Committee on Small Business

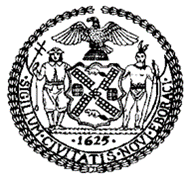
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**The Council of the City of New York**

**Committee Report of the Governmental Affairs Division**

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**Committee on small business**

*Hon. Julie Menin, Chair*

**Committee on Government Operations**

*Hon. Sandra Ung, Chair*

**January 30, 2023**

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| **Proposed Int. No. 815** | By Council Members Menin, Ung, Brewer, and Louis |
| **Title:** | A Local Law to amend the New York city charter and the administrative code of the city of New York, in relation to the rules of construction for unspecified ranges of civil penalties |

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| **Proposed Int. No. 491** | By Council Members Menin, Abreu, Restler, Sanchez, and Narcisse |
| **Title:** | A Local Law to amend the administrative code of the city of New York, in relation to reducing civil penalties where food service establishments donate left over food |

1. Introduction

On January 30, 2023 the Committee on Small Business, chaired by Council Member Menin, and the Committee on Government Operations, chaired by Council Member Ung, will hold a joint hearing on the following pieces of legislation: Introduction 815, sponsored by Council Member Menin, in relation to the rules of construction for unspecified ranges of civil penalties, and Introduction 491, also sponsored by Council Member Menin, in relation to reducing civil penalties where food service establishments donate leftover food. Those invited to testify include the Department of Sanitation, the Department of Consumer and Worker Protection, advocacy organizations, and other members of the public.

1. Background
   1. *Penalties*

The New York City Charter and Administrative Code both contain numerous provisions that impose financial penalties for violations. Different agencies are responsible for enforcing these different penalty provisions. The Citywide Administrative Procedure Act authorizes agencies to “adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal state or local law.”[[1]](#footnote-2) This includes establishing penalty schedules for violations or, where a penalty schedule is already established by local law, adding specificity to such schedule. The Act lays out the process that agencies must follow to enact or amend the rules, and generally gives them wide discretion when promulgating rules pursuant to local laws.[[2]](#footnote-3)

Local laws frequently don’t include one specific monetary penalty, but rather have a range of possible penalties. There are a very large number of penalty provisions in the Charter and Administrative Code and they are drafted in a variety of ways. Some laws specify the minimum and maximum dollar amounts,[[3]](#footnote-4) some specify a minimum but not a maximum,[[4]](#footnote-5) and some only specify the maximum penalty.[[5]](#footnote-6) Most of the provisions that specify a minimum penalty do not expressly require the minimum to be imposed for a first violation. This means that agencies may impose a penalty above the minimum for a first violation, even in the absence of aggravating factors (or in cases where no aggravating factors have been established by law or rule). For example, the New York Administrative Code sets the penalty for failing to provide open captioning at certain scheduled showings of motion pictures at “no less than $100 and no more than $500 for each violation.” But the Department of Consumer and Worker Protection, the agency charged with enforcing the law, has set $375 as the penalty for a first violation of the law on its fine schedule. This is significantly higher than the $100 minimum set by the law. While no survey has been done of every penalty provision in the Administrative Code, it is possible to find other examples where an agency has set a default penalty for a first violation that is higher than the minimum penalty set forth in the local law.

* 1. *Small Business Violations*

Small businesses in New York City must comply with regulations put forth by numerous city agencies, including the Department of Buildings, Department of Consumer and Worker Protection, Department of Environmental Protection, Fire Department, Department of Sanitation, Department of Health and Mental Hygiene, and the Department of Transportation.[[6]](#footnote-7) These regulations provide protection for the consumers, workers, and surrounding communities of New York City businesses and violating these regulations can result in fines ranging from $25 to $25,000.[[7]](#footnote-8) In some cases, responding to violations can significantly affect the financial status of a business, even for violations that are minimal and can be quickly rectified.[[8]](#footnote-9)

As the City continues to endeavor to mitigate excessive fines and unnecessary violations, as seen by the recent Executive Order introduced by the Adams Administration to reform small business violations and Local Law 80 which reduced penalties and introduced new opportunities for businesses to correct violations without having to pay a fine, alternative methods for responding to violations outside of financial penalties can be utilized to the benefit of small business owners and local communities.[[9]](#footnote-10)[[10]](#footnote-11) Violations for small businesses exist as a tool to protect consumers and workers, and they can also be an opportunity to incentivize these businesses to engage and support New Yorkers citywide. Food service establishments that often deal with excess food have an opportunity to address a significant problem in New York: food insecurity and food waste.

