

Testimony of Lorelei Salas
New York City Department of Consumer and Worker Protection
Committee on Civil Service and Labor

Hearing on
Int. 1396-2019 and Int. 1415-2019

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Good morning Chair Miller and Members of the Committee. I am Lorelei Salas, Commissioner of the Department of Consumer and Worker Protection (DCWP), and I am joined by Ben Holt, DCWP's Deputy Commissioner for the Office of Labor Policy and Standards. We would like to thank the Committee for the opportunity to testify today on Introductions 1415 and 1396, relating to wrongful discharge from employment and fast food employee layoffs, respectively.

DCWP's mission is to protect and enhance the daily economic lives of New Yorkers to create thriving communities. As part of this mission, DCWP serves as New York City's central resource for workers. The agency promotes policies that create fair workplaces, ensuring workers are empowered to realize their rights and protections. Key workplace laws we enforce include Paid Safe and Sick Leave and Fair Workweek, which have helped elevate labor standards for thousands of workers across our City.

The Fast Food Industry and Fair Workweek

The bills under consideration today touch upon an industry that we are well acquainted with – the fast food industry. Workers in the fast food industry have historically been confronted with declining real wages and unstable working schedules.¹ However, these workers, more than 67,000 in New York City alone, have continually fought to address these challenges.² Most recently, this Administration fought alongside them for a \$15 minimum wage, to end abusive scheduling practices, and to promote full-time employment in the industry.

During the Council's deliberation on the Fair Workweek legislation, the Administration testified to and cited extensive research that highlighted the negative impacts of unpredictable and unstable schedules in the fast food industry.³ As you may know, unpredictable schedules have negative impacts for both workers and businesses.⁴ For workers, this instability makes it hard to work a second job, manage a household budget, go to school, or arrange for child and elder care. For businesses, unpredictable schedules are associated with understaffing at peak business hours

¹ Fast Food Employment in New York City and State, fact sheet of the National Employment Law Project, June 2015.

² "Fired on a Whim: The Precarious Existence of NYC Fast-food Workers," by CPD, 32BJ, NELP, and FFJ.

³ Administration testimony from Fair Workweek hearing on 3/3/17.

⁴ See, e.g., Tacking Unstable and Unpredictable Work Schedules, Center for Law and Social Policy (2014); Amy Traub, Retail's Choice, Demos (2014); The Schedules That Work Act: Giving Workers the Tools They Need to Succeed, National Women's Law Center (2015).

and weak execution of business processes, resulting in poor customer service, reduced sales and lower productivity.⁵

Today, thanks to the Council's passage of Fair Workweek legislation, New York is the largest city in the country to take steps toward ending abusive scheduling practices for fast food workers. Fair Workweek guaranteed fast food workers, at chain establishments of 30 locations or more nationally, two things: (1) greater predictability through advance scheduling and premium pay requirements; and (2) the chance to work full time by picking up shifts before new workers can be hired.

As the agency charged with implementation and enforcement of the Fair Workweek laws, DCWP educates stakeholders, holds trainings and meets with businesses and workers alike to ensure their familiarity with the law. Since 2017, DCWP has conducted more than 550 worker-related educational events. This past December we visited more than 200 businesses, in commercial districts in all 5 boroughs, to educate employers about our Fair Workweek laws. Later this year, we also plan to conduct a citywide public awareness campaign highlighting these protections for both workers and businesses. DCWP also holds fast food employers to account for noncompliance with Fair Workweek, having completed 83 investigations and obtained resolutions awarding \$1.3 million in fines and restitution on behalf of 3,060 workers since the law went into effect, and we are currently pursuing another 34 active investigations. We have filed litigation against prominent fast food brands, such as KFC, McDonalds, and Chipotle, to name a few.

Our enforcement activities focus on ensuring that workers are made whole for past violations of their rights and that workplaces are in compliance with the law going forward. We work together with employers to create a proactive plan for coming into compliance as part of a larger effort to use both education and enforcement to promote a culture of compliance that protects workers and gives employers the information and tools they need to meet their obligations and, in so doing, to reduce future business costs. Fair Workweek is aimed at alleviating the unstable working conditions that are prominent in the fast food industry, which just a short time ago reported a yearly staff turnover of 150%.⁶ However, we believe there is still more that can be done to realize these protections and ensure these workers have stability in their lives and the means to support themselves and their families. This leads us to the bills before the Committee today.

