

THE RECENT RISE OF PREDICTIVE SCHEDULING LAWS: EMERGING STRATEGIES IN AN EVOLVING AREA

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For decades, the problem of scheduling has plagued employers and employees alike. Employees prefer predictable and reliable schedules, while employers need flexibility. To address this tension, regulators have recently begun to pass predictive scheduling laws that seek to strike a tenuous balance between these interests. Given the recent rise in popularity of these laws, it is important for you to understand what these laws are, where you are most likely to encounter them, and what steps you can take to make sure you're abreast of the most up-to-date compliance strategies.

WHAT ARE PREDICTIVE SCHEDULING LAWS?

Predictive scheduling laws are generally straightforward. In short, they require employers to post employee work schedules a set number of days in advance of when the work is to be performed. Once posted, however, employers are penalized for making any scheduling changes.

In theory, these laws seek to balance respective interests between employers and employees—a balance that was recently addressed in the landmark California decision, *Ward v. Tilly's*. In that case, the court assumed the role of the employee's champion and explained that schedule predictability was an absolute necessity that allowed employees to plan around second jobs, make child-care arrangements, coordinate school schedules, or commit to social plans, among other things. Glaringly absent from this analysis, however, was the employer's perspective and

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concurrent recognition that scheduling changes and fluctuating staffing needs are often caused by unforeseeable market realities such as inclement weather, employee call-outs, and unposted community events.

In practice, unfortunately, legislators have expressed wide disagreement over how to address this problem, causing many jurisdictions to take wildly different approaches. For example, in New York City, certain employers are only required to post schedules 72 hours in advance, with changes thereafter being completely prohibited. In contrast, San Francisco requires employers to post schedules not less than two weeks in advance. Once posted, however, any changes require the employer to pay the affected employee anywhere between one and four hours of additional "Predictability Pay," depending on how last-minute the change actually was. As these examples demonstrate, legislators have yet to agree on any centralized model for predictive scheduling laws, creating a potential minefield for those employers that attempt to apply consistent scheduling practices throughout multiple jurisdictions.

WHAT INDUSTRIES AND JURISDICTIONS HAVE BEEN MOST AFFECTED?

Since the first predictive scheduling law arose in San Francisco several years ago, other states and major U.S. cities have contributed to a precipitous rise in these laws. Places like Oregon, New York City, Chicago, Seattle, and Philadelphia have all since participated in this rising regulatory experiment by respectively proposing and implementing their own unique frameworks.

Simultaneously, other states have actively sought to combat the rise of these practices. In the wake of San Francisco's law, states like Georgia and Tennessee quickly implemented legislation that prohibited their own major cities from enacting similar predictive scheduling laws at the local level, seeking to stifle an already-emerging trend.

To date, however, the retail and hospitality industries have taken the brunt of the regulatory force, with the vast majority of predictive scheduling laws targeting these industries exclusively. As justification for this disparate treatment, legislators have pointed to the disproportionate number of low-wage workers present in these industries who they believe warrant greater protection. For these employees, securing a reliable schedule through traditional

means, such as direct negotiation, is far less likely. Accordingly, in these industries, the employer-employee tension between scheduling flexibility and predictability is at its zenith.

SO WHAT SHOULD YOU DO NOW?

Unfortunately, compliance with predictive scheduling laws is far from easy. Larger employers with locations throughout multiple jurisdictions tend to be the most affected, although even smaller employers can find themselves in a position that requires a full overhaul of their current staffing model. Accordingly, it's important to keep a few points in mind.

First, you should audit your locations. The piecemeal framework of predictive scheduling laws means that you may have multiple locations subject to different predictive scheduling requirements. As a result, a centralized staffing model can quickly become outdated, or even worse, a liability. Location-specific policy changes may need to be made, and managers may require retraining on how to handle staffing shortages.

Second, avoid the related pitfalls. No employment law exists in a vacuum, and predictive scheduling laws are no exception. Implementing predictive scheduling models will often impact other aspects of your business and, in some cases, could create unforeseen liability traps. For example, in San Francisco, forgetting to tell your payroll company to separately delineate the "Predictability Pay" scheduling change penalty on your employees' wage statements could saddle you with a host of unexpected labor code violations and class action demand letters—all for a simple oversight.

Third, consider novel and creative approaches. To address the rise of these laws, some large companies have implemented the use of scheduling apps. In addition to viewing pre-posted schedules, employees can use the apps to swap shifts with coworkers or sign up for unfilled shifts in upcoming weeks. Although, even without apps, voluntary schedule swapping and sign-up policies are both phenomenal ways to reduce, and even eliminate, the need for last-minute scheduling changes—all while boosting employee morale.

CONCLUSION

Ultimately, when it comes to employment policies, there is rarely a “one size fits all” approach. What’s right for one company may not be right for another. As a result, it’s important to keep up to date on the newest changes in both law and compliance strategies. In the modern day, employment laws are changing at an ever-increasing pace; if the recent rise in predictive scheduling laws hasn’t hit your state or city just yet, it soon may.

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