Seattle City Council Passes Secure Scheduling Law

Insights
9.21.16

In keeping with its goal of pioneering workers' rights, Seattle's City Council passed its controversial Secure Scheduling Ordinance on September 19, 2016, which will require certain retail and food establishments to provide both a "livable wage" and a "livable schedule" to their employees. Their employees also gain the right to request, and in some situations obtain, the preferred schedule of their choice.

The ordinance will go into effect July 1, 2017. The city will likely issue regulatory rules further refining compliance requirements before next year's effective date. However, you will want to review the proposed ordinance's requirements now; once effective, it will bring significant changes to your scheduling practices along with significant risks for failing to meet its requirements.

Ordinance In A Nutshell
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.

Seattle's newest workplace ordinance will apply to all retail and food establishments with 500 or more employees worldwide. Workers at these businesses 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 back-to-back closing and opening shifts (so-called "clopenings," a phenomenon explored by the New York Times in August 2014).

The ordinance includes the following provisions:

Covered Employers
The ordinance applies to retail and food service establishments with 500 or more employees worldwide, as well as full-service restaurants with more than 500 employees and 40 establishments globally. To determine the total number of employees, the employer must count employees at all locations that are part of a chain, integrated enterprise, or franchise system worldwide.

Covered Employees
Only employees who physically work at least 50% of the time within Seattle's limits will be entitled to secure-scheduling rights under the new law. Employees who are properly classified as overtime exempt under federal and state law, however, are 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 law states, these "salaried non-exempt" employees will 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 include:

Good Faith Estimate At Hire

Employers must provide each employee with a written good faith estimate of their 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 andwork location. The law also imposes a heightened duty if the employee's request is based on "a major life event," defined as 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 mustgive 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 an action that would violate existing law, result in a "significant and identifiable" additional cost, or cause "a significant and identifiable detrimental effect" to the employer's operational needs. The employer must also explain the reason for its denial in writing to the employee.

Advance Notice And Penalty Pay

Employers must provide employees with 14 calendar days' advanced notice of their schedules. If the employer makes a schedule change with less than two weeks' advanced 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 reduced from the employee's scheduled shift. An employee also has a right to refuse to work any non-scheduled hours.

There are a few exceptions to this requirement. Some include: if employees voluntarily swap shifts; if an employee volunteers for a shift in response to a "mass communication" sent because another employee was unable to work their scheduled hours; if the employee's hours were cut as a disciplinary action, provided the incident is documented; employee-requested changes if voluntary and documented in writing; if the employee accepted a qualifying "offer to work;" if the employee consents to work after an employer's "in person group communication" to address unanticipated customer needs; or if the location is closed due to an emergency situation, such as a natural disaster or public utility failure.

disaster or public utility failure.

Replacement Coverage

If an employee cannot work a scheduled shift because of protected leave, such as leave available under Seattle's Paid Sick and Safe Time law or the federal Family and Medical Leave Act (FMLA), employers cannot require – or even ask – employees to find replacement coverage. For all other reasons, including childcare, a second job, or educational purposes, employers can ask, but not require, employees to find replacement coverage.

The new 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 being sent home early or having them come in late. To address this potential effect, the ordinance prohibits "underscheduling," defined to mean situations "where the hours employees actually work are significantly above the hours in the written work schedule," unless the employer can demonstrate a bona fide business reason.

Other Employee Rights

The ordinance also creates other substantive rights for employees, such as the right to rest and the right to more hours.

Right To Rest

Employers cannot require an employee to work a shift within 10 hours of the end of the previous day's shift, and even if the employee consents, employers must pay the employee time-and-a-half for the shift worked less than 10 hours apart. There is no exception for emergency situations, such as where an employer needs 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 childcare, another job, or a career-related educational or training program.

Right To More Hours

Similar to an often-overlooked provision of SeaTac's minimum wage ordinance for transportation and hospitality workers, before hiring new workers, employers must first offer any new available hours to existing employees by posting a notice of the additional hours available for at least three days.

In addition, the employer must offer the additional hours or shifts to the employee who is objectively qualified to perform the work, unless it would result in overtime or predictability pay, violate another law, or the employee "is currently not in good standing due to a bona fide employer documented discipline or improvement plan."

Effective Date

The ordinance will go into effect on July 17, 2017.

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 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

The Council moved swiftly to pass this ordinance, and it appears to create unintended consequences. Some practical effects remain uncertain. Several such unanswered questions are described below.

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 new law gives little guidance as to how an employer should sort through myriad competing requests, except to give preferential treatment to those employees with childcare needs, working second jobs, or taking "career-related educational or training courses."

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.

The new 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 shift so as to accommodate a new hire's 9:00 a.m. class schedule? The ordinance's language sheds little 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 law sets a high bar for such proof. Couple this with the heightened duty imposed to accommodate schedule requests due to childcare, 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.

Under the new law, an employer may have to prove that giving a employee a preferred shift over another who requests it for childcare purposes has a significant, identifiable, and "detrimental effect" on operational needs. The ordinance gives some examples, such as a "significant ability to meet customer needs," an "insufficiency of work" during the shift requested, or a significant inability to reorganize work despite best efforts.

Preserving employee morale by fair schedule assignments would unlikely qualify. And while the employer can cut or deny additional hours, there must be a documented discipline incident on file for employees who are not in "good standing."

The End Of Double Shifts?

Because 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," a likely effect will be to eviscerate double shifts for full service restaurant workers who previously preferred to work a Sunday morning brunch on the heels of a Saturday night rush due to high tips.

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, particularly if the request is made to accommodate a major life event. The ordinance provides that only scheduling requests resulting in "significant costs" may be refused.

As for employees' requests based on childcare needs, another job, or a class schedule, the law is unclear how "related" the request must be. For example, is it sufficient that the employee would prefer the earlier shifts because the daytime childcare rates are more affordable?

The law is also silent as to what type of documentation the employer can require their employees to provide to verify that their scheduling request isbased on childcare, 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?

While the city will likely develop regulatory guidelines that may further clarify some of these unanswered questions before the law's July 2017 effective date, you should not delay conducting an audit of your current scheduling practices. This review should include taking a hard look at how you develop employee schedules, how you communicate those with employees, and how you currently handle schedule change requests.

The penalties for non-compliance will be steep, and with Seattle's Office of Labor Standards up and running, any enforcement delay seems unlikely. Starting to educate frontline managers now about

running, any enforcement delay seems unlikely. Starting to educate frontline managers now about these looming affirmative obligations and what will constitute a violation will only help with smooth implementation of any new processes and mitigate against risk of non-compliance. It makes sense to work now to get input from your frontline managers about changes that will need to be made to scheduling practices in order to comply with the law.

Employers outside of Seattle should pay attention to developments as well. As occurred with Seattle's Paid Sick and Safe Leave law, its new 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 secure 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 city ordinance. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People

Catharine Morisset
Partner
206.693.5076
Email

Service Focus

Counseling and Advice

Industry Focus

Hospitality

Retail

Related Offices

Seattle