

Mandated Predictability Jeopardizes Workplace Flexibility

The topic of predictable scheduling has become a national issue for labor groups over the last several years. The groups have focused primarily on five main areas:

- Lack of adequate notice of work schedules, referenced as “just-in-time scheduling”;
- “Clopening,” which is working a closing shift and an opening shift back-to-back;
- On-call shifts;
- Last-minute requests to work a shift or last-minute cancellation of shifts; and
- Guaranteed hours, or a lack thereof.

Proponents of predictable scheduling have stated that these issues have an impact on low-wage workers and part-time employees who try to work multiple jobs, as well as women who struggle with child care.

Opponents argue that mandating scheduling requirements will limit an employer’s flexibility to accommodate employee requests for time off, limit offers of additional hours for employees who seek or want to work more, and significantly increase the cost of doing business. This national debate between predictability versus flexibility will continue to be a policy consideration in California in 2017.

Predictability vs. Flexibility:

In March 2014, the Center for Law and Social Policy, Retail Action Project and Women Employed published a policy brief highlighting their concerns with the lack of predictable schedules. The brief, titled “Tackling Unstable and Unpredictable Work Schedules,” argues that low-wage workers are “disproportionately affect[ed]” by “just-in-time scheduling” that contributes to income instability and threatens their eligibility for government income support and benefits.

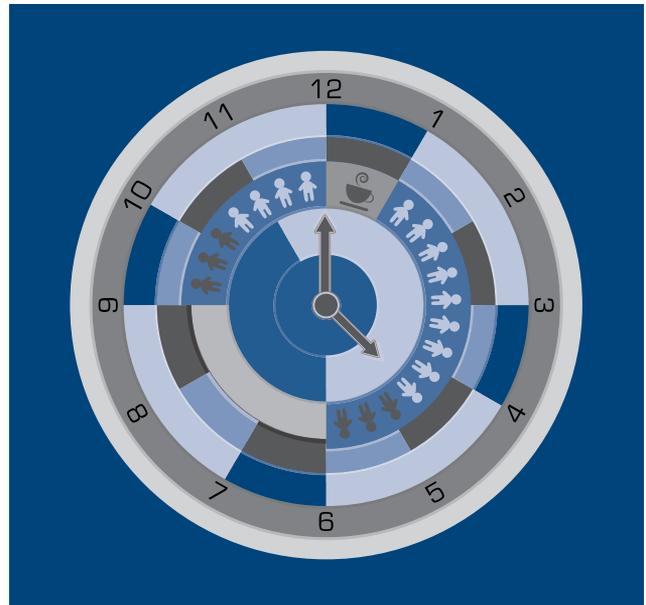
It also states that lack of control over schedules and hours creates stress, marital strife, and challenges with day care, as well as transportation. The authors claim employers are responsible for this instability due to increased utilization of scheduling software that allows employers to “manipulate workers’ schedules in response to changes in demand,” with little notice to the employee.

The policy brief makes several recommendations, including:

- Guaranteed minimum hour policies;
- Reporting time pay;
- Advance notification of schedules; and
- Laws that make union organizing easier.

Notably, California is one of nine states that already have a reporting time pay law, as discussed below, in which an employee is compensated a minimum amount for simply showing up to the scheduled shift.

In April 2015, the Economic Policy Institute published a study titled “Irregular Work Scheduling and Its Consequences,” and reported that approximately 17% of the workforce has



unstable work shift schedules. The study recommended policy measures such as the San Francisco Retail Worker Bill of Rights, described below, as well as allowing employees the “right to request” changes to work hours, schedules, or work location without fear of retaliation.

Another study by Susan J. Lambert and Julia R. Henly published by the University of Chicago documented the various challenges managers face when producing schedules. The “Work Scheduling Study: Managers’ Strategies for Balancing Business Requirements with Employee Needs” surveyed managers of 139 retail stores. The study highlighted the struggle of scheduling hours within the labor goals and limitations set by the company, while still providing employees with enough hours of work as well as the shifts they prefer. The study indicated that obtaining a sufficient number of hours was employees’ main priority as opposed to advance notice of schedules.

Although one-third of the managers surveyed provided two weeks’ notice of employee schedules, the majority provided approximately four days’ notice. More than 53% of the managers reported that, once posted, changes to the schedule are common. “[N]ot every life circumstance can be anticipated,” thereby leading to numerous employee-initiated changes to the schedule once posted.