* + 1. *Food Waste and Food Insecurity*

Food waste is a serious environmental concern. The U.S. Environmental Protection Agency (EPA) reported in November 2022, that “the United States wastes more than one third of its food supply” and that food waste is the most common material sent to landfills and incinerators in the U.S.[[11]](#footnote-12) Beyond being a waste of the water and land that created the food, food that ends up in landfills creates methane, one of the most potent greenhouse gases.[[12]](#footnote-13)

In New York, almost 4 million tons of food a year ends up in landfills and around 68% of the food wasted is still edible.[[13]](#footnote-14) A 2017 report from the Natural Resources Defense Council revealed that roughly 20 percent of NYC food waste from the industrial, commercial, and institutional sector (ICI) comes from restaurants and caterers, the most of any ICI sector.[[14]](#footnote-15) Over 260,000 tons of food waste is generated every year by this ICI sector, with 78% of this total generated specifically by full-service establishments.[[15]](#footnote-16)

Addressing food waste is also an opportunity to address a hunger crisis that affects over 35 million Americans.[[16]](#footnote-17) If retailers and consumers redirected their excess food to people instead of landfills, it could feed 154 million people for a year.[[17]](#footnote-18) In New York over 1.5 million people experience food insecurity, including one in four children.[[18]](#footnote-19) These numbers rose significantly due to the pandemic and have remained at historic highs.[[19]](#footnote-20) Food pantries and soup kitchens across New York City reported that visits to their facilities in 2022 have increased by 69% compared to 2019 visits.[[20]](#footnote-21)

1. Legislative Analysis

**Int. 491**

Int. 491 (Menin) would require the Department of Sanitation (DSNY) and the Department of Consumer and Worker Protection (DCWP) to each establish a food donation program pursuant to which food service establishments could have civil penalties for eligible violations waived if they agree to donate their excess food. Under DSNY’s program, eligible violations would include any violation designated as an eligible violation by DSNY, and any violation of a law enforced by DSNY requiring source separation, the recycling of designated materials, or the posting of signage. Under DCWP’s program, eligible violations would include any violation designated as an eligible violation by DCWP, and any violation of a law enforced by DCWP requiring the display of prices, the accuracy or scanners, or the posting of signage.

Under both programs, the owner of a food service establishment would have an eligible violation waived if (i) they have not received the same or a substantially similar violation within the past six months, (ii) they enter into an agreement with a not-for-profit organization to donate qualifying excess food for a period of time to be determined by the administrating agency (DSNY or DCWP) and such agency approves the agreement, and (iii) at the end of the donation period, the owner provides the administrating agency with a statement from the not-for-profit organization certifying that the owner donated the excess food as set forth in the agreement. A food service establishment found not to be in compliance with the agreement would have the original penalty reinstated.

For the purpose of both programs, qualifying food would include food that (i) the food service establishment does not intend to make available to its customers or intends to stop making available to its customers, and (ii) meets all quality and labeling standards imposed by federal, state, and local laws and rules. In addition, under both programs, a food service establishment would include any full-service restaurant, fast food restaurant, cafe, delicatessen, coffee shop, grocery store, vending truck or cart, or cafeteria.

This bill would take effect 180 days after becoming law.

**Int. 815**

Int. 815 (Menin) would apply to any provision of the Charter or the Administrative Code that sets forth a range of civil penalties where the minimum penalty that is greater than zero and the provision does not set forth any aggravating, mitigating, or other factors to guide discretion regarding which penalty amount to impose in a given situation. The bill would designate the minimum penalty as the default penalty for a first violation of any such provision. Furthermore, it would prohibit agencies from imposing a penalty greater than the default unless the agency has promulgated rules establishing aggravating factors that would justify the imposition of a greater penalty.

This bill would take effect 180 days after becoming law.

Int. No. 815

By Council Members Menin, Ung, Brewer and Louis

..Title

A Local Law to amend the New York city charter and the administrative code of the city of New York, in relation to the rules of construction for unspecified ranges of civil penalties

..Body

Be it enacted by the Council as follows:

Section 1. Chapter 52 of the New York city charter is amended by adding a new section 1155 to read as follows:

§ 1155. Default civil penalty within unspecified range. a. Definitions. For purposes of this section, the term “unspecified range of penalties” means any provision setting forth a range of civil penalties that meets all of the following criteria:

1. The minimum penalty is greater than zero;

2. The maximum penalty is either specified or unspecified; and

3. The provision does not set forth any aggravating, mitigating, or other factors to guide discretion regarding which penalty amount within the range to impose in a particular situation.

b. For any unspecified range of penalties set forth in this charter, the default civil penalty for a first violation shall be the lowest amount in the range. No agency or officer may impose a civil penalty greater than the default civil penalty for a violation unless the agency establishes by rule the aggravating factors that would justify the imposition of a greater penalty.

