

## Philadelphia Enacts Fair Workweek Ordinance

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On December 20, 2018, Philadelphia Mayor Jim Kenney signed into law an amendment to the Philadelphia Code titled "[Fair Workweek Employment Standards](#)" ("Ordinance"), thereby adding Philadelphia to the growing number of jurisdictions (e.g., Oregon, [New York City](#), [San Francisco](#), and [Seattle](#)) that in recent years have enacted "predictive scheduling" laws. Like these measures, the Ordinance requires large employers in certain industries to provide employees advance notice of work schedules, premium pay for specified schedule changes, the right to a minimum number of hours off between shifts, and priority on open shifts. The Ordinance becomes effective on January 1, 2020, but due to its complexity and detailed requirements, Philadelphia employers that will need to comply should begin planning their approach far in advance of the Ordinance's effective date.

### Covered Employers and Employees

Covered employers are retail, food, and hospitality establishments that have 30 or more locations worldwide (one of which is Philadelphia), including chains and franchise locations, and employ at least 250 workers in aggregate. Per the Ordinance, employers should include all full-time, part-time, and temporary workers (exempt and non-exempt) towards the 250-employee threshold.

Covered employees include all *non-exempt* full-time, part-time, temporary, and seasonal workers who work for a covered employer in Philadelphia, and whose job duties "involve the provision of" retail trade, food, or hospitality services. The Ordinance does not cover independent contractors, nor are they to be counted towards the 250-employee threshold requirement.

Further, the Ordinance excludes from coverage employees covered by a collective bargaining agreement ("CBA") to the extent that the agreement, "in clear and unmistakable terms," waives all or part of the Ordinance's mandates, and only for so long as the CBA is in effect.

## Advance Notice of Work Schedules

### *Covered New Hires*

Covered employers must provide each new hire with a “written, good faith estimate” of the employee’s work schedule.<sup>1</sup> The good faith estimate must include the following information:

- the average number of work hours the new employee can expect to work each week over a “typical 90-day period”;
- whether the employee should expect to work any on-call shifts; and
- a “subset of days and a subset of times or shifts that the employee can typically expect to work,” or days, times, or shifts on which the employee will not be scheduled to work.

The employer must revise the estimate when there is a “significant change” to the employee’s work schedule due to changes in the employee’s availability or to the employer’s business needs. The Ordinance encourages an employer to engage in an “interactive process” when the newly hired employee seeks a schedule change, but emphasizes that the employer need not grant the request as long as it does not deny it for an unlawful reason.

Further, on or before the commencement of employment, the employer must provide the new employee with a written work schedule “that runs through the last date of the currently posted schedule.” Thereafter, an employer must provide written notice of work hours as discussed below for all covered employees.

### *All Covered Employees*

Covered employers must post a work schedule for all employees “in a conspicuous and accessible location where employee notices are customarily posted.” An employer may post the notice in electronic format, as long as all employees have on-site access to the schedule. The posted work schedule must include the employees’ shifts at that worksite and whether they are scheduled to work or be on-call that week.

The work schedule must be posted ***no later than 10 days before the first day of any new schedule*** (the lead time expands to ***14 days***, beginning January 1, 2021).

Further, employers must provide notice of any proposed changes to the work schedule “as promptly as possible and prior to the change taking effect.” An employer must revise the written work schedule to reflect any changes ***within 24 hours of making the change***.

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<sup>1</sup> The Ordinance instructs that the “good faith estimate is not a contractual offer binding the employer, but an estimate made without a good faith basis is a violation” of the Ordinance.

Employees may refuse to work any hours or additional shifts that are not included in the posted schedule. An employee who voluntarily consents to work such hours must do so **in writing**.

Covered employees, including new hires, also have the “right” to make work schedule requests. This right protects employees from retaliation for making any of the following requests:

- not to be scheduled for work shifts during certain days or times or at certain locations;
- not to work on-call shifts;
- for certain hours, days, or locations of work; and
- for more or fewer work hours.

However, employers are not obligated to implement these requests.

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

When an employer changes the posted work schedule after the required 10-day notice posting, it must pay affected employees a premium, called “predictability pay,” as follows:

- One hour of predictability pay at the employee’s regular rate of pay, when the employer adds time to a work shift or changes the date, time, or location of a work shift, with no loss of hours.
- One-half hour of predictability pay for any scheduled hours the employee does not work because (i) hours are subtracted from a regular or on-call shift, or (ii) the employer cancels a regular or on-call shift.

