SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

INTERNATIONAL FRANCHISE ASSOCIATION, RESTAURANT LAW CENTER, and THE NEW YORK STATE RESTAURANT ASSOCIATION,	Index No.
	Filed:
Plaintiffs,	**SUMMONS**
- against -	Plaintiffs designate New York County as the place of trial. Venue is proper pursuant to CPLR § 504(3)
CITY OF NEW YORK,	
Defendant.	

To: City of New York
c/o Corporation Counsel
100 Church Street
New York, NY 10007

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with the summons, to serve a notice of appearance, on Plaintiffs' attorneys within 20 days after service of this summons, exclusive of the day of service (or within 30 days after the service is complete if the service is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Date: December 3, 2018
New York, New York

/s/ Eli Z. Freedberg

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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COMPLAINT

Plaintiffs International Franchise Association, Restaurant Law Center, and the New York State Restaurant Association (collectively, "Plaintiffs"), by their attorneys, Littler Mendelson, P.C., for their Complaint against Defendant City of New York, state and allege as follows:

PRELIMINARY STATEMENT

1. Plaintiffs bring this action under CPLR §§ 3001 and 3017(b), seeking a declaratory judgment that New York City's recently enacted Fair Workweek Law, NYC Admin. Code Title 20 Chapter 12 (the "FWWL"), enforced by the New York City Department of Consumer Affairs ("DCA"), is preempted by New York State law and therefore violates the State Constitution and the Municipal Home Rule Law. Under the guise of guaranteeing "predictive" scheduling for restaurant employees, the FWWL has caused great harm to Plaintiffs' member employers in New York City's fast food industry, causing them to incur enormous penalties and significant administrative costs, and interfering with their ability to schedule employees so as to best serve the constantly shifting needs of consumers.

2. The FWWL further restricts Plaintiffs' members' ability to hire new staff to meet emergent business needs, by requiring fast food employers to offer new shifts first to existing workers, regardless of their qualifications. The new law also arbitrarily requires fast food

employers to pay penalties to employees whose schedules deviate by fractions of an hour, even when those employees have consented to work the modified schedules. In addition, the FWWL compels employers to pay premiums above the minimum wages established by State wage orders.

3. Since enforcement of the FWWL began in November 2017, Plaintiffs' members have incurred hundreds of thousands of dollars in modified scheduling "premiums," and have operated under the constant threat of City audits and penalties. The FWWL has further discriminated from its inception against the franchise industry, one of the largest providers of business opportunities for small business entrepreneurs in the State, and nationwide.

4. None of the harms caused by the FWWL should be permitted to continue, because State law governing workplace schedules of private businesses, including fast food restaurants, has preempted the field of workplace scheduling regulation and minimum employee compensation. Based upon clear precedent, because the State of New York has occupied the field of workplace scheduling regulation, as well as minimum wage regulation, New York City lacked any authority to enact the FWWL and the regulations promulgated thereunder, and has no right to enforce the unlawful provisions enacted. *See Wholesale Laundry Bd. of Trade v. City of New York*, 17 A.D.2d 327(1st Dep't 1962), *aff'd*, 12 N.Y.2d 998 (1963), and numerous subsequent cases to the same effect.

5. To protect Plaintiffs' members from suffering additional harm from New York City's unlawful FWWL, Plaintiffs seek a declaration that Title 20, Chapter 12 of the New York City Administrative Code is invalid, null and void.

THE PARTIES

6. Plaintiff International Franchise Association ("IFA") is a membership organization of franchisors, franchisees, and suppliers. Founded in 1960, the IFA is the world's

oldest and largest organization representing the use of the franchise business model. The IFA has more than 15,810 members, including more than 1,350 franchisor companies and more than 12,000 franchisees nationwide, including in the State and City of New York. Many IFA members are "fast food employers" operating restaurants within New York City, with more than 30 establishments nationally, who are therefore subject to the FWWL. The IFA is incorporated under the laws of the State of Illinois.

7. Plaintiff Restaurant Law Center ("RLC") was created with the purpose of providing the restaurant and foodservice industry's perspective on legal issues significantly impacting it. RLC represents the National Restaurant Association, the largest foodservice trade association in the world, many of whose members operate fast food restaurants in New York City, with more than 30 establishments nationally, and who are therefore subject to the FWWL. The restaurant industry is a very labor-intensive industry, and compliance with the FWWL requires the significant expenditure of time, money, and other resources beyond what is required by State law. The RLC has an interest in proper enforcement of the laws already in the books. The FWWL threatens to disrupt and impair the ability of restauranteurs to modify their employees' schedules in accordance with State law.

