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## Preparing for Philadelphia's Fair Workweek Employment Ordinance

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In a growing trend among major cities, Philadelphia has enacted a law that will impose stringent new scheduling and workplace management practices on hospitality industry and retail employers with more than 250 employees and certain other criteria. Businesses affected by the law should expect significant documentation and compliance obligations.

The Fair Workweek Employment Ordinance, which goes into effect on January 1, 2020, mandates that employers provide non-exempt employees with:

- Advance notice of their schedules
- "Predictability Pay" when there is a deviation from provided schedules
- "Good faith estimates" of anticipated schedules

It also requires that current employees be offered available shifts prior to hiring outside the organization.

The Philadelphia City Council passed the Fair Workweek Employment Standards Ordinance in December 2018, becoming the fifth major city to impose similar predictive scheduling requirements on retail or hospitality employers. Similar laws have been passed in San Francisco, New York, Seattle and Washington, DC. Failure to comply with these scheduling and workplace management practices can result in significant fines and penalties.

### Covered Employers

Under the Ordinance, a "Covered Employer" is defined to include full-service restaurants, limited-service restaurants, food services contractors, caterers, mobile food service providers, drinking places (i.e., bars, pubs and lounges), cafeterias, buffets, snack and nonalcoholic beverage bars, hotels, motor hotels, resort hotels, motels and retail businesses; provided such establishments employ 250 or more employees *and* have 30 or more locations worldwide (including chain establishments or franchises associated with a franchisor or network of franchises that employ more than 250 employees in the aggregate).

### Advance Notice

#### *New Hires*

At the time of hire, Covered Employers are required to provide employees with a written, good faith estimate of the employee's work schedule, which must include:

- the average number of work hours the employee can expect to work in each week over a typical 90-day period;
- whether the employee can expect to work any on-call shifts; and
- a subset of days and times or shifts that the employee can typically expect to work, or days of the week and times or shifts on

which the employee will not be scheduled to work.

Covered Employers shall revise the good faith estimate when there is a significant change to an employee's work schedule due to the employee's availability or the employer's business needs. The Ordinance does not define when "a significant change to an employee's work schedule" occurs.

The Covered Employer is also required to provide the new employee with a written work schedule that runs through the last date of the currently posted schedule.

#### *Existing Employees*

Covered Employers must provide written notice of the work schedule to all employees in a conspicuous and accessible location where employee notices are customarily posted. If the employer posts the schedule electronically, all employees must have access to it on-site. From January 1, 2020 through December 31, 2020, work schedules shall be posted no later than 10 days before the first day of any new schedule. Beginning January 1, 2021, Covered Employers are required to post the work schedule no later than 14 days before the first day of any new schedule.

Covered Employers are required to provide notice of any proposed changes to the work schedule as promptly as possible and prior to the change taking effect. The written work schedule must be revised to reflect any change within 24 hours of making the change. An employee may decline to work any hours or additional shifts not included in the originally posted work schedule. If an employee voluntarily consents to work hours or shifts not included in the posted work schedule, such consent must be in writing.

All employees are permitted to make requests to change their work schedules. However,

Covered Employers are not obligated to grant these requests.

#### **Compensation for Changed Work Schedules**

If a Covered Employer makes a schedule change after the required advance notice period, the employee will be entitled to "Predictability Pay," in addition to the employee's regular pay for hours actually worked by the employee, as follows:

- One hour of Predictability Pay at the employee's customary rate of pay, when a Covered Employer adds time to a work shift or changes the date or time or location of a work shift, with no loss of hours.
- Predictability Pay calculated as no less than one-half times the employee's customary rate of pay per hour for any scheduled hours the employee does not work, when a regular or on-call shift is cancelled or shortened.

Employees are not entitled to Predictability Pay in the following circumstances:

- An employee makes a written request to change his/her schedule;
- A schedule change is the result of voluntary shift trades or coverage arrangements, subject to any employer policy regarding required conditions for employees to exchange shifts;
- Unforeseen/emergency situations such as threats to an employee's or a Covered Employer's property, failure of a public utility, shutdown of public transportation, fire, flood or other natural disaster, a state of emergency declared by the appropriate authorities, severe weather conditions that disrupt transportation or pose a threat to employee safety;

- An employee begins or ends work no more than 20 minutes before or after the scheduled start or end time of the shift;
- An employee volunteers to work additional hours in response to a mass written communication (that makes clear that accepting such hours is voluntary) from a Covered Employer about the availability of additional hours as a result of another employee being unable to work scheduled hours;
- There is a reduction of hours due to termination of employment of the individual;
- There is a reduction of hours due to disciplinary suspension, provided the incident leading to the disciplinary action is in writing;
- The posted work schedule is changed within 24 hours of providing a new hire with the written work schedule;
- A ticketed event is cancelled, scheduled, rescheduled, postponed, delayed, increases in expected attendance by 20% or more, or increases in duration, due to circumstances outside a Covered Employer's control and that occur after the work schedule has been posted; or
- A hotel banquet event is scheduled, due to circumstances that are outside a Covered Employer's control, after the work schedule has been posted.

### **Right to Rest Between Work Shifts**

Employees are permitted to decline, without penalty, any work hours that are scheduled or occur within nine hours of the end of the previous day's shift or a shift that spanned two days. An employee may consent to work such shifts, so long as the consent is in writing. If an employee consents in writing, the Covered Employer shall compensate the employee an additional \$40 for each such shift. Employees

are permitted to revoke their consent to work such shifts, in writing, at any time during their tenure. The Ordinance is unclear as to whether a Covered Employer can obtain a blanket authorization from an employee to work such shifts or whether the employee can revoke such authorization mid-shift.

