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## Who Could Have Predicted? Fair Scheduling Requirements Pose Compliance Challenges for Retail, Restaurant, and Other Employers

BY DEIDRA NGUYEN

After San Francisco passed its Formula Retail Employee Rights Ordinances in November of 2014, making it the first jurisdiction to impose scheduling requirements on private employers, predictive or fair scheduling laws were considered in various jurisdictions throughout the United States, but failed to take hold. That remained true until 2017, when fair scheduling laws spread to the cities of San Jose, California; Emeryville, California; Seattle, Washington; and New York City, New York. With Oregon becoming the sixth jurisdiction to adopt predictive scheduling requirements—and the first to do so on a statewide basis<sup>1</sup>—predictive or fair scheduling is threatening to rival paid sick leave in breadth and complexity.

### Which Employers Are Covered?

Fair scheduling laws are largely targeted towards larger employers in the retail and food services industries. The new Oregon law has expanded that scope to include “hospitality establishments” (i.e., hotel and motel employers).

### Industry-Specific Application

Fair scheduling laws are largely industry-specific and targeted at retail<sup>2</sup> and restaurant<sup>3</sup> employers, with San Jose being a notable exception. Although it has the narrowest provisions of all of the fair scheduling laws

1 The State of New York currently is considering the adoption of statewide regulation of “just-in-time,” “call-in” or “on-call” scheduling practices. <https://www.governor.ny.gov/news/governor-cuomo-directs-commissioner-labor-hold-public-hearings-employee-scheduling>.

2 San Francisco, CA Police Code § 3300F2; San Francisco, CA Police Code § 3300G.3; Emeryville, CA Mun. Code § 5-39.02(a)(1); Seattle, WA Mun. Code § 14.22.020.A.1; NYC Admin. Code § 20-1251.

3 Emeryville, CA Mun. Code § 5-39.02(a)(2); Seattle, WA Mun. Code § 14.22.020.A.2; NYC Admin. Code § 20-1251.

passed to date, requiring only<sup>4</sup> that employers offer additional hours to existing part-time employees before hiring externally, the San Jose ordinance has the broadest application in that it applies to all employers either subject to San Jose's business license tax or exempt from such tax but having a place of business within city limits.<sup>5</sup>

Some of the fair scheduling laws are targeted specifically at fast food establishments. The Emeryville and New York City fair scheduling laws apply to restaurants where patrons order or select food or beverages and pay before eating.<sup>6</sup>

## Employer Size Requirements

Most of the fair scheduling laws currently in effect are targeted at larger employers. San Francisco's Formula Retail Employee Rights Ordinances<sup>7</sup> apply to certain retail establishments having at least 40 retail sales establishments worldwide. The Seattle Secure Scheduling Ordinance applies to food service and retail employers with 500 or more employees worldwide and to full-service restaurants that have 500 or more employees worldwide and 40 or more locations worldwide.<sup>8</sup> New York City's "Fair Workplace" legislation applies to fast food establishments that have 30 or more establishments nationally, whether as an integrated enterprise or a franchise.<sup>9</sup> Oregon's Fair Work Week Act applies to retail, hospitality, and food services establishments with at least 500 employees worldwide.<sup>10</sup>

## Which Employees Are Covered?

Fair scheduling laws apply primarily to employees who are entitled to payment of minimum wage and perform a minimum number of hours of work within the geographic limits of the jurisdiction.

## Employees Entitled to Payment of Minimum Wage

Perhaps unsurprisingly given the underlying purpose of providing employees with predictable schedules and the opportunity to pursue full-time employment if desired, fair scheduling laws apply largely to employees entitled to payment of minimum wage.<sup>11</sup> The Seattle and Oregon laws do not apply to employees employed in an executive, administrative, or professional capacity as defined under applicable state law.<sup>12</sup> Further, the Seattle law does not apply to employees who work in an hourly administrative or professional position, such as human resources, payroll, and receptionist positions.<sup>13</sup> The New York City law explicitly excludes salaried fast food employees.<sup>14</sup>

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4 The law also imposes recordkeeping and anti-retaliation requirements.

5 San Jose, CA Mun. Code § 4.101.030(D).

6 The Emeryville ordinance explicitly excludes establishments that provide food service to patrons who order while seated and pay after eating. That ordinance also excludes all establishments that offer alcoholic beverages with meals, regardless of when the food is ordered. Emeryville, CA Mun. Code § 5-39.01(g).

