



Eye On Washington

Legislative Update



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State and Local Wage & Hour Compliance Trends: Employee Scheduling Restrictions

In recent years, local lawmakers have become increasingly active in enacting laws restricting employer scheduling practices. On May 30, 2017, New York City Mayor de Blasio announced the enactment of legislation to address scheduling practices in the fast-food and retail industries. Other cities enacting similar legislation include [San Francisco \(2014\)](#); [Seattle \(2016\)](#); [San Jose \(2016\)](#); and [Emeryville, CA \(2016\)](#).

Such legislation is intended to provide workers in some traditionally low-wage industries with more predictability in work scheduling and/or additional pay for late schedule changes or cancellations; and in some cases, time to rest between shifts, and an opportunity to accept additional work hours before the employer can hire additional staff.

According to New York City Mayor DeBlasio's [press release](#) concerning "Fair Workweek" legislation, "Nearly one in five Americans has an unstable work schedule and about 40 percent of early career workers, defined as workers aged 26 - 32, have less than one week advance notice of their schedules." Additionally, a recent [study](#) analyzed income variability within jobs, and found that over a one-year period, more than 40 percent of consumers experienced month-to-month income fluctuations of 30 percent or more. Some causes are well-known, such as months with three pay dates, but advocates have noted that employers may cause some income volatility through scheduling practices, and may be in the best position to help make income more predictable.

With more cities enacting this type of law and some states considering similar measures, employers should monitor these developments. Those that are affected should review each law carefully. Each law is materially different, which can make compliance a challenge. Some key provisions of each law are summarized below.

New York City Fair Workweek Legislation

As noted earlier, New York City recently enacted legislation to address scheduling practices in the fast-food and retail industries. This took the form of a series of related legislation. The [first law](#) in the series applies to non-salaried, fast-food employees and relates to employee schedules. The law requires a fast-food employer to provide a written statement of the number of hours the employee can expect to work per week for the duration of the employee's employment, along

with the expected dates, times and locations of those hours. If a long-term or indefinite change is made to the estimate, the employer must provide an updated good faith estimate to the affected employee as soon as possible and before he or she receives the first work schedule following the change.

Employers must provide fast-food employees with their work schedules at least 14 days in advance and, if changes to the schedule are made within that period, employers are required to pay affected employees a "premium," as noted on the next page:

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Description of Change	Premium Amount Payable
Less than 14 days' notice but at least 7 days' notice: (a) Additional hours or shifts are added; or (b) The date or start or end time of a regular shift or on-call shift is changed with no loss of hours.	\$10
Less than 14 days' notice but at least 7 days' notice: (a) Hours are subtracted from a regular or on-call shift; or (b) A regular or on-call shift is cancelled.	\$20
Less than 7 days' notice: (a) Additional hours or shifts are added; or (b) The date or start or end time of a regular or on-call shift is changed with no loss of hours.	\$15
Less than 7 days' but at least 24 hours' notice: (a) Hours are subtracted from a regular or on-call shift; or (b) A regular or on-call shift is cancelled.	\$45
Less than 24 hours' notice: (a) Hours are subtracted from a regular or on-call shift; or (b) A regular or on-call shift is cancelled.	\$75

The [second law](#) prohibits fast-food employers from scheduling employees to work shifts with less than 11 hours between them. If an employer requests that an employee take a shift less than 11 hours after the last shift they worked, and the employee consents to do so, the employer must pay that person \$100.

The [third law](#) requires fast-food employers with available hours to offer shifts to existing employees before hiring new employees. It is intended to provide part-time, fast-food workers with a path toward additional hours and full-time employment, should they want it. Employers must offer hours to current employees up until the point at which the employer would be required to pay overtime, or until all current employees have

rejected available hours, whichever comes first. Only after the employer has exhausted options to provide shifts to current workers can the employer hire additional part-time workers.

The [fourth law](#) requires employers to afford fast-food employees with the ability to make voluntary contributions to not-for-profit organizations of their choice through payroll deductions. Unlike the other provisions, this law will be repealed two years after the effective date, unless extended.

A [fifth law](#) applies to the retail industry, and generally prohibits retail employers from scheduling an employee for any on-call shift; from canceling a regular shift



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within 72 hours of the start of such shift; from requiring employees to work with less than 72 hours' notice (unless the employee consents in writing); and from requiring a retail employee to confirm whether or not they should report for a shift, as specified. This law provides for a number of exceptions.

These laws take effect on November 26, 2017; although the effective date presumes that appropriate regulations have been promulgated. Affected employers should also be aware of applicable notice and posting provisions.

San Francisco, CA Retail Employee Rights Law

The San Francisco [Retail Employee Rights law](#) applies to chain stores with at least 40 establishments worldwide and 20 or more employees in San Francisco. Covered employers are required to provide:

Scheduling:

- **Initial Estimate of Work Schedule** – New employees must be given a good faith written estimate of the employee's expected minimum number of scheduled shifts per month and the days and hours of those shifts.
- **Two Weeks' Notice of Work Schedules** – Schedules may be posted in the workplace or provided electronically, so long as employees are given access to the electronic schedules at work.
- **Predictability Pay for Schedule Changes** – If changes are made to an employee's schedule with less than seven days' notice, the employer must pay the employee a premium of 1-to-4 hours of pay at the employee's regular hourly rate, depending on the amount of notice and the length of the shift.

