What Employers Should Know About Predictive Scheduling Laws

Insights
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Hospitality industry employers know that scheduling the right number of workers on any given day – or shift – is a challenge. In addition to unpredictable customer patterns, the ongoing COVID-19 pandemic, labor shortages, and record turnover rates add to the difficulty of keeping operations running smoothly. You might be tempted to rollout "on-call" scheduling polices to help respond to varying levels of customer traffic and resolve last-minute staffing shortages when workers call out sick or don't show up for a shift. While these policies are permissible in many locations, some states and localities have "predictive scheduling" laws that limit such practices and impose penalties when employees aren't given sufficient notice of schedule changes. What do you need to know about these laws, and how do they impact your scheduling practices?

On-Call Scheduling

Restaurant and lodging employers typically want their employees to be flexible so they can respond to staffing shortages or unexpected changes in customer traffic. An on-call scheduling system can help businesses meet customer service needs by designating certain employees to be available – either regularly or on a rotating basis – to report to work on short notice or with no advance notice, if needed. The designated employees will usually call at a certain time to see if they should report to work. Often "on call" workers are those that are sent home first if guest traffic is slower than expected.

Such practices have come under fire in recent years, however, by worker advocates. They say on-call scheduling systems disproportionately affect low-wage earners who may work more than one job or have difficulty planning for financial, transportation, and childcare needs.

Therefore, a growing number of jurisdictions have enacted predictive scheduling laws. They generally only apply to large businesses and aim to provide workers with more predictability when it comes to their work hours and related income. Predictive scheduling laws, however, make it difficult for employers to quickly resolve staffing issues as they arise without triggering an obligation to pay "predictability pay" or other rules.

A Patchwork of Predictive Scheduling Laws

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What legal limits may apply to an on-call scheduling plan will differ by where your business is located. San Francisco was the first location to enact a predictive scheduling law in 2015, followed by Seattle, Oregon, New York City, Chicago, Philadelphia, and Emeryville, California. Although the stated purpose of these laws is similar, they vary significantly in terms of which employers are covered, how far in advance employees must receive their schedules, and the penalties for making last-minute schedule changes.

For example, San Francisco's Formula Retail Employee Rights Ordinances applies to certain chain stores and businesses – including bars and restaurants – with at least 40 stores worldwide and 20 or more employees in San Francisco. The ordinance also applies to a covered company's janitorial and security contractors. Among other obligations, San Francisco's law requires employers to post schedules at least two weeks in advance and pay employees between one and four hours of additional "predictability pay" for last-minute changes.

Seattle's Secure Scheduling Ordinance applies to retail and food service establishments with at least 500 employees worldwide, including any employer within a franchise network that employs over 500 people. To be covered, full-service restaurants must also have at least 40 full-service locations worldwide.

Under Seattle's law, employers are required to provide new hires with a written good faith estimate of their expected hours. The law also requires, employers to post work schedules at least 14 days in advance. Employees have the right to decline any hours that were not on the initial schedule. Employees are also entitled to additional pay for last-minute changes, including if they are sent home early, not actually called in to work when they are on call, or required to work "clopenings" – meaning closing and opening shifts that are less than 10 hours apart.

Under New York City's Fair Workweek Law, covered employers are required to post schedules 72 hours in advance and changes thereafter are prohibited unless the employer cannot operate due to certain emergency conditions, such as natural disasters, failures of public utilities, or shutdowns of public transportation.

Additionally, you should note that some states and localities have rules on "reporting time pay." For example, in California, an employee who is sent home after working less than half their scheduled workday must be paid for two to four hours of work, depending on the specific circumstances. Notably, a California court has held that the reporting time pay law applies to on-call shifts if employees are required to check in and are told not to report to work. Unless very narrow exceptions apply, Seattle's law also requires that employees who are sent home before the end of their scheduled shift receive certain compensation.

Connecticut, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Rhode Island, and Washington, D.C., also have reporting time pay laws that impose various obligations on employers.

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On the contrary, some states – such as Arkansas, Georgia, Iowa, and Tennessee – have laws that prohibit cities in their respective states from enacting local predictive scheduling laws.

Tips for Employers

The right scheduling approach for your operations will depend on many factors, including your location, company culture, and type of business. Although small employers may encounter scheduling and compliance issues, large employers that operate in multiple jurisdictions, in particular, may face significant challenges when attempting to apply consistent scheduling practices company wide. Depending on where you are located, you may need to create geographically specific policies.

- If you do business in locations with predictive scheduling requirements, you should consult with counsel to ensure you are complying with the various components of these complex laws.
- Look into any exceptions that might apply to predictability pay. For example, some of these laws allow you to create a list of employees to call about available shifts and allow them to decide whether to accept a shift without collecting predictability pay. But some may not, so it's important to know the details about your local predictability pay laws.
- You might also allow employees to voluntary swap schedules or sign up for open shifts, consistent with any requirements of the local laws. Scheduling apps can help facilitate these programs.
- Train frontline managers on how to handle staffing shortages and comply with the applicable predictive scheduling laws.

Conclusion

Fisher Phillips will continue to monitor these rules and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, any attorney in Wage and Hour Practice Group, or any member of our Hospitality Industry Team.

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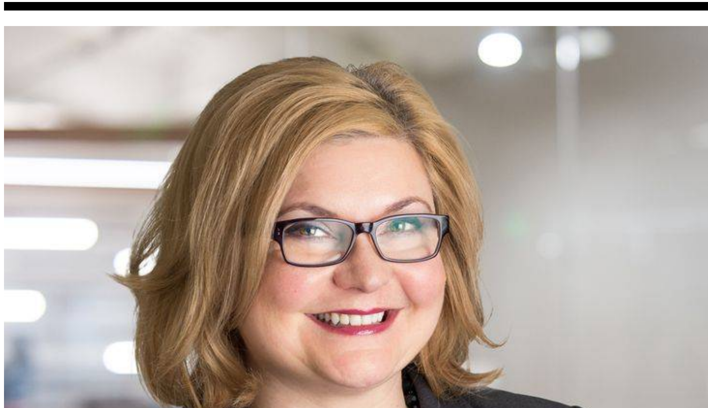

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