7 San Francisco, CA Police Code §§ 3300F, 3300G. The ordinances apply to businesses that are located in San Francisco, fall under the San Francisco Planning Code's definition of "Formula Retail Use," employ at least 20 employees in the City of San Francisco, and have at least 40 retail sales establishments worldwide. San Francisco, CA Police Code §§ 3300F.2, 3300G.3.

8 Seattle, WA Mun. Code § 14.22.020.A.

9 Certain components of the law apply to retailers. A "retail business" is defined more broadly as any entity with 20 or more employees engaged primarily in the sale of consumer goods at one or more stores within the city. NYC. Admin. Code § 20-1201.

10 Oregon SB 828, § 3(1) (2017).

11 San Francisco, CA Police Code §§ 3300F.2, 3300G.3; Code § 5-39.01(d); San Jose, CA Mun. Code § 4.101.030(C); Emeryville, CA Mun. Code § 5-39.01(d). San Jose explicitly exempts executive, administrative, and professional employees who are exempted from overtime requirements. San Jose Opportunity to Work Ordinance General FAQs, Q7.

12 Seattle, WA Mun. Code § 14.22.015, A; Seattle, WA Mun. Code § 12A.28.200; Oregon SB 828 §2(b)(A) (2017); ORS 653.020(3).

13 Seattle Office of Labor Standards, Chapter 120, Administrative Rules, SHRR ("SHRR") 120-090.2.

14 NYC Admin. Code § 20-1201.

## Geographic Restrictions

With the exception of Oregon's state-wide law, most fair scheduling laws prescribe geographic requirements for employee eligibility. San Francisco requires that eligible employees perform at least two hours of work for an employer located within San Francisco's geographic boundaries.<sup>15</sup> San Jose requires that eligible employees perform at least two hours of work for a covered employer.<sup>16</sup> The Emeryville ordinance applies to employees who perform at least two hours of work within the geographic boundaries of the City of Emeryville.<sup>17</sup> The Seattle ordinance applies to employees who work at least 50% of the time within the City of Seattle over the course of a year (or over the course of the period of employment if less than one year).<sup>18</sup> The New York City ordinance applies to employees "employed within the city."<sup>19</sup>

## What Do Fair Scheduling Laws Require?

Much like paid sick leave legislation, the fair scheduling laws currently in effect vary (sometimes greatly) from jurisdiction to jurisdiction. The laws generally mandate one or more of the following, each of which is discussed in more detail below: (1) a good-faith estimate of the employee's anticipated work schedule, (2) the right to request input into one's work schedule, (3) the right to rest between work shifts, (4) advance notice of the work schedule, (5) the right to decline employer-requested changes to the posted work schedule, (6) compensation for schedule changes (if the employee agrees to accept such changes), and (7) a duty to offer available work hours to existing employees before hiring externally.

## Good-Faith Estimate of Work Schedule

The fair scheduling laws in San Francisco, Emeryville, Seattle, New York City, and Oregon all require employers to provide employees with good-faith estimates of their work schedule, although the requirements differ for each jurisdiction.

In San Francisco, employers must provide each employee, prior to the start of employment, with a written good-faith estimate of his or her schedule. The good-faith estimate must include the employee's expected minimum number of scheduled shifts per month and the days and hours of those shifts, including on-call shifts.<sup>20</sup> Importantly, the employee may request that the employer modify the good-faith estimate, and the employer must provide the employee with notice of its decision regarding the request on or before the commencement of employment.<sup>21</sup>

In Emeryville, employers must provide new employees with a good-faith estimate of all anticipated shifts in a calendar week, including start and end times for the shift.<sup>22</sup> Covered employers are required to consider an employee's request to modify the good-faith estimate, and while the employer has sole discretion to accept or reject the request, the employer must provide written notification of its decision prior to or upon commencement of employment.<sup>23</sup>

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15 San Francisco, CA Police Code §§ 3300F.2, 3300G.3.