Flexibility

Workplace flexibility also is a significant factor for employees. The need and importance of flexibility in the workplace was emphasized in the Executive Summary published by President Barack Obama in March 2010, “Work-Life Balance and the Economics of Workplace Flexibility.” One of the issues raised in this summary was the ability of employees to have input on their schedule. The summary focused on businesses that allow employees the ability to change their start

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and end times on shifts periodically, even on a daily basis, as a positive attribute of flexibility.

Additionally, the CitiSales Study, conducted by Jennifer E. Swanberg, Jacquelyn B. James, Mac Werner, et al. with the University of Kentucky Institute of Workplace Innovation and Boston College's Center for Work and Family in 2008, interviewed more than 6,000 hourly employees and senior management in 388 stores across the country. The intent of the study was “to examine the employee and organizational benefits associated with a work environment that is responsive to the needs of workers employed in lower-wage hourly jobs.”

The CitiSales Study found that “six workplace dimensions are critical components of employee engagement and customer satisfaction in the retail industry. The dimensions are: 1) Effective Supervisors; 2) Job Fit & Adequate Resources; 3) Opportunities for Career Development; 4) Teamwork; 5) Schedule Satisfaction; and, 6) Schedule Flexibility.”

Schedule flexibility, the study found, optimizes recruitment of quality employees, boosts retention, promotes productivity, engages employees, reduces turnover, and creates quality customer service. The study noted that the two largest burdens with providing flexibility, however, were accommodating employee scheduling requests while still meeting the business's demands. The study quoted one manager regarding employee requests: “There is only so much time that you can spend constantly changing the schedule before you have to just make it what it should be.”

To ensure flexibility and schedule satisfaction, the CitiSales Study promoted the following six practices for workplace flexibility: 1) allow employees to provide input on their schedule preferences such as days, shifts, or hours of work; 2) opportunity to request times or days off in advance; 3) permit employees to work at more than one store location; 4) allow employees to work reduced hours and maintain benefits; 5) provide employees job security if they take a week or more off work; and 6) provide employees with “just-in-time” schedule changes.

Contrary to the studies referenced above regarding the need for predictability, the CitiSales Study found that employees want flexibility and the opportunity to “modify their schedule when unexpected events” arise with just-in-time schedule changes. These just-in-time changes include swapping shifts with other employees and having management help with finding someone to cover the shift.

In “Scheduling in Hourly Jobs: Promising Practices for the Twenty-First Century Economy,” Susan J. Lambert and Julia R. Henly contemplated the two competing issues of flexibility and predictability. The report for *The Mobility Agenda* stated: “[a]n overemphasis on any one of these dimensions could result in unintended consequences for workers. If workers have little input into their work schedules or if posted schedules are not amenable to change, predictability can turn into rigidity. Similarly, as argued above, flexibility can result in unstable hours and thus precarious earnings, reducing the prospects of financial stability among hourly workers.”

San Francisco Ordinance

In November 2014, San Francisco passed two ordinances referred to as the “Formula Retail Worker Bill of Rights” that included multiple provisions applicable to large retailers with regard to hours, schedules and worker benefits. A formula retail company is defined in the city ordinance as any retail employer with 20 or more employees, at least 11 locations anywhere in the world, and a standardized array of merchandise, facade, decor and color scheme, uniform apparel, signage, trademark or a service mark. Such employers include, but are not limited to, restaurants, banks, retail stores, and movie theaters.

Provisions included in the Formula Retail Worker Bill of Rights are a 14-day notice of employees' schedule with financial penalties imposed against the employer for changes made to the schedule with fewer than seven days notice, same hourly rate of pay for full-time and part-time employees who perform the same duties, same paid and unpaid time off for part-time and full-time employees, and written offer of additional hours of work to part-time employees before hiring additional employees. The Formula Retail Worker Bill of Rights was passed by the Board of Supervisors in November 2014, but was not signed by Mayor Ed Lee. The ordinances went into effect in July 2015.

The Office of Labor Standards Enforcement for the City and County of San Francisco promulgated regulations regarding implementation of the Formula Retail Bill of Rights before its effective date. These regulations focused on several issues, including how to determine the number of employees an employer has in a calendar year, whether an employer has to offer part-time employees hours that would force the employer to pay overtime, what employer conduct triggers an obligation to pay penalties for schedule changes—such as inviting, soliciting, or suggesting that the employee can change his/her schedule—and how to reconcile predictability penalty pay with California's reporting time pay. The final regulations went into effect on March 1, 2016.

