

Philadelphia Fair Workweek Ordinance Set to Go into Effect April 1

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Notwithstanding the devastating impact the COVID-19 crisis is having on employers and employees nationwide, the Philadelphia Fair Workweek Ordinance is scheduled to go into effect on April 1, 2020. The Ordinance became law in December 2018 and originally was to go into effect on January 1, 2020. Late in 2019, the effective date was pushed back until April 1. However, due to the COVID-19 crisis, enforcement of several important aspects of the Ordinance will not begin on that date. Nevertheless, employers with operations in Philadelphia must still ensure that certain requirements of the Ordinance are met on time.

Covered Employers and Employees

The Ordinance is limited to retailers, hotels, and food service establishments, including chain establishments or franchises, with at least 30 locations and 250 employees worldwide. The Ordinance applies to all employees who are non-exempt under either federal or state law, regardless of whether the employees are full-time, part-time, temporary, or seasonal. Union-organized workers are likewise covered, although the Ordinance's requirements may be waived through clear and explicit language in a collective bargaining agreement.

Scheduling and Pay Requirements

The Ordinance imposes significant scheduling and pay requirements on covered employers and provides protections for employees whose employers fail or refuse to comply with the regulations. Significantly, covered employers must:

- Provide every covered employee, at the time of hiring, with a written "good faith estimate" of the employee's work schedule, including the average number of hours the employee can expect to work each week over a typical 90-day period. In addition, at the time of hire the employee has the right to make schedule requests to account for his or her availability or unavailability.
- For the first year of the Ordinance, release all work schedules of covered employees at least 10 days prior to the start of the scheduled period. Beginning in January 2021, this notice requirement will increase to 14 days. This means that by March 22, employers must begin releasing work schedules for covered employees to satisfy the April 1 deadline.
- Notify covered employees of all proposed scheduling changes prior to their taking effect. Obviously, with many businesses currently closed (voluntarily or by order), the usual methods of posting may not be effective. Employers should consider emailing the notice (and the work schedules) to employees if email is a standard method of communication for their business. This notice must be posted or otherwise communicated by April 1.
- In addition to regular pay for hours worked, compensate a covered employee for changes made to the posted work schedule more than 24 hours after the deadline to release schedules (referred to as "predictability pay"), unless the employee voluntarily consents to the change.

A covered employee may decline, without penalty, to work hours or shifts not included in the posted work schedule. If an employee's hours are increased, or his or her shift schedule is altered with no change in total hours, the employer must pay one hour of predictability pay. Conversely, if the employer decreases the employee's hours, the employer must pay half-pay, at the employee's regular rate of pay, for all hours that the employee's schedule was reduced or canceled.

Predictability pay is not required under certain circumstances. For example, employers need not provide predictability pay when power outages, severe weather, or transit or utility shutdowns occur; when threats to the employer's property or personnel occur; when an employee's schedule is altered due to changes involving a ticketed event or hotel banquet that are beyond the employer's control; or when an employee's hours are reduced due to termination of employment. In addition, the Ordinance includes a 20-minute grace period for changes to shift times before an employee would be

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entitled to predictability pay.

Importantly, in light of the current health crisis, *the Philadelphia Office of Wage Compliance will not begin enforcing these predictability pay requirements on April 1.*

- Allow for a minimum of nine hours of rest between shifts. A covered employee may decline, without penalty, hours or shifts that would occur within less than nine hours after the end of the covered employee's prior shift. However, a covered employee who voluntarily waives the mandatory rest period is entitled to an additional \$40 per shift.

In addition, under the Ordinance, employers are restricted in their ability to use outside staffing agencies or other third-party applicant pools in an effort to avoid paying predictability pay to their own employees. Employers must offer work shifts to existing employees before hiring new employees or using staffing agency employees. Employers must make this offer at least 72 hours before the applicable shift(s) and, generally, must give the work to employees who offer to work, unless doing so would result in additional overtime costs.

Employee Protections and Enforcement

The Ordinance expressly prohibits retaliation and affords a rebuttable presumption of retaliation for any adverse employment action within 90 days of an employee exercising his or her protected rights, unless the adverse action was due to documented disciplinary reasons constituting just cause. An aggrieved employee may file a complaint of an alleged violation with an agency to be designated by the City of Philadelphia. That agency also may investigate covered employers on its own initiative. Penalties for a violation of the Ordinance may include back pay, presumed damages, liquidated damages not to exceed \$2,000, attorneys' fees, and equitable relief.

The Takeaway

Despite the unprecedented economic effects of the COVID-19 crisis currently impacting the country, employers nevertheless need to ensure that they continue to comply with applicable federal, state and local employment laws, such as those set to take effect in the Philadelphia Fair Workweek Ordinance.

If you have any questions about the Ordinance, or any other wage and hour issue, please contact a Jackson Lewis attorney.

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