16 San Jose, CA Mun. Code § 4.100.030(B).

17 Emeryville, CA Mun. Code § 5-39.01(d).

18 Seattle, WA Mun. Code §14.22.015; SHRR 120-090.1, SHRR 120-090.4.

19 NYC Admin. Code § 20-1201.

20 San Francisco, CA Police Code § 3300G.4(a)(1).

21 San Francisco, CA Police Code § 3300G.4(a)(2).

22 Emeryville, CA Mun. Code § 5-39.03(a).

23 Emeryville, CA Mun. Code § 5-39.03(a)(2).

In Seattle, employers are required to provide new employees<sup>24</sup> with a good-faith estimate along with the information required by Seattle's wage theft ordinance.<sup>25</sup> The good-faith estimate must state the median<sup>26</sup> number of hours the employee can expect to work each week and whether on-call shifts will be expected. The good-faith estimate must cover the first year of employment, divided into three-month increments.<sup>27</sup> Employers must revise the good-faith estimate annually and whenever there is a "significant change."<sup>28</sup>

In New York City, covered fast food employers<sup>29</sup> must provide a written good-faith estimate setting forth the employee's expected hours per week for the duration of employment and expected dates, times, and locations of those hours. In the case of a long-term or indefinite change to the good-faith estimate, the fast food employer is required to provide an updated good-faith estimate to the affected employee as soon as possible and before the employee receives the first work schedule following the change.

In Oregon, the good-faith estimate must (1) state the median number of hours the employee can expect to work in a one-month period, (2) explain the voluntary standby list (a requirement that is unique to Oregon), (3) explain the objective standard to determine when an employee expected to work on-call shifts must be available to work such shifts, and (4) state the employee's "work schedule," which means the hours, days, and times, including regular work shifts and on-call shifts, when an employee will be required to work.<sup>30</sup>

## Right to Request Input into Work Schedule

Most fair scheduling laws give employees a right to request and provide input regarding their work schedules.

In Emeryville, apart from the ability to request modification of the good-faith estimate, employees may request a flexible working arrangement, which could include requests for additional shifts or hours, changes in days of work or start and/or end times for shifts, permission to exchange shifts with other employees, limitations on availability for work, part-time or part-year employment, job-sharing, and reductions or other changes to work duties.<sup>31</sup> Employees are protected from retaliation for requesting a flexible work schedule.

In Oregon, employees may identify limitations or changes in their availability for work, or request not to be scheduled during certain times or at certain locations.<sup>32</sup> Employers may require reasonable verification of the need underlying the request but in the case of medical verification, the employer must pay the costs of such verification that are not covered by the employee's health benefit plan, including lost wages.<sup>33</sup>

The Seattle law is the most robust on this point, requiring employers to engage in an interactive process with employees who identify limitations or changes in their availability for work. For requests not due to a "major life event," the employer may grant or deny the request for any reason that is not unlawful. If

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24 It is unclear whether the Seattle ordinance also requires employers to provide a good-faith estimate to existing employees who were already employed when the Seattle ordinance went into effect on July 1, 2017.

25 Seattle, WA Mun. Code §14.22.025.

26 Seattle, WA Mun. Code §14.22.025.A; SHRR 120-120.4.

27 SHRR 120-120.3.

28 A "significant change" is defined as a difference of at least 30% (above or below) between the good-faith estimate and the employee's median number of scheduled hours in the written work schedules over the course of one or more three-month increments. SHRR 120-130. Importantly, the administrative rules for the Seattle ordinance provide that the "employee is responsible for recognizing a significant change and notifying the employer of the significant change." SHRR 120-140.2.a. Absent such notification from the employee, the employer is merely "encouraged to initiate the interactive process within a week of the employer's recognition of a significant change." *Id.*

29 The New York City law does not require retail employers to provide good-faith estimates.

30 Oregon SB 828 §4(1) (2017).

31 Emeryville, CA Mun. Code § 5-39.07.

32 Oregon SB 828 §6a (2017).

33 Oregon SB 828 §6a(2) (2017).

the request is due to major life event,<sup>34</sup> the employer may require the employee to provide verifying information and must grant the request unless there is a bona fide business reason for denial. The employer's response to the request must be in writing, and there are specific timelines for initiating and completing the interactive process.<sup>35</sup>

## Right to Rest Between Work Shifts

Most fair scheduling laws<sup>36</sup> also require that covered employees be provided with a minimum number of hours' rest between work shifts, and grant such employees the right to decline to work during the mandatory inter-shift rest period. In the event an employee agrees to work during the rest period, the employer is required to pay additional compensation. The rest period ranges from 10 hours in Seattle<sup>37</sup> and Oregon<sup>38</sup> to 11 hours in Emeryville<sup>39</sup> and New York City (fast food employers only).<sup>40</sup> The measure of compensation owed to employees who agree to work within the rest period differs for each jurisdiction. In Emeryville<sup>41</sup> and Oregon,<sup>42</sup> the employee is entitled to pay at 1.5 times the employee's regular rate of pay for hours worked within the rest period. In Seattle, the employee is entitled to compensation at 1.5 times the employee's "scheduled rate of pay."<sup>43</sup> In New York City, fast food employers must pay a fast food employee a flat \$100 for each instance that the employee works a shift within the rest period.<sup>44</sup>