8. Plaintiff New York State Restaurant Association ("NYSRA") is a not-for-profit employer association which represents food service establishments throughout New York State. Founded in 1935, NYSRA is the oldest and most comprehensive professional organization for restaurant management in New York. It provides a forum for restaurants to exchange ideas and information, participate in creative problem-solving, and receive education. The NYSRA has over 10,000 members representing nearly every type of dining establishment in New York State and about 1,000 of its members are located in New York City. Many of those NYSRA members

operate fast food restaurants within New York City, with more than 30 establishments nationally, who are therefore subject to the FWWL.

9. The IFA, the RLC, and the NYSRA, each represent members located in New York City who: (i) are part of a franchise, brand or chain, (ii) maintain at least 30 establishments nationally or operate as part of a franchisor/franchisee relationship that owns or operates thirty or more such branded establishments nationally, (iii) have a primary purpose of serving food and drink, and (iv) operate a business where patrons order or select items and pay before eating, operate an establishment where the food and beverage purchased may be consumed on premises or taken out, or delivered to the customer's location.

10. Each of the plaintiffs has standing to pursue this action as an association/representative of employers injured by the FWWL, because: (1) One or more of each plaintiff's members would have standing to sue in their own right; (2) The interests asserted in this litigation are germane to each plaintiff association's purposes; and (3) Neither the claims asserted nor the relief requested requires the participation of the individual members of any of the plaintiff associations. The legally protected interests of Plaintiffs' New York City members are plainly infringed by the FWWL within the meaning of CPL 3001, in a manner not shared by all citizens of the state.

11. Upon information and belief, Defendant City of New York ("City" or "Defendant") is a municipality existing under and by virtue of the laws of the State of New York.

VENUE

12. Venue is proper in New York County pursuant to CPLR § 504(3), as the venue in which the cause of action arose (or separately and independently, as the county in which actions against the City of New York are required to be brought pursuant to CPLR § 504(3)).

FACTUAL BACKGROUND

History of the Challenged Law

13. On or about May 24, 2017, the New York City Council passed a number of bills—collectively called the "Fair Workweek" legislative package—that significantly restrict the ability of fast food and retail employers to schedule their staff.

14. On May 30, 2017, Mayor De Blasio signed these bills into law, making their effective date November 26, 2017.The specific legislation challenged in this case was codified as N.Y. Admin. Code Title 20 Part 12.

15. As enacted, the FWWL restricts the ability of fast food and retail employers to modify their employees' schedules by imposing harsh penalties and wage "premiums" on fast food employers who are forced to make schedule changes to accommodate employers' legitimate business and scheduling needs or even because of employee initiated requests to accept additional shifts.

16. Among other provisions, the FWWL requires fast food employers to provide employees with a good faith estimate, in writing, of the number of hours the employee can expect to work per week for the duration of the employee's employment. The estimate must include the expected dates, times and locations for the scheduled work hours. If a long-term or indefinite change is made to the good-faith estimate, the fast food employer is required to update the estimate as soon as possible following the change. *See* NYC Admin. Code § 20-1221(a).

17. In addition, the FWWL requires fast food employers to provide a written work schedule to each fast food employee that identifies regular shifts and on-call shifts. The schedule must span a period of at least seven days. All subsequent schedules must be provided with at least 14 days' notice. *See* NYC Admin. Code § 20-1221(b).

18. The FWWL contains penalties for fast food employers who modify shifts with less than 14 days' notice in accordance with the following schedule:

a. $10 for each change to the work schedule provided with at least 7 but less 14 days' notice where: (i) additional hours or shifts are added to the schedule; or (ii) the date or start or end time of a regular shift or on-call shift is changed with no loss of hours;

b. $20 for each change to the work schedule provided with at least 7 but less than 14 days' notice where: (i) hours are subtracted from a regular or on-call shift; or (ii) a regular or on-call shift is cancelled;

c. $15 for each change to the work schedule provided with less than 7 days' notice where: (i) additional hours or shifts are added to the schedule; or (ii) the date or start or end time of a regular shift or on-call shift is changed with no loss of hours;

d. $45 for each change to the work schedule provided with less than 7 days' notice but at least 24 hours' notice where: (i) hours are subtracted from a regular or on-call shift; or (ii) a regular or on-call shift is cancelled; and

e. $75 for each change to the work schedule provided with less than 24 hours' notice where: (i) hours are subtracted from a regular or on-call shift; or (ii) a regular or on-call shift is cancelled.

