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PERSPECTIVE

Predictive scheduling laws are spreading

2017 IN REVIEW

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It's no secret that working in retail and fast food can be tough. Among other challenges, employees must often contend with unpredictable and irregular schedules. Shifts might be changed after they are posted, sometimes only hours before they are scheduled to start. Employees working on-call shifts must be prepared to work, but without assurance that they will actually be called in. Such schedules present obvious difficulties for managing child care, personal appointments, or a second job. At the same time, employers view such flexibility to be essential to managing labor expenses, typically one of the highest controllable costs on their balance sheets. However you look at it, though, laws aimed at combatting such scheduling practices appear poised to be the next wave of wage and hour regulation.

As has been the case with a number of other employee-friendly initiatives in recent years, municipalities have been leading the charge. To date, San Francisco and Emeryville have enacted local "predictive scheduling" laws, as have Seattle and New York City. Oregon has enacted the first statewide law, while New York state has proposed predictive scheduling regulations that, if adopted as expected, will take effect in 2018. A California bill proposed in 2015 did not survive, although further efforts can be expected. Michigan, Massachusetts and New Jersey have tested the waters with proposed laws as well, without passing them yet.

While each have their own idiosyncrasies, the various laws in effect share many of the same characteristics. So far, the laws are restricted to chain retailers and the fast food industry. For example, San Francisco's law applies to "formula retail establishments," which includes most fast food and retail chains, while New York City's law applies to either retail or fast food, depending on the provision. New York state's proposed regulations, however, would apply to all employers, subject to a few exceptions, most notably restaurants and hotels. The enacted laws also share similar notice and penalty provisions designed to encourage predictable schedules.

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All of the existing laws require employers to provide new hires with a written estimate of their work schedule (although New York City requires it only for fast food). In San Francisco and Emeryville, this means an estimate of the expected number of shifts per week, and the days and hours of those shifts, while Oregon requires only an estimate of the median number of hours the employee can expect to work in an average month. These estimates are not necessarily set in stone. New hires in San Francisco and Emeryville, for example, may request changes to their schedule, although the employer may reject those changes prior to the start date.

The laws further require employers to provide employees advance notice of their work schedules. If an employer changes the posted schedule — such as by adding a new shift or extending, moving, or canceling an existing shift — with less than the required notice, the employer must pay a penalty. For example, the San Francisco ordinance requires at least two weeks' notice. Some of the laws, such as those in Emeryville, New York City, and Oregon, also give employees the right to decline a shift not included in the posted schedule. New York state's proposed regulations do not affirmatively require an employer to post a schedule, but require an extra two hours of "call in" pay for shifts not scheduled at least 14 days in advance.

The penalty imposed for changes to schedules — called "predictability pay" — varies among locals. Typically, though, the penalty depends on when the change is made. In San Francisco, changes made between 24 hours and seven days before a scheduled shift incur a penalty equal to one hour of pay at the employee's regular rate, and the penalty increases to two or four hours of pay (depending on shift length) when the employer provides less than 24 hours' notice of changes. Thus, the laws incentivize employers to provide as much notice as possible of any schedule changes.

Most of the ordinances include exceptions, such as for natural disasters or when there are mutually agreed-upon schedule changes. San Francisco recognizes additional exceptions, including when an employee is required to work overtime, or to cover for another employee who does not report to work.

The various laws further impose penalties or other disincentives for "on-call" shifts, where the employee is required to be available, but works only if called in by the employer. For example, San Francisco's law provides for two hours of pay for each on-call shift of four hours or less, and four hours of pay for on-call shifts over four hours, when the employee is not required to work. New York state's proposed regulations, on the other hand, require a minimum of four hours of pay whenever an employee is required to be on-call, in addition to any regular wages owed when he or she is actually called in to work. New York City's ordinance prohibits on-call scheduling altogether for retailers, although it could be preempted if the proposed state regulations are adopted.

California employers who do not operate in localities with predictive scheduling laws, or who fall outside the scope of those laws, are still not in the clear. California wage orders already require minimum compensation (i.e. half the scheduled shift, with a two-hour minimum and four-hour maximum) in the form of "reporting time" pay when an employee reports to work but is not provided at least half of his or her usual or scheduled day's work. These requirements apply broadly to nonexempt employees across all industries. Employees have attempted, with mixed results, to extend these existing reporting time regulations to on-call or "call-in" shifts. A Los Angeles County Superior Court judge recently concluded that an employee who is required to call in two hours before the start of a scheduled shift to find out if he or she needs to come in is "reporting" to work and thus owed reporting time pay. *Monroy v. Yoshinoya America, Inc.*, BC653419. Other courts, however, have found that an employee must physically report to work for reporting time obligations to be triggered. *See, e.g., Casas v. Victoria's Secret Stores, LLC*, CV 14-6412-GW (C.D. Cal.).

Employers in retail, fast food and beyond will need to prepare themselves as predictive scheduling laws gain traction across California and the rest of the country. Labor costs will inevitably increase, as employers lose flexibility to adjust their labor needs on a day-to-day basis. Meanwhile, advocates of such laws hope that the lives of workers will become more manageable.

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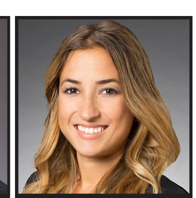

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