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THE UNPREDICTABILITY OF SEATTLE'S PROPOSED PREDICTABLE SCHEDULING LAW

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In keeping with its goal of pioneering workers' rights, Seattle's City Council is expected to pass its Secure Scheduling Ordinance this fall, requiring certain retail and food establishments to provide both a "livable wage" and a "livable schedule" to their employees. While originally designed to imitate San Francisco's secure scheduling law for large "formula" retailers, Seattle's proposed ordinance will far surpass San Francisco's in its employee and employer coverage, onerous requirements, and penalties.

While the ordinance is not yet finalized, it is expected to pass in its current form soon. You will want to review the proposed ordinance's requirements now; once enacted, it will bring significant changes to your scheduling practices along with significant risks for failing to meet its requirements.

Proposed Ordinance In A Nutshell

Seattle's newly unveiled draft ordinance applies to all retail and food establishments with 500 or more employees worldwide. If it passes, these workers will receive the right to two weeks' advanced notice of their work schedule, a right to request their desired shifts, the right to "on-call" pay, and a prohibition on a back-to-back closing and opening shifts (so-called "clopenings," a phenomenon [explored by the New York Times in August 2014](#)).

The Goal Of Secure Scheduling

The ordinance's stated goal is to address economic hardships faced by part-time workers, particularly people of color, as well as to reduce conflicts that "minimal notice"

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schedule changes create with childcare, school commitments, or even other jobs. However, the Council's proposal has been met with mixed reviews from both business owners and employees alike.

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Employer criticisms include claims that the law unfairly circumvents the long-accepted practice of negotiating such rights on an individual employer basis in the collective bargaining setting. Some employees, such as full-service restaurant tipped employees, claim that the proposal actually impedes worker-desired flexibility and schedule choices.

To address these concerns, the Council met with business owners and worker advocates 12 times over the past six months to help arrive at the current version of the draft ordinance. The Council also commissioned a study to investigate the public's desire for a secure scheduling ordinance, and the impact irregular schedules have on different racial, sex, and socio-economic groups.

The study concluded that food service businesses more commonly engage in problematic practices than other industries, while the hardship effects are more common in retail. The study concluded that the juxtaposition likely reflected the fact that workers in a better position to handle scheduling insecurity tend to opt into the food service industry. The study also concluded that small businesses more commonly engage in problematic practices.

The Council has stated that its final proposal reaches a middle ground between preserving an employer's need to schedule its workforce and an employee's need for stable scheduling, although critics of the law have continued to express their concerns that the ordinance fails to achieve this balance. Another criticism is that the law will apply only to larger employers, despite the fact that the survey found that small employers more commonly engage in "unpredictable" scheduling. The ordinance also covers full-service restaurant establishments, despite the study's relatively low report of food service workers dissatisfaction.

Summary Of Proposed Ordinance

It its current form, the proposed ordinance includes the following provisions:

Covered Employers

The proposed ordinance applies to larger retail and food service establishments, only those with 500 or more employees worldwide. This includes any employer within a franchise network that employs over 500 people, as well as full-service restaurants with 500 or more employees and more than 40 locations worldwide.

Covered Employees

Only employees who physically work at least 50% of the time within Seattle's limits would be entitled to secure scheduling rights under the proposed law. Employees who are properly classified as overtime exempt under federal and state law would also be excluded.

Of course, not all employees who are paid a salary are exempt from overtime; Washington law allows employees to be paid a minimum guaranteed salary each week for working up to 40 hours even if the actual time worked varies, such as 35 hours one week and 39 hours the next. As the proposed law currently reads, these "salaried non-exempt" employees would also receive secure scheduling rights even though they do not face the same risk of wage loss due to a schedule reduction as their hourly counterparts.

Key Scheduling Requirements And Immediate Consequences

The new scheduling mandates would include:

- **Good Faith Estimate at Hire:** Employers must provide each employee with a written good faith estimate of the work schedule at the time of hire, indicating the employee's expected median work hours each week, and if on-call shifts are required.
- **Right to Request a Schedule:** Employers will have a duty to engage in an "interactive process" to grant their employee's preferred schedule and work location. The law also imposes a heightened duty if the employee's request is based on caregiving needs, a second job, or a "career-related educational or training program."

If an employee makes a schedule request for one of these reasons, the employer must give the employee their preferred location or schedule unless the employer has a "bona fide business reason" for the denial. A bona fide business reason means a "significant and identifiable"

additional cost or “detrimental effect” to the employer’s operational needs.

- **Advance Notice:** Employers must provide employees with two weeks’ advance notice of their schedules. If the employer makes a schedule change with less than two weeks’ advance notice, the employer must either (1) pay an additional hour of wages if the employer adds time to the employee’s shift, or (2) pay the employee half their hourly rate for each hour they have reduced from the employee’s scheduled shift.

There are a few exceptions to this requirement: if employees voluntarily swap shifts; if an employee volunteers for a shift in response to a “mass communication;” if the employee’s hours were cut as a disciplinary action; if the employee accepted a qualifying “offer to work;” or if the store is closed due to an emergency situation, such as a natural disaster or public utility failure.

The proposed law also assumes that employers may be tempted to trim employees’ set schedules in order to reduce the risk of having to pay employees for non-work time. To address this potential effect, the ordinance prohibits “under scheduling,” defined to mean situations “where the hours employees actually work are significantly above those that are scheduled.”

