



# **Philadelphia Will Have A “Fair Workweek”: What Covered Employers Need To Know Right Now**

Insights

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On December 6, 2018, Philadelphia City Council approved the Fair Workweek Ordinance by a vote of 14-3. Following its passage by City Council, Mayor Kenney reiterated his support and his intention to sign the Ordinance into law. Even if Mayor Kenney vetoed the Ordinance, City Council could override the veto with 12 votes- which it currently has. In sum, it appears that Philadelphia will have a Fair Workweek for 130,000 employees in the retail, food service, and hospitality industries.

The following information is based on the Fair Workweek legislation, as amended, and as passed by City Council on December 6:

## **What Is It?**

Philadelphia’s Fair Workweek Ordinance applies to large businesses in the retail, food service, and hospitality industries that employ more than 250 people and have at least 30 locations worldwide (“Covered Employers”). The legislation generally requires Covered Employers to provide advance notice of work schedules; pay additional compensation, or “Predictability Pay,” for changes to an employee’s scheduled shift; and permit employees to take nine hours of rest time between shifts.

## **When Does This Begin?**

Fair Workweek is scheduled to become effective in Philadelphia on January 1, 2020.

## **Why Does Philadelphia Want It?**

Employees expect that predictable work scheduling will help with (1) personal life scheduling, including planning for medical appointments and for childcare; (2) having a better expectation of monthly income for financial planning; (3) qualifying for childcare subsidies; and (4) being able to have dedicated time to pursue additional educational and training opportunities, ultimately leading to higher paying jobs. On a broader level, advocates hope that Fair Workweek will help to reduce the 26% poverty level in Philadelphia.

For Covered Employers, a recent study has shown that predictable scheduling practices can lead to increased sales and employee productivity. In addition, predictable scheduling could reduce the time and expense associated with hiring and training new employees, may assist with employee retention, and may reduce the need to find last-minute shift coverage.

## **What Are The Potential Downsides?**

As we explain in greater detail below, Covered Employers will be required to implement additional scheduling, notice, and record-keeping procedures in order to comply with the mandates. The implementation of such procedures will likely be time-consuming and could add additional expense to the Covered Employer. Employers in other cities where similar legislation has been passed have reported spending thousands of dollars on additional computer software to track scheduling changes.

Fair Workweek also requires Covered Employers to pay additional compensation to employees for shift changes under certain circumstances and when an employee works a shift without receiving nine hours of rest time. Again, this creates additional expense for the Covered Employer.

Fair Workweek may also subject Covered Employers to legal exposure and associated costs if an employee feels that the Fair Workweek mandates have been violated. Not only would this be an additional cost for Covered Employers, but the number of potential claims stemming from this legislation could create significant demands on the City and its courts.

As a result of the increased costs to the Covered Employer, it may be forced to increase its prices, which may reduce its customer base and perhaps lead to a reduction in workforce. Worse, some businesses may be discouraged by Fair Workweek and may decide to operate in the neighboring Pennsylvania suburbs, New Jersey, and/or Delaware. This would result in fewer available jobs for Philadelphians working in these industries.

### **Who Else Has A Fair Workweek?**

Similar legislation has been passed in New York City, San Francisco, San Jose, Seattle, and in the state of Oregon. It is currently being considered in Chicago and Boston.

Notably, Philadelphia is the first city to include hotel employees in its predictable scheduling legislation.

### **What Are The Practical Business Implications For Covered Employers?**

#### **1. For New Hires**

1. A Covered Employer must provide a written, good faith estimate of the new employee's work schedule. This includes the average number of hours the new employee can expect to work each week over a typical 90-day period; whether the new employee can expect to work any on-call shifts; and the days/times/shifts that the new employee can expect to work.
2. A Covered Employer must provide the new employee with a written work schedule that runs through the last date of the currently posted schedule.
3. New hires can make work schedule requests.

#### **2. For Existing Employees**

1. Covered Employers must provide written notice of work schedules, including the employees' shifts and if the employees are scheduled to work or are on-call. The work schedule shall be

shifts and if the employees are scheduled to work or are on-call. The work schedule shall be posted 10 days before the first day of any new schedule from January 1, 2020 - December 31, 2020. Beginning on January 1, 2021, the work schedule shall be posted 14 days before the first day of any new schedule.

