Predictive Scheduling Marches Onward

Insights
1.02.20

Perhaps no industry in history has been targeted for its basic employment requirements like the retail industry has been targeted over scheduling practices. The philosophy behind the rise of these ordinances is that having a predictable schedule is critical to employees. In the decision of *Ward v. Tilly's*, in fact, the California Court of Appeal essentially 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 childcare arrangements, coordinate school schedules, and commit to social plans, among other things.

Glaringly absent from the court's analysis, however, was the employer's perspective. There was no 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. The court also did not consider potential negative impacts on employees. For example, because of restrictions on scheduling, employers now have fewer tools to manage unanticipated absences and are therefore likely to deal more harshly with those than they have in the past.

Predictive Scheduling Is Spreading
Chicago has become the latest municipality to pass a predictive scheduling ordinance, which will take effect in July 2020. The scope of Chicago's new ordinance is stunning. It sets forth a notice requirement that employees be provided their schedule a minimum of 10 days in advance, which will increase to 14 days in 2022. The law prohibits an employer from taking adverse action against an employee who refuses to work nonscheduled hours. It further empowers employees to decline to work a shift if they have had less than a 10-hour break from their last shift.

If an employee does agree to work such a shift, the employer must pay them 1.25 times their regular hourly rate for that shift. In order to change an employee's schedule after the deadline for notice, the employer must pay the employee one hour of extra pay. And if an employer cancels an employee shift with less than 24 hours' notice, the employer must pay the employee 50% of the regular rate of pay for the hours that were canceled. The 50% pay also applies for an employee who is on call for a shift, but is not called in. Likewise, an employee sent home early must be paid 50% of the remaining hours.

Further complicating matters, an employer must offer an additional shift to current employees before it can use temporary or seasonal workers to handle their shifts. While there are some

before it can use temporary or seasonal workers to handle their shifts. While there are some exceptions to these penalties – such as changes in schedule caused by civil unrest or where requested by the employee – they are unlikely to apply in the vast majority of situations.

Chicago now joins two states – Vermont and Oregon – and seven other municipalities – San Francisco, Berkeley, Emeryville, San Jose, Seattle, New York, and Philadelphia – as having predictive scheduling ordinances.

What Should You Do Now?

Unfortunately, compliance with predictive scheduling laws is far from easy. Larger employers with locations in 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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