PREDICTIVE SCHEDULING: AN EXPANDING TREND IMPACTING THE FOOD SERVICE, HOSPITALITY, AND RETAIL INDUSTRIES

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Food Industry Alert

By: April Boyer, Mallory M. Cooney, Yamilet Hurtado, Suzanne J. Thomas

On September 19, 2016,[1] Seattle became the second local jurisdiction to enact a “predictive scheduling” or “secure scheduling”[2] ordinance that allows the jurisdiction to restrict how retailers and restaurants schedule their employees. The federal Department of Labor is also analyzing whether existing wage and hour laws can be applied to address this issue and other state and local legislation similarly is being considered. These laws attempt to provide predictability to workers' schedules by, among other matters, requiring employers to give workers two weeks' notice of work schedules, pay employees for schedule changes or cancelled shifts, and provide predictability pay for on-call employees not called into work. These measures and proposals currently are targeted largely to the food service, hospitality, and retail industries, although in some jurisdictions the concept has been expanded to target all employers.

What is driving these often union-motivated legislative efforts? Businesses do not need the same number of workers on a consistent basis. Many businesses schedule workers weekly, and worker schedules may vary significantly from week to week. Some workers are on-call, with no schedule and no guarantee of shifts. Thus, the hours for which an employee is scheduled to work or that the employee actually works may increase or decrease substantially.

As a result, some workers complain that erratic scheduling practices:

- Make it difficult to plan for family care, school, and other jobs;
- Make it difficult to predict income;
- Allow some employers to coerce employees to take unscheduled shifts; and
- Do not give workers enough rest time between closing and opening shifts.

In addition to these general worker complaints, certain themes appear to be driving legislative efforts. These include:

- The impact of scheduling on low income workers and caregivers;
- The belief that part-time scheduling may be more burdensome for women than men;
- An increase of nonunion workers who are not protected by collective bargaining; and
- The belief that many part-time workers are “involuntary” part-timers.

What may be included in proposed legislation:

- Two weeks' notice of work schedules or notice to change in work schedules;
- “Predictability pay” to employees for schedule changes, additional shifts, or cancelled shifts;
- “Predictability pay” for on-call employees who are not called into work;
- Requirement to offer additional hours to part-time employees before hiring additional employees;
- Good faith estimate of hours at time of hire;
- Right to request flexible work arrangements;
- Some ordinances require the jurisdiction to accommodate workers' other obligations and needs, such as school, caregiving, transportation or housing changes, or another job unless the employer has a “bona fide” reason not to grant such an accommodation;
- Minimum hours before shifts;
- Part-time employees' hourly rate equal to that of full-time employees;
- Part-time employees' eligibility for the same paid and unpaid time off (prorated) as full-time employees;
- Right to decline additional, unscheduled shifts with no adverse consequences;
- Agency processes; and/or
- Private rights of action.

This employee-friendly trend presents significant challenges to at least employers in the hospitality and retail industries where flexibility in scheduling is vital to business operations due to large numbers of part-time employees, high employee turnover rates, and constantly fluctuating customer demands, all of which can change month-to-month, week-to-week, or even day-to-day based on factors such as the weather, season, traffic or holidays. Imagine a venue where the work demands are based on whether a sports team makes the playoffs. Scheduling needs would not be anticipated in a timely way to give the notice required under this kind of legislation, but the game would still need to be staffed at a great cost to these businesses if these harsh laws go into effect. Many employers and industry groups have actively campaigned against these efforts arguing that such scheduling measures would unnecessarily burden their businesses by removing needed flexibility, increasing costs, and unreasonably interfering in relationships with employees — many of whom specifically entered the industry for the scheduling flexibility it provides.

NEW SCHEDULING PRACTICES TAKE HOLD

In November 2014, San Francisco became the first U.S. jurisdiction to pass predictive scheduling legislation, the “Predictable Scheduling and Fair Treatment for Formula Retail Employees Ordinance,” implemented as part of the city's larger “Retail Workers' Bill of Rights” aimed at chain stores and restaurants. The ordinance applies to “Formula Retail Establishments” — chain stores with at least 40 locations worldwide and 20 or more employees (including corporate officers) in San Francisco. The expansive legislation requires that, among other things, employers give new workers written good faith estimates of their expected hours and schedules, provide two

weeks' advance notice to employees of their schedules, pay employees for schedule changes and cancelled on-call shifts, and offer extra hours to current part-time employees before hiring new employees or utilizing a staffing agency.

