Fair Workweek Laws: Navigating the What, Where, and How of Compliance

Insights
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Employers currently face a patchwork of state and local "fair workweek" laws that are difficult to navigate. While federal lawmakers have recently stepped into the fray with their own proposals, seeking to establish more consistent nationwide protections, these proposals are unlikely to become law anytime soon. In the meantime, employers should stay apprised of the varying legal protections in order to ensure compliance.

What: Fair Workweek Laws
Fair workweek laws, also commonly referred to as "predictable scheduling," "advanced scheduling," or "secure scheduling," are generally intended to afford employees more stability, predictability, input, and flexibility with their work schedules. They typically apply only to larger retail and chain food service employers. While the details vary significantly across the country, most of the laws share a fundamental feature: restricting an employer's ability to adjust a work schedule on short notice. Other common features require employers to provide new hires with a good faith estimate of their work schedule and offer available work shifts to current employees before hiring new employees.

Where: The Lay of the Land
San Francisco passed the first fair workweek in 2014, with several cities following suit soon after. Additional cities that have some form of fair workweek law in place include Berkeley, Emeryville, and San Jose, California; Seattle, Washington; New York City; and Washington, D.C. Chicago also has an ordinance that is pending passage by the City Council. New Hampshire has a partial scheduling law that simply prohibits retaliation against any employee who requests a flexible work schedule. Oregon is the only state with a full-fledged statewide fair workweek law.

Seattle's "Secure Scheduling Ordinance" is one of the more complex. On the whole though, it illustrates many common features, including the following:

- Only food or retail establishments that employ 500 or more employees worldwide, as well as full service restaurants with at least 500 employees and 40 locations worldwide are covered.
- Employees must work at least 50 percent of their time at a fixed location within the City of Seattle, which also means employees working in and outside of Seattle may be covered

covered.

- Employers must give employees a written good faith estimate of the employee's work schedule, including an average total of weekly hours and whether the employee can expect any on-call shifts.
- Employers must provide a written work schedule at least 14 calendar days before the first day of the work schedule.
- Employees have the right to request changes in their scheduled hours or work locations.
- Employers must engage in an interactive process with the employee about any such request. A request based on a "major life event" must be granted unless there is a "bona fide business reason" to deny the request. "Major life event" has a broad definition, covering many things from health issues to second jobs.
- Employees may decline to work any hours not included in the advanced written notice of their work schedule. If they agree to the schedule change under specific circumstances, they must be paid one additional hour at their regular rate of pay in addition to their regular compensation.
- Employers must pay employees one-half times their scheduled rate of pay per hour if the employer reduces the employees' scheduled hours, with limited exceptions.
- Employers cannot require employees to work less than ten hours after the end of the previous calendar day's work shift (this prohibits certain "clopening" shifts where the employee is scheduled to close the business one night and open the business the following morning).
- Employers must offer shifts to existing employees before hiring outside applicants.
- Employers can be liable for substantial monetary damages, penalties, and fines through judicial or administrative enforcement.

The jurisdictions mentioned above include some or all of the same features from Seattle's ordinance. But even when they share similar features, they often differ in the details. For example, Oregon requires a good faith estimate of the employees' monthly hours, rather than weekly. In San Francisco, employers must pay an additional two to four hours of pay depending on the schedule change. And New York City's regulations vary significantly depending on whether the employer is a retailer or fast food establishment.

Or Everywhere? Potential Federal Legislation

Recent federal proposals broadly encompass many high profile employment law trends, including paid sick and paid family leave, as well as fair workweek concerns. These particular bills are not likely to be finalized into law, but they nevertheless demonstrate the increased legal attention placed on employees' work schedules, and foreshadow what future federal legislation could look like. For example, the Workflex in the 21st Century Act (H.R. 4219) would allow business to bypass certain local laws by giving their employees 12-20 days of paid sick leave and by offering at least one of several flexible work arrangements (*e.g.*, a compressed work schedule or telecommuting program). Similarly, the Schedules that Work Act (H.R. 2942) would require employers to engage in a good faith interactive process with any employee who asks for certain schedule changes, including advance notice or limitations on on-call shifts.

How: Complying with Fair Workweek Laws

While uniform legislation remains unlikely, employers should expect more cities and states to add to the existing milieu of fair workweek laws. Tracking the jurisdictional nuances is a necessary headache. Covered employers should audit their scheduling policies and practices and take steps to tailor them to each jurisdiction. Given the highly technical and varying details of these laws, a one size fits all approach is unlikely to ensure compliance. Employers should also prioritize educating and training front-line managers. Managers should understand what they cannot do and, just as importantly, what they must affirmatively do with regard to coordinating employees' work schedules and paying employees at the correct rate. The types of businesses covered under fair workweek laws are often fast-paced environments with many employees who have competing needs. So affirmative pro-active training will help mitigate against the potential for even inadvertent violations.

The Bottom Line

Employers are wise to consult with local legal counsel who are familiar with the varying laws and can help identify minor details that could trigger major liability. Fair workweek laws will likely increase in breadth and complexity over the coming years, so staying informed is a good investment for any employer.