Other Employee Rights

The proposed ordinance also includes a “right to rest” – employers cannot schedule an employee to work a shift within 10 hours of the end of the previous day’s shift. There is no exception for emergency situations, such as where an employer may need a person to step in at the last minute for a shift if the scheduled employee is a no-show. The ordinance is silent as to whether employers must grant the employee’s request to have a regular “clopening” schedule, if the request is based on a need for child care, another job, or educational purposes.

Further, the ordinance contains a “right to more hours” provision. Similar to an often overlooked provision of SeaTac’s minimum wage ordinance for transportation and hospitality workers, employers must first post a notice of the position and additional hours for at least three days so that its existing employees may have the first chance to accept the additional hours before it can hire any additional employees. In addition, the employer must offer the

additional hours or shifts to the employee who is objectively qualified to perform the work.

Retaliation, Fines, And Lawsuits

The new law will strictly prohibit employers from retaliating against employees for exercising any of their rights under this ordinance. In fact, there is a presumption of retaliation if the employer takes any adverse action against an employee within 90 days of the employee exercising of any one of his or her rights under the ordinance.

Aggrieved employees may either file a complaint with the Seattle Office for Civil Rights or may file a private civil lawsuit. Employers found in violation may be liable for up to \$5,000 in penalties, plus unpaid wages, liquidated damages in an additional amount, interest, and attorneys' fees.

Unintended Consequences And Unpredictable Effects

With the Council moving swiftly forward with its final draft, the proposed ordinance still appears to create unintended consequences while important practical effects still appear to be in an uncertain state. Several such unanswered questions are described below:

The End Of Double Shifts?

While the proposed mandatory 10-hour rest period was designed to prevent "clopenings," employers must still pay one and a time and a half of the employee's hourly wage even if an employee volunteers for a clopening shift under the current proposal. A likely effect will be to eviscerate "doubles" shifts for restaurant workers.

This highlights one reason why many full-service restaurant establishment workers protest their inclusion in the law: servers who benefit from working Saturday night rushes and Sunday morning brunches are concerned that they may lose their opportunity to work both lucrative shifts due to the additional wage requirement.

What Is The Interactive Process And Who Benefits?

Employers are familiar with the "interactive process" in the disability reasonable accommodation setting, but that knowledge seems of little use for handling employee-scheduling requests. Juggling dozens of competing preferred schedule requests for dozens of employees at a single location may leave human resources in an operational quagmire.

If most employees request to work the most desirable shifts, the proposed law gives little guidance as to how an employer should sort through the myriad requests, except to give preferential treatment to employees with children, second jobs, or in school. Such preferential treatment may also give way to employee discord. For example, it is not difficult to imagine that by giving only certain employees preferential scheduling treatment, regardless of their job skills, the scheduling may stir negative sentiments between coworkers.

As written, the proposed law also leaves open the question of whether an employer must rearrange the existing work schedule of another employee so as to accommodate the qualifying scheduling requests of a new employee. Must an employer demote one of its senior retail salespersons to the less desirable late night shifts so as to accommodate a new hire's 9:00 a.m. class schedule? The ordinance's current text sheds no light on these issues.

What Is A "Bona Fide" Business Justification?

While employees' schedule requests need not be accommodated if the employer can show a "bona fide business reason," the proposed law sets a high bar for such proof. Couple this with the heightened duty imposed to accommodate schedule requests due to child care, school, or second jobs, and the law suggests that an employer might no longer be able to assign preferred shifts primarily based on merit, experience, or skill.

As it currently reads, the employer may have to prove that giving employee a preferred shift over another who requests it for childcare purposes has significant, "detrimental effect" on operational needs. Preserving employee morale by fair schedule assignments would unlikely qualify.

What Is a Valid Scheduling Request?

Also left open for debate is how employers must respond to requests that may push the law's boundaries. For example, given the law's purpose, it seems risky for an employer to refuse an employee request to work "clopening" shifts just because paying that employee time and a half would increase payroll costs. The ordinance provides that only scheduling requests resulting in "significant costs" may be refused.

As for employees' requests based on a child care, another job, or a class schedule, the law is unclear how "related" the

request must be. Is it sufficient that the employee would prefer the earlier shifts because the daytime child care rates are more affordable?

The proposed law is also silent on what type of documentation the employer can require their employees to provide to verify that their scheduling request is based on a child care, other employment, or educational conflict. Nor does it appear that the ordinance imposes any reciprocal obligations for employees to attempt in good faith to arrange for job scheduling or class scheduling that does not conflict with their scheduled shifts.

What Are The Next Steps?

As the City Council prepares for its final vote – currently scheduled to take place later this month – businesses and employees have a narrow opportunity to urge Council members to clarify the law's requirements or relax some of its more complicated ones. It does seem too late, however, to act to avoid passage of some form of the secure schedule ordinance.

Employers outside of Seattle should pay attention to developments as well. As occurred with paid sick and safe leave, this proposed ordinance is also likely a harbinger of similar laws in other jurisdictions. Oregon, California, New York, North Carolina, Connecticut, Washington D.C., and Illinois are among those jurisdictions currently considering similar legislation, and worker advocates will no doubt push for a further spread of predictable scheduling laws in 2017.

For more information, visit our website at www.fisherphillips.com, or contact any member of [our Seattle office](#) or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific proposed city ordinance. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.