## Advance Notice of Schedule

With the exception of San Jose, all fair scheduling laws require covered employers to provide covered employees with advance notice of their work schedules. In San Francisco,<sup>45</sup> Emeryville,<sup>46</sup> Seattle,<sup>47</sup> and Oregon,<sup>48</sup> covered employers must provide employees with 14 days' advance notice of their work schedules. Fast food employers in New York City must also provide employees with 14 days' advance notice of their work schedules,<sup>49</sup> while New York City retail employers must provide employees with 72 hours' notice.<sup>50</sup>

<sup>34</sup> Under the Seattle ordinance, a "major life event" is defined as "a major event related to the employee's access to the workplace due to changes in the employee's transportation or housing; the employee's own serious health condition; the employee's responsibilities as a caregiver; the employee's enrollment in a career-related educational or training program; or the employee's other job or jobs." Seattle, WA Mun. Code §14.22.010.

<sup>35</sup> Seattle, WA Mun. Code §14.22.030; SHRR 120-150, 120-160, 120-170.

<sup>36</sup> The San Francisco and San Jose fair scheduling laws do not impose such requirements and the New York City ordinance does not impose such requirements on retail employers.

<sup>37</sup> In Seattle, unless requested or consented to by the employee, the employer may not require an employee to work fewer than 10 hours after the end of the previous shift. Seattle, WA Mun. Code §14.22.035. The requirement for additional compensation does not apply to a "split shift" as defined under the administrative rules, but does apply to a "double shift." Seattle, WA Mun. Code §14.22.035C; SHRR 120-190, 200.

<sup>38</sup> Oregon SB 828 §6 (2017).

<sup>39</sup> In Emeryville, an employee has the right to decline work hours that occur fewer than 11 hours after the end of the previous shift. Emeryville, CA Mun. Code §5-39.06(a).

<sup>40</sup> In New York City, unless a fast food employee consents or requests, a fast food employer shall not require a fast food employee to work two shifts with fewer than 11 hours rest between end of first shift and the beginning of second.

<sup>41</sup> Emeryville, CA Mun. Code § 5-39.06(b).

<sup>42</sup> Oregon SB 828 §6(2) (2017). These pay requirements do not apply to an employee engaged in providing roadside assistance services, which is defined as offsite repair assistance rendered to a motorist with a disabled vehicle. Oregon SB 828 §6(3) (2017).

<sup>43</sup> Seattle, WA Mun. Code §14.22.035.B.

<sup>44</sup> NYC Admin. Code § 20-1231.

<sup>45</sup> San Francisco, CA Police Code § 3300G.4(b).

<sup>46</sup> Emeryville, CA Mun. Code § 5-39.03.

<sup>47</sup> Seattle, WA Mun. Code §14.22.040.

<sup>48</sup> Effective July 1, 2018, covered Oregon employers must provide employees with 7 days' notice of their work schedules. Oregon SB 828 §5 (2017). The requirement to provide 14 days' notice will take effect on July 1, 2020. Oregon SB 828 §§ 5a, 16(3) (2017).

<sup>49</sup> NYC Admin. Code § 20-1221(b).

<sup>50</sup> NYC Admin. Code § 20-1252(b).

## Compensation for Schedule Changes

All jurisdictions that require employers to provide employees with advance notice of their work schedules also require employers to pay compensation for schedule changes made within the notice period.<sup>51</sup> The amount owed generally depends upon the amount of notice given, the length of the schedule that was revised, and whether hours were added or subtracted or just moved to a different date or time. New York City is unique in requiring fast food employers to pay a flat sum for each schedule change.

There are some exceptions to pay requirements. For example, Seattle and Oregon recognize a grace period of 15 or 30 minutes, respectively, for schedule changes.<sup>52</sup> In addition, each of the jurisdictions provides an exception for when an employer's operations cannot begin or continue due to threats beyond the employer's control<sup>53</sup> and for voluntary shift swaps or trading between employees.<sup>54</sup>

## Offers of Work to Existing Employees

All of the fair scheduling laws encourage employers to offer additional work hours that become available to existing employees before hiring externally. In San Francisco,<sup>55</sup> Emeryville,<sup>56</sup> and San Jose,<sup>57</sup> employers are required to first offer available hours to part-time employees before hiring externally. In Seattle<sup>58</sup> and New York City (fast food employers only),<sup>59</sup> the requirement to first offer available hours to existing personnel is not limited to part-time employees.