### **Offer of Work to Existing Employees**

Under the Ordinance, Covered Employers are required to offer work shifts to existing employees before hiring new employees or engaging subcontractors. Covered Employers must provide written notice of available work shifts for at least 72 hours, unless a shorter period is necessary to timely perform the work. The notice must be in English and in the primary language(s) of the employees at the workplace. The notice must be posted both in a conspicuous location at the workplace that is readily accessible and visible to all employees and electronically, if that is the method normally used for distributing scheduling information. The notice must include:

- a description of the position and its required qualifications;
- the schedule of available shifts;
- the length of time for which coverage is needed; and
- the process for notifying the Covered Employer of their desire to work the offered shifts.

Covered Employers are permitted to provide the notice concurrently to employees at the location where the shifts will be worked, locations other than the location where the work is to be performed, and to external candidates.

The Ordinance specifically states that Covered Employers are not required to "offer employees work hours paid at a premium rate under state

or federal law.” The plain language of the Ordinance suggests that a Covered Employer would not have to offer available shifts to existing employees if filling such shifts with an existing employee from any location would require a Covered Employer to pay the employee overtime.

### **Assignment of Available Shifts**

In the event that one or more employees accept such shifts, the shifts shall first be distributed to qualified employees who regularly work at the location where the shifts are available. If it is the regular practice of a Covered Employer to schedule employees across multiple locations, shifts must then be distributed to qualified employees who work at other locations. If it is not a Covered Employer’s regular practice to schedule employees across multiple locations, offering the available shifts to employees at a different location is optional. Covered Employers are prohibited from distributing hours in a way that discriminates against employees or is intended to avoid application of the Patient Protection and Affordable Care Act.

Covered Employers may hire new employees for the available work shifts if:

- an existing employee does not accept the offer of available work shifts within 24 hours after the 72 hour posting period ends;
- it receives written confirmation from eligible employees that they are not interested in accepting the available work shifts; or
- existing employees have only accepted a subset of the offered work shifts and there are remaining shifts available.

### **Presumption of Retaliation**

The Ordinance prohibits retaliation against an employee who exercises his/her rights under

the Ordinance. In addition, the Ordinance creates a “rebuttable presumption” of retaliation if an employee is subjected to an adverse action within 90 calendar days of the employee’s exercise of rights under the Ordinance. There is no “rebuttable presumption” of retaliation, however, if the adverse action was for just cause and the incident that led to the adverse action was documented in writing. For seasonal employees, a “rebuttable presumption” of retaliation applies if the individual’s employment ended before the 90 calendar day period expired and the Covered Employer fails to rehire the individual to work in the same position at the next opportunity for work.

### **Notice Requirements**

At the time of hire and within 24 hours of any change, Covered Employers must advise employees, in writing, of its policy for offering and distributing work shifts. The policy must also be posted in an accessible location in the workplace and include:

- where employees can access written notices of available work shifts;
- how employees may notify the Covered Employer of their desire to work the available shifts; and
- the factors the Covered Employer considers when assigning work shifts among qualified and interested employees.

Additionally, Covered Employers are required to post a notice, to be prepared by the City, summarizing the rights and responsibilities under the Ordinance. The notice must be posted in a conspicuous and accessible location where employee notices are customarily posted.

## Recordkeeping Requirements

Covered Employers are required to maintain records that demonstrate compliance with the Ordinance for a period of two years. Records that must be maintained include, but are not limited to good faith estimates of work schedules and any modifications thereto, written consent for work shifts, offers of work shifts to existing employees and responses to those offers, and payroll records showing Predictability Pay. Covered Employers must grant access to these records to the City upon request, with appropriate notice and at a mutually agreeable time. Upon request by an employee, and in accordance with the rules to be established by the City, Covered Employers must provide the employee with work schedules for all employees at the location in writing for any previous week for the past two years, including the originally posted and modified versions of work schedules.

## Enforcement

Aggrieved individuals have two avenues to assert their rights under the Ordinance. First, they can file a claim in court within two years of the alleged violation. Second, they can file a claim within two years of the date the employee knew or should have known of the alleged violation with an agency designated by the Mayor (the Agency) that will be responsible for administering and enforcing the Ordinance. If a court or the Agency determines that the Covered Employer has violated the Ordinance, the successful plaintiff/complainant can receive full restitution for lost wages and benefits (including Predictability Pay), reinstatement (if the individual's employment was terminated in violation of the Ordinance's anti-retaliation provisions), attorneys' fees, and costs. Aggrieved individuals who prevail in court can obtain liquidated damages of up to \$2,000. If an aggrieved individual files a complaint with the Agency and the Agency determines that a

Covered Employer violated the Ordinance, the City could assess fines of \$2,000 for violation of the anti-retaliation provision and \$1,000 for all other violations.

It is evident that this Ordinance will impose significant administrative burdens, including rigorous documentation obligations, on Covered Employers. Covered Employers need to ensure that their practices of posting schedules and offering shifts to existing employees comply in all respects with the Ordinance. Covered Employers should work closely with experienced employment counsel well in advance of January 1, 2020 to ensure compliance with the Fair Workweek Employment Standards Ordinance.

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