2. The Covered Employer shall provide notice of any proposed change to the work schedule as promptly as possible and prior to the change taking effect. The written work schedule must be revised within 24 hours of making the change.
  3. An employee is entitled to nine hours of rest time between shifts (but will be compensated \$40 for a shift worked in under nine hours).
  4. Existing employees can make work schedule requests.
3. Compensation for Changed Work Schedules
1. For employer-initiated changes to the work schedule that occur after the 10 (and later, 14) day notice requirement, a Covered Employer shall pay the employee Predictability Pay, in addition to the employee's regular pay for hours actually worked by the employee.
    1. When a Covered Employer adds time to a work shift or changes the date/time/location of the shift, with no loss of hours to the employee, the Covered Employer is required to pay one additional hour at the employee's regular rate of pay.
    2. If the employee does not work scheduled hours because hours are subtracted from a regular/on-call shift or a regular/on-call shift is cancelled, the Covered Employer is required to pay "no less than one-half times" the employee's regular hourly rate for the missed hours.
    3. For Tipped Employees (*i.e.*, those that receive more than \$50 per month in gratuities), a forthcoming regulation will establish a regular rate of pay for purposes of determining Predictability Pay.
  2. Predictability Pay is not required in all situations where work schedules are changed and exceptions include:
    1. Changes that are made to the work schedule within 24 hours after being posted under the 10 (and later, 14) day notice requirement.
    2. A ticketed event (*e.g.*, concert, sporting event) is cancelled or scheduled after the work schedule is posted.
    3. A hotel banquet event is scheduled after the work schedule is posted.
    4. The employee initiates the shift change or swaps shifts with another employee.
    5. The Covered Employer's business cannot operate for reasons such as weather conditions or the closing of public transportation.
    6. The employee begins or ends work no more than 20 minutes before or after the schedule start or end time of the shift.
  4. Offering Work to Existing Employees Before Hiring New Employees

1. Before hiring new employees, Covered Employers must offer work to existing employees. Notice of the work must be made available for at least 72 hours, unless less time is necessary in order for the work to be performed.
5. Notice of Fair Workweek Rights
  1. Covered Employers must post a notice that sets forth the rights afforded under Fair Workweek.
6. No Retaliation
  1. Covered Employers are prohibited from retaliating against employees who exercise their Fair Workweek rights.
7. Record Keeping
  1. Covered Employers must keep records of its compliance with Fair Workweek, including the good faith work schedule estimates for new employees and offers of work to existing employees made before hiring new employees. These records must be retained for two years.

### **What Are The Legal Implications For Covered Employers?**

An aggrieved employee can pursue recourse through two primary means: filing a Complaint with the proposed Fair Workweek Agency and/or filing a court action.

1. Agency Complaints
  1. An employee has two years to file a Complaint with the Agency. The Agency will investigate the allegations and, if appropriate, attempt resolution through mediation.
  2. The Agency can subpoena records from the Covered Employer relating to the Complaint and the Covered Employer must provide records within 30 days of receiving the subpoena.
  3. The Agency can impose penalties for a Covered Employer violating Fair Workweek mandates, including reinstatement of employment and payment of lost wages.
  4. Fair Workweek does not specifically provide for the recovery of attorney's fees and costs by a Covered Employer if it succeeds in defending against the Agency Complaint.
2. Court Actions
  1. An employee also has the right to bring a court action against the Covered Employer, within two years, for violating Fair Workweek mandates. The employee does not need to file a Complaint with the Agency before filing a lawsuit.
  2. If an employee files a lawsuit and also has an investigation pending with the Agency based on the same allegations, the Agency claim will be deemed withdrawn.
  3. If the employee prevails in the court action, Fair Workweek provides for the recovery of any unpaid compensation, lost wages and benefits, presumed damages (to be established by the Agency), and an equal amount of liquidated damages (up to \$2,000). The employee is also entitled to an award of attorney's fees and costs.

4. Fair Workweek does not specifically provide for the recovery of attorney's fees and costs by a Covered Employer if it succeeds in defending against the lawsuit.

We will continue to monitor developments and provide updates as they are available. If you have any questions regarding how the Fair Workweek Ordinance could impact your business, please consult your Fisher Phillips attorney.

### ***Related People***

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