See NYC Admin. Code § 20-1222(a).

19. The FWWL also prohibits fast food employers from scheduling employees to work two shifts with fewer than 11 hours between the end of the first shift and the beginning of the second shift when the first shift ends the previous calendar day or spans two calendar days. Any employer who schedules employees to work this type of shift, referred to as a "clopening"

(both closing and opening a restaurant), must pay the affected employee a penalty of $100. *See* NYC Admin. Code § 20-1231.

20. Despite penalizing employers for adding new and unscheduled shifts to existing employees' schedules, the FWWL also requires fast food employers to offer regular or on-call shifts to currently employed employees and prohibits employers from hiring new fast food employees to fill these shifts. This requirement to offer shifts to a fast food employer's existing employees extends to employees who work at all fast food establishments owned by the same employer and is not limited to the employees at a single location. *See* NYC Admin Code § 20-1241(a).

21. The FWWL also requires fast food employers to notify their existing employees of open and additional shifts. *See* NYC Admin. Code § 20-1241(b).

22. The FWWL also contains anti-retaliation provisions that make it unlawful to take any adverse action against an employee who attempts to exercise her rights under the new law and provides employees with the right to file private causes of action against employers that allegedly violate the law.

23. In addition, the FWWL authorizes the DCA to enforce the law. The DCA has begun enforcing the law by undertaking numerous audits against New York City members of the plaintiff associations, and by assessing substantial penalties in a number of cases.

Impact of the Challenged Local Law

24. The impact of the FWWL on Plaintiffs' members operating fast food establishments in New York City has already been (and will continue to be) extremely burdensome.

25. Due to the impracticability of anticipating schedule changes for events as disparate as heavy business, slow business, poor attendance due to employee illness or personal

events, or poor attendance due to weather related events, many fast food employers have already incurred and will continue to incur significant cost increases in both premium payments and administrative management of the scheduling process.

26. Service to customers has been rendered more difficult and hiring needs have become much harder to address.

27. The threat of enforcement litigation due to the virtual impossibility of perfect compliance with the FWWL's provisions is also endangering many of Plaintiffs' members' fast food businesses.

28. Upon information and belief, the DCA is investigating dozens of employers across New York City for alleged violations of the FWWL and has assessed hundreds of thousands of dollars in penalties for alleged violations of the FWWL.

State Preemption Of The Field Of Workplace Scheduling Laws And Minimum Wages.

29. Prior to the enactment of the FWWL, employee scheduling and compensation requirements were governed (and remain governed) exclusively by a comprehensive and detailed statutory scheme in the New York State Labor Law ("Labor Law").

30. Specifically, Section 160 of the Labor Law governs the number of hours constituting a workday. Section 161 of the Labor Law prohibits scheduling of employees for seven consecutive days and mandates a break of at least 1 out of every seven consecutive days; Section 162 of the Labor Law requires scheduling meal breaks at specific times; and Section 21 of the Labor Law provides the Commissioner of Labor with the authority to investigate and enforce the provisions of the Labor Law. Finally, Sections 650-665 of the Labor Law provide New York State with the exclusive authority to enact laws that raise the minimum compensation to be paid to employees, in the form of wages or other remuneration including wage premiums.

31. Section 199 of Labor law authorizes the Commissioner of Labor to promulgate Rules and Regulations for the purposes of carrying out the Labor Law. The Commissioner of Labor has used this power to issue industry-specific regulations and has promulgated the Wage Order for the Hospitality Industry ("Hospitality Wage Order").

32. In the Hospitality Wage Order, the Commissioner of Labor exercised its authority to issue rules and regulations that govern employee scheduling. For example, Section 146-1.5 of the Hospitality Wage Order contains a "call-in pay" provision, which requires payments of premiums to employees who report to work but whose shifts are subsequently cut short. Similarly, Section 145-1.6 of the Hospitality Wage Order contains a "spread of hours" provision that requires payment of a premium to employees whose work days extend over a ten hour period.