Not long after San Francisco's Ordinance went into effect, the New York State Attorney General issued information request letters to 15 large retail chains regarding their respective scheduling practices. In September 2016, the New York City mayor promised to introduce a predictive scheduling proposal to the city council that would regulate scheduling practices for more than 65,000 New Yorkers employed by the city's fast food chains. Under the mayor's proposal, fast food restaurant chains would be required to set shifts for each employee at least two weeks in advance and prominently post the schedules. If an employer were to change a worker's hours on short notice for any reason, the employee would be entitled to extra compensation. Washington, D.C. looked into predictive scheduling earlier in 2016, but the bill was tabled indefinitely in June.

SEATTLE'S SECURE SCHEDULING ORDINANCE

Seattle became the latest city to pass predictive scheduling legislation with a unanimous vote on the Secure Scheduling Ordinance.[3] The legislation extends to retail and fast food service establishments with more than 500 employees worldwide and full service restaurants with more than 500 employees and 40 full-service restaurant locations worldwide.[4] The ordinance mirrors the San Francisco ordinance in many ways but imposes additional onerous requirements upon employers. The key provisions include:

- A good faith estimate of workers' hours must be provided to new and existing employees. The estimate must be updated annually or whenever it is subject to substantial change. While the estimate is not binding, the employer must initiate an interactive process with the employee to discuss any significant change from the good faith estimate and, if applicable, explain the bona fide business reason for the change.[5]
- Employers must give employees their schedules 14 days in advance.[6] Employees have a right to decline any shift added to their schedule within the two-week notice period. If an employer alters the work schedule, it must timely notify the employee in person or by telephone, email, text, or similar means.[7] Where an employer adds hours to an employee's shift or changes the start or end time of a shift, the employee must be paid for one additional hour of “predictability pay.”[8] If an employee is scheduled for a shift and sent home early or an on-call shift is cancelled, the employee must be paid for half of the hours not worked.[9]
- Employees have the right to request input into their schedule. An employee may make a scheduling request and the employer must engage in a timely, interactive process to discuss the request.[10] The employer must have a “bona fide business reason” for denying requests related to an employee's serious health condition, changes in transportation or housing, caregiving, education, or second job responsibilities or conflicts.[11]
- If the gap between a closing and opening shift is fewer than 10 hours, an employee is entitled to be paid time-and-a-half for the difference (addressing so-called “clopenings”).

- If new additional hours become available, the "access to hours" measure requires that employers give notice and offer those hours to qualified current employees before hiring additional staff.[12]

The Seattle ordinance also imposes notice and record-keeping requirements on employers and prohibits retaliation against employees who exercise their rights under its provisions. In addition to various penalties which may be imposed upon employers, *any person (not just employees) aggrieved by* an employer's scheduling practices is provided with a private cause of action against the business.[13]

The most significant and troubling difference between the Seattle ordinance and other predictive scheduling measures is the required interactive process for employee scheduling requests. This requirement undoubtedly will prove to be burdensome for employers. This process will be markedly different from the "interactive process" employers engage in with regard to requests for reasonable accommodation of a disability. Human resources personnel and managers will likely face scores of requests from multiple employees with minimal guidance as to how those competing requests should be handled. The ordinance requires that employers give preferential treatment to requests related to transportation and childcare needs, second jobs, or career-related educational or training courses. However, it is unclear how employers should prioritize competing employee requests for those "major life events." Further, an employer's ability to deny an accommodation request for such events is limited to the existence of "bona fide business reasons," which are defined narrowly. The ordinance provides examples, for instance: "significant ability to meet customer needs," an "insufficiency of work" during the shift requested, or a significant inability to reorganize work.

PENDING LEGISLATION

As the predictive scheduling movement continues to gain momentum, legislation is pending at the state level in California, Connecticut, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, and Rhode Island, as well as on the federal level. These proposals are similar to those enacted in San Francisco and Seattle.

California

In February 2015, state legislators in California introduced the "Fair Schedule and Pay Equity Act." The act would apply to food and general retail establishment employers with 500 or more California-based employees. The bill would require two weeks' advance notice of schedules for employees with additional pay provided for changes within that period but would allow for an exception for changes to a schedule requested by a worker herself.

Connecticut

Only a week after the California bill was introduced, Connecticut's "Act Concerning Predictable Scheduling" was proposed by legislators. The act would apply to all employers in the state, not just retail or food establishments. If passed, the bill would require 21 days advance notice of scheduled work hours and an hour of additional pay for each changed shift if the change is made more than 24 hours before an employee is scheduled to work. For changes made within that 24-hour time frame, the employee would be entitled to four hours of extra pay at the regular rate in addition to pay for hours worked.