§ 2. Chapter 1 of title 1 of the administrative code of the city of New York is amended by adding a new section 1-115 to read as follows:

§ 1-115 Default civil penalty within unspecified range. a. Definitions. For purposes of this section, the term “unspecified range of penalties” means any provision setting forth a range of civil penalties that meets all of the following criteria:

1. The minimum penalty is greater than zero;

2. The maximum penalty is either specified or unspecified; and

3. The provision does not set forth any aggravating, mitigating, or other factors to guide discretion regarding which penalty amount within the range to impose in a particular situation.

b. For any unspecified range of penalties set forth in the code, the default civil penalty for a first violation shall be the lowest amount in the range. No agency or officer may impose a civil penalty greater than the default civil penalty for a violation unless the agency establishes by rule the aggravating factors that would justify the imposition of a greater penalty.

§ 3. This local law takes effect 180 days after it becomes law.

NAB

LS #9482

10/26/22 2:10PM

Int. No. 491

By Council Members Menin, Abreu, Restler, Sanchez and Narcisse

..Title

A Local Law to amend the administrative code of the city of New York, in relation to reducing civil penalties where food service establishments donate left over food

..Body

Be it enacted by the Council as follows:

Section 1. Chapter 1 of title 16 of the administrative code of the city of New York is amended by adding a new section 16-144 to read as follows:

§ 16-144 Food donations. a. As used in this section, the following terms have the following meanings:

Eligible violation. The term “eligible violation” means (i) a violation which is set forth in rule by the department as eligible for the food donation program and (ii) a violation issued for a failure to comply with any provision of the code or the rules of the city of New York, which is enforced by the department and requires source separation, the recycling of designated materials or the posting of signage.

Food service establishment. The term “food service establishment” means a premises or part of a premises where food is provided directly to the consumer whether such food is provided free of charge or sold, and whether consumption occurs on or off of the premises or is provided from a pushcart, stand or vehicle and shall include, but not be limited to, full-service restaurants, fast food restaurants, cafes, delicatessens, coffee shops, grocery stores, vending trucks or carts and cafeterias.

Not-for-profit corporation. The term “not-for-profit corporation” means a not-for-profit corporation as defined in subparagraph 5 or subparagraph 7 of subdivision a of section 102 of the New York state not-for-profit corporation law.

Qualifying excess food. The term “qualifying excess food” means food that (i) such food service establishment does not intend to make, or intends to stop making available to its customers and (ii) meets all quality and labeling standards imposed by federal, state and local laws and rules.

b. Notwithstanding any other provision of law, the commissioner shall establish a food donation program. Such program shall allow an owner of a food service establishment who is issued an eligible violation to have the civil penalties for such violation waived where such owner (i) had not received the same or a substantially similar violation within the six month period prior to the issuance of such eligible violation, (ii) enters into an agreement, approved by the department, with a not-for-profit corporation to donate such establishment’s qualifying excess food for a period to be determined by the department and (iii) provides to the department, at the end of such period, a statement from such not-for-profit corporation certifying that such establishment has donated its qualifying excess food over such period.

c. An owner who enters into such a regulatory agreement pursuant to subdivision b of this section and is found not to be in compliance with such agreement shall have the original civil penalty reinstated and doubled.

§ 2. Title 20 of the administrative code of the city of New York is amended by adding a new chapter 16 to read as follows:

CHAPTER 16

INCENTIVIZING FOOD DONATIONS

§ 20-1601 Incentivizing food donations.

§ 20-1601 Incentivizing food donations. a. As used in this chapter, the following terms have the following meanings:

Eligible violation. The term “eligible violation” means (i) a violation which is set forth in rule by the department as eligible for the food donation program and (ii) a violation which is issued for a failure to comply with any provision of the code or the rules of the city of New York which is enforced by the department and requires the display of prices, the accuracy of scanners or the posting of signage.

Food service establishment. The term “food service establishment” means a premises or part of a premises where food is provided directly to the consumer whether such food is provided free of charge or sold, and whether consumption occurs on or off of the premises or is provided from a pushcart, stand or vehicle and shall include, but not be limited to, full-service restaurants, fast food restaurants, cafes, delicatessens, coffee shops, grocery stores, vending trucks or carts and cafeterias.

Not-for-profit corporation. The term “not-for-profit corporation” means a not-for-profit corporation as defined in subparagraph 5 or subparagraph 7 of subdivision a of section 102 of the New York state not-for-profit corporation law.