33. Moreover, the Commissioner of Labor, in exercise of the power reserved to New York State, recently conducted hearings and proposed amendments to the Wage Order for Miscellaneous Industries and Occupations ("Miscellaneous Wage Order") that would require payment of premiums to employees who: (i) report to work for less than 4 hours, (ii) are assigned an unscheduled shift with less than 14 days advanced notice, (iii) have a shift cancelled with less than 72 hours' notice, (iv) are scheduled to be "on-call," and (v) are required to call their supervisor with less than 72 hours' notice to see if they have to work. These proposed scheduling restrictions are similar to but different from those enacted by New York City in the FWWL, though at the time of filing of this Complaint, these proposed amendments have not yet been enacted.

34. According to the "Frequently Asked Questions" section on the Employee Scheduling Regulations page of the State Department of Labor's website (https://www.labor.ny.gov/workerprotection/laborstandards/scheduling-regulations.shtm) (the

"FAQs"), "[t]he proposed rulemaking for call-in pay concerns employee scheduling practices, including just in time scheduling and on-call scheduling, which are common practices that allow employers to cancel or schedule shifts hours before or after the start of a shift." The FAQs explain that "current law already requires four hours of call-in pay at the minimum wage when an employee reports to work and is sent home early," pursuant to 12 NYCRR Part 142 at § 142-2.3, but that "[u]nder the proposed rule, call-in pay is also required when shifts are cancelled or scheduled at the last minute . . . ."

35. On November 29, 2018, it was reported that the State Department of Labor will issue new proposed rules "that would limit when employers can schedule and cancel workers' shifts." The regulations will be subject to a 30-day comment period that begins December 12, 2018. *See* www.bloomberglaw.com, "New York Will Limit Company Flexibility On Worker Shifts," Nov. 29, 2018.

36. Regardless of what the new, proposed regulations ultimately require, it is clear that the State Department of Labor claims jurisdiction to regulate workplace scheduling and compensation for shift changes under existing State Labor Law, thereby preempting the authority of New York City to regulate in this same arena.

AS AND FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment Pursuant to CPLR §§ 3001, 3017(b) That The FWWL Violates The New York Constitution and the Municipal Home Rule Law)

37. Plaintiffs repeat and re-allege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

38. The above challenged provisions of the FWWL, N.Y. Admin. Code Title 20 Part 12, are unconstitutional and invalid pursuant to the New York Constitution, article IX, § 2, and

Municipal Home Rule Law §§ 10 and 11, on the grounds that the City lacked the authority to enact the FWWL and the FWWL is preempted and superseded by State law.

39. The City has the authority to legislate only to the extent that such authority has been delegated to it pursuant to Article IX, Section 2, of the New York State Constitution and Sections 10 and 11 of the Municipal Home Rule Law.

40. Section 11(f) of the Municipal Home Rule Law prohibits the City from adopting a local law which supersedes a State statute and applies to or affects any provision of the State Labor Law.

41. The FWWL applies to, affects, and purports to supersede the statutory and regulatory scheme for employee scheduling, work hours, and minimum compensation imposed by the New York State Labor Law, and imposes rules and regulations that prohibit what the State law permits.

42. New York State law currently permits employers, including those designated as "fast food employers" under the FWWL, to alter the work schedule of employees, including by subtracting hours or cancelling a shift, with even only 1 days' notice, without incurring a penalty or requiring the employer to pay additional sums. By requiring fast food employers to, for example, pay $45 for each change to a work schedule resulting in a subtraction of hours or a cancellation of a shift provided with less than 7 days' notice but at least 1 days' notice, the FWWL proscribes what State law permits.

43. The FWWL, in whole or in part, is therefore inconsistent with the New York State Labor Law (and regulations promulgated thereunder), in which New York State has clearly evinced a desire or intent to preempt the field of regulation of employees' work hours, schedules, and minimum compensation.

44. The FWWL, and the ongoing enforcement thereof by the City's DCA, infringes on legally protected interests of Plaintiffs' members operating in New York City, creating a justiciable controversy within the meaning of CPL 3001 and 3017(b).

WHEREFORE, Plaintiffs respectfully request an award to be entered as follows:

(a) On the First Cause of Action, an order declaring and adjudicating that the FWWL, N.Y. Admin. Code Title 20 Part 12, currently in effect, is unconstitutional, invalid, and unenforceable, and thus null and void;

(b) Granting Plaintiffs such other and further relief as the Court may deem just, equitable, and proper.

Date: December 3, 2018
New York, New York

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