Introduction 1415

Too often, fast food workers face the injustice of arbitrary and wrongful discharge. They are discharged or have their hours cut for not smiling enough, for not having the "right hat", or for having nails that are "too long".⁷ Moreover, 65% of fast food workers reported being given no explanation at all for their termination. Imagine working hard at your job and one day being fired, losing your source of income, beset with uncertainty, and not knowing why or what caused it to happen.⁸ We are also aware that workers are too frequently dismissed in retaliation for

⁵ Williams, Joan C., Lambert, Susan J., Kesavan, Saravanan, et al. Stable Scheduling Increases Productivity and Sales. March 28, 2018. Available at: <https://worklifelaw.org/publications/Stable-Scheduling-Study-Report.pdf>

⁶ Leslie Patton, "McDonald's High-Tech Makeover is Stressing Workers Out," Bloomberg News, March 13, 2018

⁷ Worker testimony [Harmony Higgins] from Fair Workweek hearing on 3/3/17.

⁸ "Fired on a Whim: The Precarious Existence of NYC Fast-food Workers," by CPD, 32BJ, NELP, and FFJ.

asserting their rights under the Fair Workweek laws, a practice that is already illegal but highlights just how precarious fast food work is. For a worker to be able to defend their rights at work by pointing out unlawful practices and reporting violations, it is critically important that they are protected against termination as a reprisal. To that end, 1415 supplements and strengthens the anti-retaliation protections for fast food workers in Fair Workweek laws. In addition, 1415 would give fast food workers greater certainty about their employment – so long as a worker is performing adequately, they will have a reasonable expectation of continued employment. 1415 does not eliminate businesses’ ability to remove employees who fail to perform or engage in misconduct; instead it promotes transparency in the workplace and protects employees from arbitrary dismissals for which they are not at fault.

Just cause standards are not new and have been negotiated and arbitrated by employers and unions for more than a century. In addition, the state of Montana has had a statewide just cause standard since 2001 and Philadelphia has a similar protection for parking lot attendants which went into effect in September 2019. 1415 contemplates using similar standards that have been developed over time to assess whether employers have met just cause. We look forward to examining in greater detail how just cause standards have been applied in other jurisdictions and how they might be incorporated into the City’s legal landscape.

Still, these cases are likely to be factually complex and are most similar to the retaliation cases we already handle. Retaliatory dismissals represent some of DCWP’s most challenging investigatory work and present imminent concern for workers who are out of work and missing a paycheck. For this reason, DCWP utilizes a “fast track” process when employers take retaliatory measures against their workers. This entails conducting a separate, specialized investigation focusing only on the retaliatory firing with strict deadlines for collecting and weighing the relevant evidence. These cases are typically focused only a single complainant, but usually involve competing factual accounts and mixed motivations that take care and time to sort out.

Overall, Introduction 1415 builds on Fair Workweek’s ideals of enhanced predictability and job quality by giving fast food workers increased job stability. We support this goal and believe there is a strong factual record demonstrating just how important this would be for fast food workers in New York City.

Introduction 1396

Introduction 1396 ensures that employers have the ability to make business decisions based on reasonable, objective economic circumstances: it sets forth parameters for layoffs of fast food employees when a business has a “bona fide economic reason” for doing so. DCWP believes that this is a sensible complement to the goals of just cause standards in balancing an employee’s right to more predictable employment with an employer’s legitimate business needs to adjust staffing levels.

There are existing legal frameworks for assessing business’ financial condition and whether layoffs are factually supported. Under the federal National Labor Relations Act and other laws,

legal tests have been developed to examine economic health that can be used and built upon for 1396.

Conclusion

An arbitrary or wrongful dismissal is all too common, much more common than we should expect. In fact, in one poll, 90% of workers expected that they were protected from being fired for an arbitrary reason, such as their supervisor simply disliked them.⁹ We know that this is not the case for fast food workers without protections such as those contemplated in Introductions 1396 and 1415.

In supporting just cause standards, our priority is to ensure it is a protection that is embraced by workers, is reasonable for businesses, and is effectively enforced. While this innovative and groundbreaking policy builds upon Fair Workweek enforcement and our anti-retaliation measures, it will require additional personnel to perform outreach, implementation, intake, investigations, and litigation in order to ensure businesses understand how to comply and to protect workers who are illegally dismissed. Under the Fair Workweek laws, workers have available to them a combination of agency-led and private enforcement, which is an approach that has leveraged our existing enforcement model. The bills today include three distinct enforcement options – administrative enforcement, a private right of action, and a DCWP-overseen arbitration process. DCWP does not currently administer an arbitration system. We would like to work with Council to understand how this process would work, and what resources and expertise are needed for it to be implemented effectively. Additionally, we would like to work with Council, through the legislative process, to ensure there is clear guidance on items such as “bona fide economic reasons” for termination, and “just cause” to facilitate clarity and flexibility for businesses. We note that the Law Department is currently reviewing the bills as well.

In closing, both Introduction 1396 and 1415 help provide workers increased stability in both their working and personal lives. We look forward to working with the Council on these bills and other progressive policies that ensure New York City remains at the forefront of workers’ rights issues in our country. Once again, thank you Chair and Members of the Committee for the opportunity to testify today and I am happy to answer any questions you may have.

⁹ Pauline T. Kim, “Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World.”