Illinois

In March 2015, Illinois representatives followed Connecticut's lead by introducing House Bill 3554, which would also apply to all employers doing business in the state. The bill would empower employees to request changes to their time on call, number of required hours or location of work, amount of notice given to employees for schedules and assignments and changes in hours. Employers would be required to engage with employees in a "good faith interactive process" to work through the requests and in the event of a denial, the employer would have to state the reason in writing and consider alternatives to employee proposals.

New York

While Mayor de Blasio has yet to present his proposal to the city, New York's assembly and senate have had identical bills pending since early 2015. Both the assembly's A3055 and senate's S2414 would apply to all employers and, similar to Illinois's bill, would provide employees with a forum to make requests for flexible working arrangements free from retaliation and with the requirement that their employer seriously consider their requests and provide a timely decision on the matter. An amendment to New York state labor law limiting on-call shifts was introduced as well but has since been withdrawn.

Oregon

Introduced in early 2015 and recently amended, House Bill 3337 and Senate Bill 888 would require employers to engage in an interactive process to respond to employee scheduling change requests. It would also go a step further than other proposed state legislation by mandating that requests made because of a worker's second job, serious health condition, caregiving responsibilities, or participation in a training program would have to be granted unless the employer can provide a bona fide business reason for denial. The proposed bills also would require three weeks' advance notice of work schedules with additional pay for schedule changes and prohibit employers from requiring employees to work nonscheduled shifts without their written consent, or even to require their employee to find a replacement for that shift. The bills would also limit the use of on-call shifts, providing the employee with a mandatory four hours of additional pay for any shift for which the worker is required to contact the employer or be available to be contacted by the employer at any time within 72 hours of the potential shift to determine whether they will be needed. Finally, the Oregon bills would eliminate "split shifts" or any schedule in which the employee would need to work one or more nonconsecutive shifts in a 24-hour period.

TIPS FOR EMPLOYERS

Employers, especially those in the retail and hospitality industries, should educate themselves about and prepare themselves for the legal and practical challenges that changes in the scheduling law will present to their businesses. Proactive employers will individually or through industry groups try to influence legislation before it is passed. And, when local jurisdictions adopt such measures, employers, such as those with operations in Seattle, will have to closely monitor developments including forthcoming implementing regulations.

Employers should consider aligning themselves against potential or already proposed legislation in the localities in which they do business and actively lobby decision-makers. Employers can find helpful resources for doing so in the "Restrictive Scheduling Toolkit" that the National Retail Federation has created for that purpose.

Additionally, employers in all industries should recognize that even if legislators do not take action on behalf of workers in their state, predictive scheduling can become an employee relations issue that labor activists may utilize as a call to unionization in an effort to achieve the same effect through collective bargaining. For this reason, a number of nationwide retailers have already chosen to phase out on-call scheduling in the wake of the publicity following New York's Attorney General inquiry last year. While it is possible that no other attorneys general will follow that lead, retail and service industry employers should closely monitor developments to ensure their scheduling practices do not pose a risk of legal challenge. But, proactive employers will recognize that some jurisdictions may be quick to follow New York's approach.

If you are in a jurisdiction that has adopted predictive scheduling, it is important to consult with legal counsel about compliance as these are new laws that are still developing and the uncertainties surrounding these issues will present compliance challenges.

NOTES:

[1] Seattle's ordinance becomes effective on July 1, 2017.

[2] Employers have referred to such measures by terms such as "restrictive scheduling," signaling their discomfort with the terms of such legislation.

[3] Seattle, Wash. Mun. Code ch. 14.22.

[4] *Id.* ch. 14.22.020.A.

[5] *Id.* ch. 14.22.025.

[6] *Id.* ch. 14.22.040.

[7] *Id.* ch. 14.22.045.

[8] *Id.* ch. 14.22.050.A.1.

[9] *Id.* ch. 14.22.050.A.2.

[10] *Id*. ch. 14.22.030.

[11] *Id*. ch. 14.22.030.B.2. A bona fide business reason is not required if the request is unrelated to a "major life event." *Id.* ch. 14.22.030.B.1.

[12] *Id*. ch. 14.22.055.

[13] *Id*. ch. 14.22.125.

KEY CONTACTS

APRIL BOYER
PARTNER

MIAMI
+1.305.539.3380
APRIL.BOYER@KLGATES.COM

MALLORY M. COONEY
ASSOCIATE

MIAMI
+1.305.539.3342
MALLORY.COONEY@KLGATES.COM

YAMILET HURTADO
COUNSEL

MIAMI
+1.305.539.3383
YAMILET.HURTADO@KLGATES.COM

