

New and Expanding “Fair Workweek” Laws Likely to Increase Costs for Employers Looking to Address Last-Minute Changes in Staffing Needs

Labor & Employment Workforce Watch

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The COVID-19 pandemic forced many employers to lay off or furlough employees, conduct reorganizations, and otherwise adjust to partial operations, sometimes on short notice. In order to address last-minute changes in staffing needs, employers may prefer the flexibility of on-call scheduling. However, fair workweek laws, which are designed to provide employees with more predictable schedules and pay, may make scheduling more challenging and costly for employers as the pandemic continues to affect businesses.

Fair workweek laws, also known as predictive scheduling laws, generally require that employers in covered industries provide employees in advance with their schedules and good faith estimates of anticipated work hours per week. Often these laws also require additional compensation to covered employees for last minute schedule changes, with the amount of such compensation depending on how advanced the notice is and whether the change increased or reduced hours. These laws also can impose obligations regarding the duration of between shift rest periods. Some laws even require that existing employees be given priority for additional available hours.

Although the applicability of these laws varies by jurisdiction, many apply to workers in the hospitality, retail, and food service industries, some of the industries hardest hit by the pandemic. Other industries covered by some fair workweek laws include building services, healthcare, manufacturing, and warehouse services. Applicability of these laws may depend on the size of the employer and the employee’s pay level, among other considerations.

Currently the most extensive scheduling laws have been passed primarily at the municipal level, including in San Francisco, San Jose, and Emeryville, California; Seattle; New York City; Philadelphia; and Chicago.

In Philadelphia, for example, employers now must provide employees with written notice of their schedules fourteen days in advance. Except in limited, defined circumstances, schedule changes may require that affected Philadelphia employees receive “predictability pay.” For instance, an employee whose hours are reduced because of a change in his or her schedule may be entitled to half his or her pay for each canceled hour.

In Chicago, a covered employee is entitled to ten days’ notice of his or her work schedule, and is entitled to one hour of additional “predictability pay” for each hour he or she agrees to work that is different than originally scheduled. When an employee’s hours are reduced, he or she is entitled to receive half of his or her scheduled pay for each hour lost. The law also requires premium pay when employees must return to work within fewer than ten hours of their previous shift.

Failure to comply with the obligations to provide advanced schedules and proper pay for changes can result in fines. In New York City, for example, an employer may be liable for a penalty of \$500 for the first violation and up to \$750 for any violation thereafter if it occurs within two years of any previous violation. A number of these laws permit employees to bring private causes of action for violations.

At the state level, only Oregon to date has passed a fair workweek scheduling law. Other states, including for example New Hampshire and Vermont, imposed what are referred to as partial scheduling laws or flexible working arrangement laws. These laws generally require employers only to consider employees' requests for flexible schedules in good faith and prohibit adverse employment actions when employees request flexible or accommodating schedules.

Employers should check to see whether recent changes and additions to fair workweek laws mean that they are now covered employers in new locations. Additionally, recent changes to employee counts caused by layoffs, reductions in locations, and reorganizations also could mean the laws no longer apply to previously covered employers. Employers also should be mindful of pending legislation, which recently was under consideration in additional locations, including, for example, Boston, Los Angeles, and the states of California and Illinois.

Where an employer determines that one of these laws applies, it should determine what scheduling tools, resources, and supervisor training are needed to ensure compliance.

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