Although the final regulations for the Formula Retail Worker Bill of Rights have been in effect for less than a year, employers and employees already are feeling the impact. Feedback from several employers on the ordinances is as follows:

- Employers are unable to adjust to staffing needs based upon changes to consumer demand as offering part-time employees additional hours or reducing hours triggers an obligation to pay penalties, which employers are not willing to absorb;
- Employees do not always know their availability to provide input for a two-week schedule and are frustrated with the hours and days of work they ultimately are provided;
- Part-time employees who want additional hours of work, even last-minute offers, are not getting those hours because employers are concerned they will be exposed to financial penalties for offering those hours of work;
- Employee requests for schedule changes after the schedule is posted cannot be accommodated as employers are not willing to expose themselves to financial penalties for making these accommodations. Employees are frustrated with the lack of flexibility.

State Legislation

AB 357

Assemblymember David Chiu (D-San Francisco) was elected to the Assembly in 2015. He previously was a member of the San Francisco Board of Supervisors and one of the authors of the Formula Retail Worker Bill of Rights. Chiu introduced AB 357, which mirrored provisions of the Formula Retail Worker Bill of Rights. Specifically, AB 357 mandated a two-week notice of an employee schedule, financial penalties associated with changes made within seven days before the scheduled shift, penalties for on-call shifts, exposure to civil litigation, and a protected leave of absence for an employee to attend appointments with the county human services agency for government assistance. The bill was sponsored by the United Food and Commercial Workers (UFCW) and supported by numerous labor organizations, as well as plaintiff's attorneys. Proponents argued that the legislation was important to assist low-wage workers who have two jobs and need their schedule to be predictable.

AB 357 was widely opposed by numerous business-related organizations and labeled a job killer by the California Chamber of Commerce. Opponents argued that the financial penalties associated with schedule changes as proposed by AB 357 would eliminate employers' willingness to accommodate last-minute employee requests for schedule changes. The bill moved through the Assembly committees, but was never taken up for a vote by the entire Assembly.

SB 878

On March 15, 2016, SB 878 (Leyva; D-Chino) was amended into another predictable scheduling proposal. SB 878 was applicable to any grocery, retail, or restaurant and mandated a 21-day work schedule that was provided to the employee at least seven days prior to the first scheduled shift. If the employer made any changes to the schedule with less than seven days notice, but more than 24 hours notice, the employer had to pay the employee 1 hour of modification pay at the employee's regular rate. If the employer changed the schedule with less than 24 hours notice, the employer had to provide the employee with modification pay for at least half the scheduled shift, not to exceed 4 hours. SB 878 provided limited exceptions to the modification pay.

Similar to AB 357, SB 878 was sponsored by labor groups and opposed by the business community, including being labeled as a job killer by the CalChamber. The bill failed to pass out of the Senate Appropriations Committee.

National, Local, State Activity

In 2015, Representative Rosa DeLauro (D-Connecticut) introduced H.R. 3071, "Schedules that Work." Senator Elizabeth Warren (D-Massachusetts) introduced an identical Senate bill, S. 1772. Both bills were referred to policy committees in each respective house, but did not otherwise move through the legislative process. The proposals would

allow employee the right to make schedule changes with regard to number of hours, location, and notification of schedule assignments. It also would require the employer and employee to engage in a good faith interactive process regarding schedule changes and require the employer to approve the schedule request unless the employer had a bona fide reason to deny it.

In 2016, Seattle passed a local ordinance titled "Secure Scheduling." The ordinance will go into effect July 1, 2017, and applies to any restaurant or retail establishment with at least 500 employees worldwide, and for restaurants, at least 40 full-service locations worldwide. Under the ordinance, such employers will have to do the following:

- Upon hire, provide the employee with a good faith estimate of the hours they will work;
- Allow the employee the right to request certain shifts;
- Give 14 days notice of employees' work schedules, with predictability pay for changes thereafter;
- At least 10 hours between a closing and opening shift; and
- Offer additional hours of work to qualified internal employees first, before hiring or offering to external employees.

In 2016, Emeryville, California passed the "Fair Workweek Ordinance," which similarly requires larger retail and fast food employers to provide an employee with a good faith estimate of hours, allow an employee to decline changes to schedule with less than 14 days notice, make penalty payments for changes to schedules, offer additional hours of work to part-time employees, and limit back-to-back shifts. The ordinance goes into effect on July 1, 2017.

