On-Call Scheduling Under Attack

Insights
12.01.15

The Bureau of Labor Statistics recently released its annual report on productivity and costs for the retail trade industry, and there's good news and bad news for retailers. The good news is that, for 2014, productivity in the retail trade was up 1.9% overall. The bad news is that compensation rose by a higher percentage than productivity over the same time period, leading to increased labor costs. Simply put, while retail employees are doing more in the time they work, that increase in productivity comes with a cost.

Because labor is such a significant percentage of retail operation expenses, retail employers want to spend that money as wisely as possible. Particularly, stores need to be staffed to be able to provide great customer service; that requires having more employees during times when stores are busier. With the advent of sophisticated sales-tracking software, companies have become significantly better at predicting when their stores will be crowded. But even the best software cannot predict weather events, traffic jams, and other random events that can change sales patterns in an instant.

The Rise (And Fall?) Of On-Call Scheduling

In order to spend the labor budget as effectively as possible, retailers need flexibility from their staff. Employees need to be available for unexpected events, whether it be a coworker calling in sick, or an emergency creating a run of shoppers for bottled water and batteries. Retailers also need employees who can work more hours during the Christmas holidays and fewer during slow seasons.

These needs led to the implementation of what is now being referred to as "on-call scheduling." Under an on-call scheduling system, employees are expected to be able to report to work at any time during store hours upon a few hours' notice. Workers might have no advance notice or regularity to their schedule, but would instead call in on a daily basis to determine if they are expected to work the next day.

Recently, there has been a strong backlash against on-call scheduling. Worker advocates complain that on-call scheduling is unfair to workers because their ever-changing schedule makes it impossible for workers to plan on a consistent income, and renders it difficult to accomplish other tasks that need advance notice (such as scheduling childcare). In reaction to the complaints, some large retailers such as Gap, Bath & Body Works, and J.Crew have announced that they will end this practice.

Practice Leads To Legal Concerns
Besides the outcry from workers' rights advocates, there are also legal issues with on-call scheduling. In New York, a state regulation requires that employees who report for work must either be paid for at least four hours of work, or the number of hours in a regular shift. Specifically, the regulation states that "an employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less."

In April, the New York Attorney General wrote letters to 13 national retailers advising them that their policies around on-call scheduling may be in violation of this regulation. Several of these retailers responded that they did not, in fact, use on-call scheduling. But some of the companies contacted are the same ones who recently announced they will be ceasing the practice.

The legal uncertainty revolves around the interpretation of the term "reports for work." Thirty years ago, before the cell phone became ubiquitous and email commonplace, most people would have understood the regulation to apply to somebody who physically went to the employer's premises at the request of the employer before being told his services were not needed.

The New York Attorney General, on the other hand, appears to be suggesting that the practice of an employee having to contact the employer – whether by phone, email, or text – to learn if they were to come to work is considered to be someone who "reports to work." Thus, under this very broad interpretation, such a practice triggers an employer's obligation to pay that worker's wages. Given the uncertainty, it likely made little sense for an employer to risk paying wages for time not worked, leading to some retailers caving under the legal threat.

New York Retailers Are Not Alone
New York is not the only state with a regulation relating to the payment of wages to an employee who "reports to work." For example:

- California requires retailers to pay an employee for at least half his scheduled shift if he reports for work, even if he is sent home before working that number of hours.
- Massachusetts requires employers to pay those employees who report to work and are scheduled to work at least three hours to be paid for a minimum of three hours if they are not provided their scheduled hours.
- New Hampshire requires an employer to pay an employee who reports to work for a scheduled shift at least two hours of pay unless the employer made a good faith effort to notify the employee not to come to work.
- Oregon, Connecticut, New Jersey, Rhode Island, and Washington, D.C. also have similar laws on the books.

Federal Law Could Also Impact On-Call Scheduling

Federal law, on the other hand, does not expressly state that an employer needs to pay an employee simply for reporting to work. Instead, the federal wage and hour statute states that hourly workers only need to be paid for the time they actually spend working. However, where on-call scheduling may create an issue under federal law relates to whether or not any associated activities are considered "working time."

Generally, employees who are on call do not have to be compensated under federal law as long as the terms of their on-call status do not overly restrict their ability to use their "on-call" time for their own personal needs or desires. But if an employer creates on-call restrictions that inhibit the employee's ability to use the time for personal use, it can become working time.

For example, an employer might implement a system whereby an employee must be able to report to work in a very short amount of time following being called in – say, 15 minutes. In that case, the restriction on the employee's ability to travel farther than 15 minutes away from the worksite and engage in activities that are not easily ceased (such as grocery shopping) might create a situation where the on-call time could be considered compensable working time under federal law.

Theoretically, employees with on-call schedules might be able to argue that some portion of the time around their expected call-in time is being restricted. This would likely only occur if the calling time was very shortly before the employee was obligated to report to work. Employees who are required to call in the night before a potentially scheduled shift would not be as problematic for employers, whereas an employee required to call in 15 minutes before needing to appear may be.

What Should Retailers Do?

To date, employees who do not have a regular schedule (*i.e.*, don't work the same days and times each week) have not challenged that system under any law. Thus, you are currently able to adjust employee schedules on a weekly basis without legal risk.

There are other reasons you may need or want to schedule workers on irregular schedules on a week-by-week basis besides simply having the right number of employees to provide the best levels of customer service. Store managers need to know all their employees, not just a set of employees working the same shift. Changing hours and groups of employees also deters shrink. Stores have different needs at different times of the day and having employees that are trained to perform both opening and closing duties makes filling in for inevitable absences significantly easier.

Nevertheless, the same arguments used to attack on-call schedules also seem to apply to situations where employers implement irregular schedules. The reason you need to concern yourself with this is that scheduling has become an issue that unions are latching onto in an attempt to foster dissatisfaction in employees. Unions are successful in organizing in new workplaces when employees are unhappy or feel their employer does not care for them. A union's claim it will be able to bargain for regular schedules is a theme that may well resonate with retail employees.

As a matter of psychology, most people function better and are happier when their lives have routine. Inconsistency and change are drivers of anxiety and fear. Thus, regular scheduling could increase inconsistency and change are drivers of anxiety and fear. Thus, regular scheduling could increase productivity because employees are more comfortable in that system.

No Easy Solutions

Unfortunately, there is no easy solution to these problems. It is made harder still by the fact that frontline managers are trying to manage these competing concerns in addition to juggling a host of other duties. It is sometimes difficult for the store manager to take the time to explain to an employee why their request for a certain schedule is unreasonable.

However, a manager saying "because I say so" to an employee asking about scheduling is an unsatisfying explanation. Most people will be as dissatisfied with that answer as they were when they heard it as small children, and that is the juncture where discontent foments.

Although not every employee will be satisfied even if you offered them a detailed explanation for your scheduling system, it can help. More often than not, communicating the reasons behind the decision is the key to employees not seeking out a third party (like a union, a government investigator, or a lawyer) to whom to express their grievances.

You would do well to train your store managers that scheduling is a significant concern of employees and that it is a hot button issue for union organizing. As such, taking the time to work with employees on their schedules and to explain the reasons when schedules are not consistent with an employee's desires should be a high priority.

For more information, contact the author at EHarold@fisherphillips.com or 504.592.3801.

Related People

Edward F. Harold
Regional Managing Partner
504.592.3801
Email

Service Focus

Wage and Hour

Industry Focus

Retail