#### *Exceptions to the Predictability Pay Requirement*

A covered employer is *not* required to pay predictability pay (or obtain written consent from employees who voluntarily agree to work extra hours or shifts, as discussed above): (i) when it makes changes to the posted work schedule **within 24 hours** after the required 10 days’ notice; (ii) where the employee requests the change in writing; or (iii) in certain other very specific circumstances enumerated in the Ordinance, such as where an employee begins or ends work no more than 20 minutes before or after the scheduled start or end time of his or her shift.

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

The Ordinance gives employees the right to nine hours of rest time between shifts or after a shift that spans over two days. An employee who declines to work during such rest time may not be penalized. However, if the employee agrees to work during such time, *the employee must consent in writing and be paid \$40 for each instance that he or she works such a shift.*

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

The Ordinance mandates that a covered employer must offer work shifts to existing employees prior to seeking to hire workers from outside the company. Toward this end, employers must provide written notice of available work shifts for at least 72 hours, unless time constraints require that the open shift(s) be filled sooner. The notice must be in English and in the primary language(s) of the employees at the workplace, and posted both at a conspicuous location at the workplace and electronically, if that is the method normally used by the employer.

In addition, the notice must include the following: (i) a description of the position and the required qualifications, (ii) the schedule of available shifts, (iii) the anticipated duration of the open shifts/hours, and (iv) the method by which interested employees should notify the employer. However, at the same time the employer provides notice to employees at the location where the shifts/hours described in the notice will be worked, it also can seek candidates from other locations, as well as external applicants.

### *Assignment of Open Shifts*

A covered employer must first assign an open shift to a qualified employee at the location where the opening exists. If no qualified employee seeks the shift, the employer must offer the position to a qualified employee at its other locations, but only if that is the employer's established practice. If no qualified existing employee accepts the offer of available work shifts within 24 hours of the end of the 72-hour posting period, or if filling the position with an existing employee from any of its locations would require the employer to pay the employee at the overtime rate, the employer may seek to fill the position with an external hire.

Notably, in assigning the open position, an employer cannot deny the position to any applicant on the basis of family caregiving responsibilities or status as a student. Further, *an employer may not distribute hours in a manner intended to avoid application of the Affordable Care Act.*

### *Notice Requirement*

Covered employers must advise new hires in writing of their policy on distributing work shifts. If, at any time, an employer changes the policy, it must post a notice in an accessible location in the workplace, which states the following:

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

### **Anti-Retaliation Mandate, Notice Posting and Recordkeeping Requirements, and Penalties for Violations**

Covered employers may not take any adverse action against an employee for exercising his or her rights under the Ordinance. A rebuttable presumption of retaliation will attach to any adverse action taken against a covered employee “within 90 calendar days of the employee’s exercise of rights protected” by the Ordinance. The employer can rebut the presumption of retaliation by providing documentation that it took the adverse action for other disciplinary reasons.

Employers must post a notice of employees’ rights under the Ordinance, which will be created by an agency designated by the mayor.

Covered employers will be required to maintain for two years records “necessary to demonstrate compliance” with the Ordinance, including, but not limited to:

- good faith estimates of work schedules and any changes made to them,
- written consent for work shifts as required by the Ordinance,
- offers of work shifts to existing employees and responses to those offers, and
- payroll records that specify the amount of additional compensation paid to employees where required by the Ordinance.

Further, an employer, pursuant to an employee’s request, must provide the employee “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.”

The agency designated by the mayor to develop regulations and oversee enforcement of the Ordinance is charged with, among other tasks, determining appropriate remedies and penalties for violations of the Ordinance. Aggrieved individuals will be able to file a complaint with the agency or bring a civil action.

## What Covered Employers Should Do Now

Although the Ordinance does not take effect until January 1, 2020, it is a complicated law requiring significant changes. Therefore, covered employers should:

- promptly begin the process of developing policies and procedures necessitated by the Ordinance and determining which current practices will need revision and what practices will need to be established;
- train managers and employees responsible for carrying out those policies and practices to ensure compliance once the required policies and practices are in place; and
- consider, with respect to unionized employees, negotiating language in an existing CBA (or a new CBA entered into before January 1, 2020) that clearly and in unmistakable terms waives all or part of the Ordinance's mandates for as long as the CBA is in effect.

It is hoped that the as-yet unidentified agency tasked with implementing the Ordinance will provide practical guidance for covered employers on how to ensure compliance with the myriad new mandates.

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