In 2016, 13 states, including California, had pending legislation regarding scheduling for employees, although none have been enacted. These states include: Arizona, New Jersey, Rhode Island, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, New York, North Carolina, and Maine.

In 2015, Michigan passed a law (HB 4052) that preempts any local jurisdiction in the state from enacting an ordinance that imposes a mandate on employers to pay higher wages or benefits to employees or provide employees with more leave than that required by state law.

In 2014, SeaTac, Washington passed an ordinance that requires employers to offer additional hours of work to part-time employees before contractors.

Existing California Law

While California does not have a law that specifies the required time in which to post an employee's work schedule, it has several existing laws that regulate the hours and days of work for an employee, as follows:

- **Reporting Time Pay:** California law requires an employer to provide employees with at least partial compensation when they report to work, but are sent home by the employer for some reason such as lack of work/customer demand, improper scheduling, or lack of notice. The Industrial Welfare Commission Orders require that employers pay nonexempt

employees “half the usual or scheduled day’s work, but in no event for less than two hours nor more than four hours, at his or her regular rate of pay.” So, if an employee is scheduled to work 8 hours, but is sent home after one hour, the employer must pay the employee 4 hours of reporting time pay.

In *Aleman v. Airtouch Cellular*, 209 Cal.App.4th 556 (2012) the court clarified this requirement to specify that an employer is required to pay reporting time pay only when the employee works for less than half of the scheduled shift. In *Aleman*, the employee was scheduled for only a 1-hour-and-30-minute meeting, which ended early and lasted only an hour. The employer paid the employee for an hour and the employee sued the employer, claiming he should have received the minimum 2 hours of compensation for reporting time pay. The court disagreed and stated that reporting time pay requires an employer to pay the minimum two hours of pay only when an employee has worked less than half of the scheduled shift. In *Aleman*, the scheduled shift was 1 hour and 30 minutes, and the employee worked more than half of the shift, for which he was paid. Accordingly, the employer was not required to pay reporting time pay.

- **Split Shift Pay:** California also requires employers who have employees work two separate shifts in a day that are separated by a break longer than one hour to provide split-shift pay. The employer must pay the employee an extra hour of pay at minimum wage, unless the employee earns an hourly wage wherein the total amount earned for all hours worked is greater than the minimum wage for all hours worked, including the extra hour of pay. See *Aleman*, 209 Cal.App. at 574-575.

- **Daily and Weekly Overtime:** California is one of only three states in the country that requires employers to pay employees both daily and weekly overtime. Specifically, Labor Code Section 510 requires an employer to pay 1.5 times the employee’s regular rate of pay for hours worked over 8, but under 12, and double the regular rate of pay for hours worked over 12 in a workday. California also requires 1.5 times the regular rate of pay for all hours worked over 40 in a workweek. Under Labor Code Section 514, unionized employers can waive the daily overtime requirement through a collective bargaining agreement.

In order for a nonunionized employer to “waive” the daily overtime requirement, the employer must navigate a lengthy, multi-step process, to allow employees to elect an alternative workweek schedule (AWS). Any misstep in the process or application of the AWS exposes an employer to costly litigation. A valid AWS allows an employee to work up to 10 hours in a day or 40 hours in a week without payment of overtime wages. If an employer actually elects to utilize the AWS option, any adopted AWS can be repealed only through a two-thirds vote via secret ballot election by the employees in the affected work unit. Additionally, if the employer and/or employee want to

deviate from the elected AWS, they can do so only by going through the entire election process set forth in Section 511 and the Wage Orders to adopt a new AWS

- **One Day of Rest:** Labor Code Section 552 mandates employers to provide employees one day of rest in a workweek. Labor Code Section 510 specifies that any work in excess of eight hours on any seventh day worked in a workweek shall be paid at twice the employee’s regular of pay.

CalChamber Position

Legislation that seeks to micromanage a private employer’s business, such as mandating when schedules must be posted, what changes to the schedule an employer may make, when an employer can make schedule changes, or guaranteeing minimum hours of work, will have negative consequences for the business as well as its employees.

Government is not in a better position to determine how to effectively manage a workforce, especially in various industries where customer demand, location, employee needs, and business needs are changing constantly. Strict statutory standards that seek to regulate such issues with the threat of financial penalties and litigation will ultimately force businesses into rigidity with regard to employee requests for schedule accommodations, other workplace flexibility, or even the number of full-time versus part-time employees the businesses hire.

These unintended, but likely consequences should cause the Legislature to pause before seeking to impose such broad and onerous laws on California employers.



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