, interviews with witnesses, and visits to worksites. If, as a result of an investigation, DCWP determines that an employer has violated one or more provisions of NYC's Fair Workweek Law, DCWP may seek monetary relief for workers, civil penalties, and/or commitments to future compliance through settlement or through litigation at the Office of Administrative Trials and Hearings (OATH).

As of January 1, 2022, workers who believe they were fired without just cause or laid off without a bona fide economic reason can request arbitration through a program administered by DCWP.

DCWP also regularly conducts outreach and education to employers, workers, and the public about NYC's Fair Workweek Law.

***What happens if an employer violates the law?***

Workers may be entitled to monetary relief for an employer's violations. Employees whose hours were cut unlawfully or who were terminated without just cause may be entitled to back pay or reinstatement. In addition to payments owed to an employee, an employer may be liable for fines payable to the City for violations of the law.

An employer might receive a court order requiring it to comply with the requirements of the law.

***What types of fines could covered employers have to pay for violating the law?***

Employers may also be subject to the following fines:

- \$500 for a first violation
- up to \$750 for a second violation within a two-year period
- up to \$1,000 for subsequent violations within a two-year period

***If an employer had a worker sign a document saying that the worker gave up the right to relief under NYC's Fair Workweek Law, can the worker still file a complaint with DCWP against the employer?***

Yes. Any agreement to limit fast food workers' rights under NYC's Fair Workweek Law is invalid. Also, DCWP might investigate the employer on its own initiative whether or not workers file a complaint.

***What if an employer repeatedly violates the law?***

When there is reason to believe that an employer is engaged in a pattern or practice of violations, the NYC Law Department may file an action in court against that employer seeking relief for workers, fines (including an additional fine of up to \$15,000), and injunctive relief.

## VI. Private Right of Action and Arbitration

### ***Can individuals bring their own action in court against an employer?***

Yes.

Any person or organization alleging a violation of NYC's Fair Workweek Law may bring a civil action in court to seek damages and other relief.

Individuals must bring an action under NYC's Fair Workweek Law within two years of the date that the individual learned, or should have learned, of the violation.

### ***Can individuals file private arbitrations instead of going to court or filing a complaint with DCWP?***

Yes.

As of January 1, 2022, DCWP administers a private arbitration program that employees alleging wrongful discharge may use instead of the DCWP complaint or civil litigation process. This arbitration process is only available for wrongful discharge cases.

### ***Can an individual file a complaint with DCWP and bring a civil action or arbitration at the same time?***

No.

If individuals file a complaint with DCWP first, they cannot bring their own lawsuit or seek arbitration unless they withdraw the complaint in writing or DCWP dismisses the complaint "without prejudice," generally meaning that the complaint was neither decided nor settled.

If individuals file a civil action in court or arbitration first, they cannot file a complaint with DCWP unless the civil action or arbitration is withdrawn or dismissed without prejudice. When a party files suit in court, the party must give notice of the lawsuit to DCWP.

DCWP may still investigate and pursue a case against an employer, even when a worker has a case pending against that employer in court.