

Philadelphia City Council Enacts Broad Scheduling Regulations

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Wage and Hour

The Philadelphia City Council has passed the Philadelphia Fair Workweek Employment Standards Ordinance, intended to regulate scheduling practices for the employers in the city in the hospitality, retail, and food services industries. Mayor Jim Kenney (D) is expected to sign the Ordinance, which would become effective on January 1, 2020.

The Ordinance, passed on December 6, 2018, reflects a growing trend in major cities (including New York City, San Francisco, and Seattle) to reduce abusive employer scheduling practices, and to increase stability in pay and work hours for employees, through legislation.

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 will apply 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 likewise are 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, as well as provides protections for employees whose employers fail or refuse to comply with the regulations.

Significantly, under the Ordinance, 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.
- Notify covered employees of all proposed scheduling changes prior to their taking effect.
- 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.

- 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.

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.

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 entitled to predictability pay.

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.

Implications for Covered Employers

If enacted, the Ordinance likely will significantly affect the scheduling practices of covered employers in Philadelphia. While legal challenges are expected, covered employers should begin taking the steps necessary to revise their scheduling policies and practices to comply with the Ordinance.

Jackson Lewis will continue to monitor developments regarding the Ordinance. If you have any questions about the Ordinance or any other wage and hour issue, please contact the Jackson Lewis attorney(s) with whom you regularly work.

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