The Oregon law does not require employers to offer additional hours to existing employees before hiring externally but authorizes the use of a "voluntary standby list" to avoid predictability pay requirements.<sup>60</sup> Employers may use the voluntary standby list to request that employees work additional hours to address unanticipated customer needs or unexpected employee absences. The employer provides notice of the availability of additional hours to employees who have agreed in writing to be included on the list, and those employees are then free to either accept or reject the additional hours. Employees who accept the additional hours are not entitled to predictability pay for the change to their work schedule.

## Family-Friendly Ordinances

Closely related to fair or predictive scheduling laws are family-friendly workplace laws, which give employees a right to request flexible or predictable work arrangements. Currently, such laws are in effect in Vermont; San Francisco, California; and Berkeley, California.<sup>61</sup> These laws generally allow employees to request a flexible or predictable working arrangement, which may consist of intermediate or long-term changes to the number

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51 San Francisco, CA Police Code § 3300G.4(c); Emeryville, CA Mun. Code § 5-39.04(c); Seattle, WA Mun. Code § 14.22.050; NYC Admin. Code § 20-1222; Oregon SB 828 §7 (2017).

52 SHRR 120-260.3; Oregon SB 828 §7(3)(a) (2017).

53 San Francisco, CA Police Code § 3300G.4(e)(1), (2), (3); Emeryville, CA Mun. Code § 5-39.04(d); Seattle, WA Mun. Code § 14.22.050.B.7, B.8, B.9; NYC Admin. Code § 20-1222(c)(1); Oregon SB 828 §7(3)(g), (h), (i) (2017).

54 San Francisco, CA Police Code § 3300G.4(e)(7); Emeryville, CA Mun. Code § 5-39.04(d)(4); Seattle, WA Mun. Code § 14.22.050.B.1; NYC Admin. Code § 20-1222(c)(3); Oregon SB 828 §7(3)(b) (2017). There are additional exceptions specific to each jurisdiction, such as disciplinary-related reductions in hours and last-minute schedule changes caused by another employee unexpectedly missing work.

55 San Francisco, CA Police Code § 3300F.3.

56 Emeryville, CA Mun. Code § 5-39.05.

57 San Jose, CA Mun. Code § 4.101.040.

58 Seattle, WA Mun. Code § 14.22.055.

59 NYC Admin. Code § 20-1241.

60 Oregon SB 828 §4a (2017).

61 Vt. Stat. Ann. tit. 21, § 309; San Francisco, CA Admin. Code § 12Z et seq.; Berkeley, CA Mun. Code § 13.101 et seq.

of days or hours worked or the time the employee arrives at or departs from work and arrangements to work from home or job-share. Employees are permitted to make requests at least two times per year, and employers are required to consider and respond to the request.

## Next Steps

Employers with operations in fair/predictive scheduling or family-friendly workplace locations should take immediate steps to comply with scheduling requirements:

- Employers in San Francisco, San Jose, Berkeley, Emeryville, Seattle, New York City, or Oregon should determine whether fair/predictive scheduling or family-friendly workplace laws apply to their operations.
- Employers in the retail, hotel, motel, hotel casino, and food services industries should determine whether fair/predictive scheduling or family-friendly workplace laws apply to their operations.
- Affected employers should ensure that management can access historical weekly/daily business data for affected locations to assist managers in designing effective schedules.
- Covered employers should adopt fair/predictive scheduling and family-friendly workplace policies, as applicable, to inform employees and managers of the applicable legal requirements and demonstrate to regulators the company's commitment to complying with such requirements.
- Covered employers should also train human resources, payroll, and managerial staff on fair/predictive scheduling and family-friendly workplace requirements.
- To comply with the laws' extensive record-keeping requirements, employers should draft the documentation necessary to comply with (or demonstrate compliance with) fair/predictive scheduling and family-friendly workplace requirements, such as good-faith estimates of work schedules, voluntary standby list notice and consent, notices of work schedules, notices of available hours, and memorialization of employee requests or consents to work within the rest period between shifts or to make changes to posted work schedules. Employers should also review their payroll and timekeeping systems to ensure that they are capable of recognizing, processing and accurately applying all applicable scheduling and predictability pay scenarios.
- In addition, employers should consider adding a summary of covered employees' rights in job postings, offer letters, and other recruitment and orientation materials.