Qualifying excess food. The term “qualifying excess food” means food that (i) such food service establishment does not intend to make, or intends to stop making available to its customers and (ii) meets all quality and labeling standards imposed by federal, state and local laws and rules.

b. Notwithstanding any other provision of law, the commissioner shall establish a food donation program. Such program shall allow an owner of a food service establishment who is issued an eligible violation to have the civil penalties for such violation waived where such owner (i) has not received the same or a substantially similar violation within the six month period prior to the issuance of such eligible violation, (ii) enters into an agreement, approved by the department, with a not-for-profit corporation to donate such establishment’s qualifying excess food for a period to be determined by the department and (iii) provides to the department, at the end of such period, a statement from such not-for-profit corporation certifying that such establishment has donated its qualifying excess food over such period.

c. An owner who enters into such a regulatory agreement pursuant to subdivision b of this section and is found not to be in compliance with such agreement shall have the original civil penalty reinstated and doubled.

§ 3. This local law takes effect 180 days after it becomes law.

Session 12

IP

LS #8463

5/23/22 3:45pm

Session 11

JW, SSY

LS #961

Int. #568-2018

1. Administrative Code § 1043 [↑](#footnote-ref-2)
2. Administrative Code § 1043 (d)(2) [↑](#footnote-ref-3)
3. *See. e.g.*, Administrative Code § 17-1903(a). [↑](#footnote-ref-4)
4. *See. e.g.*, Administrative Code § 22-506(e)(3). [↑](#footnote-ref-5)
5. *See. e.g.*, Administrative Code § 18-146(a). [↑](#footnote-ref-6)
6. NYC Business, Learn Basic Rules to Avoid Common Business Violations, <https://www.nyc.gov/nycbusiness/commonviolations/default> (Accessed January 20, 2023) [↑](#footnote-ref-7)
7. *Id* [↑](#footnote-ref-8)
8. Examining Federal Rulemaking Challenges and Areas of Improvement within the Existing Regulatory process: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs, Subcomm. On Regulatory Affairs and Fed. Mgmt., 114th Cong. (2015) (statement of Drew Greenblatt). [↑](#footnote-ref-9)
9. NYC.Gov. (2022) *Mayor Adams Signs "Small Business Forward" Executive Order to Reform Small Business Violations.* (January 4, 2022) *Available at* <https://www.nyc.gov/office-of-the-mayor/news/002-22/mayor-adams-signs-small-business-forward-executive-order-reform-small-business-violations#/0>. [↑](#footnote-ref-10)
10. *See* Local Law 80 of 2021, *available at* <https://nyc.legistar.com/LegislationDetail.aspx?ID=4805925&GUID=2C7D9F71-D49E-499E-A21F-F6A9D5C76B90&Options=Advanced&Search>= [↑](#footnote-ref-11)
11. Jaglo, Kirsten, Shannon Kenny, and Jenny Stephenson. *From Farm to Kitchen: The Environmental Impacts of U.S. Food Waste.* U.S. Environmental Protection Agency Office of Research and Development *(*November 2021). Available at: <https://www.epa.gov/system/files/documents/2021-11/from-farm-to-kitchen-the-environmental-impacts-of-u.s.-food-waste_508-tagged.pdf>. (Accessed January 20, 2023) [↑](#footnote-ref-12)
12. Buzby, Jean. *Food Waste and its Links to Greenhouse Gases and Climate Change.* USDA. *January 24, 2022. Available at:* <https://www.usda.gov/media/blog/2022/01/24/food-waste-and-its-links-greenhouse-gases-and-climate-change#:~:text=Food%20loss%20and%20waste%20also,even%20more%20potent%20greenhouse%20gas>. [↑](#footnote-ref-13)
13. Gallanter, Melissa. *Food Waste: Food by the Numbers.* Hunter College New York CIty Food Policy Center, *(February 24, 2020). Available at:* <https://www.nycfoodpolicy.org/food-waste-food-by-the-numbers/.> [↑](#footnote-ref-14)
14. Hoover, Darby. *Estimating Quantities and Types of Food Waste at the City Level.* National Resource Defense Council, *(October 2017)*, *Available at:* <https://www.nrdc.org/sites/default/files/food-waste-city-level-report.pdf>. (Accessed January 20, 2023). [↑](#footnote-ref-15)
15. *Id.* [↑](#footnote-ref-16)
16. Jaglo, Kirsten, *supra* note 11*.* [↑](#footnote-ref-17)
17. *Id.*  [↑](#footnote-ref-18)
18. City Harvest (2022), As New Yorkers struggle with rising costs for food, rent, and other necessities, food insecurity in our city remains near historic highs. Available at: . [↑](#footnote-ref-19)
19. *Id.* [↑](#footnote-ref-20)
20. *Id.*  [↑](#footnote-ref-21)