- **Pay for On-Call Shifts** – If an employee is required to be "on-call," but is not called in to work, the employer must pay the employee a premium of 2-to-4 hours of pay at the employee's regular hourly rate, depending on the amount of notice and the length of the shift.
- **Exceptions to the "predictability pay" elements apply;** e.g., natural disaster, changes at the request of an employee, etc.

Equal Treatment for Part-time Employees:

Employers must provide equal treatment to part-time employees, as compared to full-time employees at their same level, with respect to (1) starting hourly wage, (2) access to employer-provided paid time off and unpaid time off; and (3) eligibility for promotions. Hourly wage differentials are permissible if they are based on reasons other than part-time status, such as seniority or merit systems.

Available Work Hours Must be Offered to Current Employees

- in writing before hiring new employees (including independent contractors and/or temporary employees).
- Employers must make the offer in writing or by posting the offer in a conspicuous location in the workplace.
 - Employees must be given 72 hours to respond.
 - Employers must keep records of notices and responses for three years.

Required Posting:

Affected employers are required to post a [Retail Employee Rights Poster](#) at the workplace informing covered employees of their rights under these laws.



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San Jose, CA Opportunity to Work Ordinance

The [San Jose Opportunity to Work Ordinance](#) was a ballot measure adopted in November 2016, which became effective on March 13, 2017. The San Jose ordinance is broader than similar laws in San Francisco and Seattle, applying to employers with more than 35 employees within the organization (i.e., not just in San Jose), that are subject to the San Jose Business License Tax or that maintain a facility in San Jose. Employers should refer to the [FAQs](#) posted for definitions of “chain,” “franchise,” etc.

The ordinance generally requires that, before hiring additional employees (including contractors and temporary staff), an employer must offer additional hours of work to current part-time employees.

Employers should keep careful records to demonstrate any additional hours/shifts were offered to existing employees. Employers may be called upon to produce employee work schedules and “any other records the office requires to demonstrate compliance.” Penalties of \$50 per employee for each day of violation are possible.

As in New York City and San Francisco, affected employers must post a notice of Employee Rights under the ordinance.

Seattle, WA Secure Scheduling Ordinance

The [Seattle Secure Scheduling Ordinance](#), became effective July 1, 2017. It generally applies to food-service and retail establishments with 500 or more employees nationally, and full-service restaurants with 40 or more locations worldwide. It generally requires the following:

- **Good Faith Estimate.** Upon hiring, employers must provide to the employee a good faith estimate of the

hours he or she can expect to work, and whether the employee will work on-call shifts.

- **Right to request input into the work schedule.** Employees may request schedule preferences regarding times and location of work. Employers must engage in an interactive process with employees to discuss these requests, and must grant a request related to a major life event (i.e. employee’s transportation, housing, other job(s), education, caregiving responsibility, and care regarding a serious health condition) unless the employer has a bona fide business reason to support denying the request.
- **Right to rest between work shifts.** Employers cannot schedule a closing and opening shift separated by less than 10 hours unless an employee requests, or consents, to such hours. Regardless of request or consent, employers must always pay time-and-a-half for the hours separated by less than 10 hours.
- **Advance notice of work schedule.** Employers must post employees’ work schedules 14 days in advance.
- **Compensation for changes to work shifts.** For example,
 - Half the hourly wage for hours cut from the posted schedule (unless the employee initiates the change, or there are conditions such as loss of power or natural disaster);
 - Half the hourly rate for on-call hours scheduled if the employee is not required to report for duty
- **Offer of additional hours to existing employees.** Before employing or contracting with new workers, employers, generally, must post a notice of available hours or shifts for at least three days.
- **Recordkeeping requirements.** Employers must keep records for three years to show compliance.



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Emeryville, CA Fair Workweek Ordinance

On July 1, 2017, Emeryville's [Fair Workweek Ordinance](#) became effective. It includes retail firms with 56 or more employees globally, and fast-food establishments with 56 or more employees globally with 20 or more employees in Emeryville. The ordinance generally requires the following:

- Employers must post employees' schedules at least two weeks in advance.
- Employees have the right to decline any modification of a previously scheduled shift for which the employee has been provided advance notice of less than seven days but at least 24 hours.
- If the employer requires an employee to work a previously unscheduled shift with less than 14 days' notice but more than 24 hours' notice, the employer must pay the employee one hour of "Predictability Pay" at the employee's regular rate of pay.
- If less than 24 hours' notice is provided, the employer must pay "predictability pay" of the lesser of 4 hours, or the number of hours in the scheduled shift.
- Employees have the right to decline any hours that occur less than 11 hours after the previous day's shift

or during the 11 hours following the end of a shift that spanned two days.

- Employers must offer additional hours to part-time employees before hiring any new workers.
- Covered employers are required to maintain for at least three years a record of each employee's initial posted schedule and all subsequent changes to that schedule; consent to work hours where required, and documentation of the time and method of offering additional hours of work to existing staff.

Outlook

In light of the trend toward Wage & Hour legislation restricting employer work scheduling, employers should carefully evaluate whether any of these laws apply to them, and monitor state/local Wage & Hour legislation for similar scheduling restrictions and related requirements. Several other cities are considering similar laws, including, Washington, D.C. and Albuquerque, NM. If applicable, consult with your Human Resource professionals and Legal counsel, and observe carefully any new restrictions or requirements, together with any written notice and recordkeeping obligations.

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