

December 9, 2014

San Francisco Ordinance Imposes New Burdens on 'Formula' Retail Employers

By Michael Brewer, Christopher Cobey, and Jason Shapiro

In addition to federal and state laws, San Francisco currently has ten labor and employment laws that apply only to employees working within the City.¹ On December 5, 2014,² the eleventh San Francisco-specific employment law was enacted, expanding the rights of some retail workers employed by specified retail employers.

The "Retail Workers Bill of Rights," which consists of two ordinances (Nos. 140880 and 141024),³ will regulate the employment of some part-time retail workers in San Francisco.

Which San Francisco employers are affected?

The Retail Workers Bill of Rights covers employers that qualify as "Formula Retail Establishments" (FRE) under the San Francisco Planning Code, have at least 20 retail sales establishments located worldwide, and employ 20 or more people within San Francisco. Section 703.3 of the San Francisco Planning Code defines "formula retail use" as a retail sales establishment that maintains *two or more* of the following features:

1. a standardized array of merchandise (i.e., 50 percent or more of in-stock merchandise comes from a single distributor bearing uniform markings);
2. a standardized façade;
3. a standardized décor and color scheme;
4. a uniform apparel;
5. standardized signage; and
6. a trademark or service mark.

1 Minimum Wage Ordinance, Paid Sick Leave Ordinance, Health Care Security Ordinance, Family Friendly Workplace Ordinance, Prevailing Wage, Minimum Compensation Ordinance, Health Care Accountability Ordinance, Sweatfree Contracting Ordinance, Displaced Worker Protection Act, and the Fair Chance Ordinance.

2 The City's Board of Supervisors passed the law on November 25 and Mayor Edwin Lee allowed it to become law by failing to sign within 10 days of the Board's action.

3 The 37 pages of the text of the two ordinances, along with previous versions and legislative reports, are accessible at <http://www.sfbos.org/index.aspx?page=9681>.

The Retail Workers Bill of Rights is estimated to affect approximately 1,250 retail chain stores in San Francisco. Business groups, including San Francisco's Chamber of Commerce, have publicly opposed the new legislation, claiming that the legislation does not provide sufficient flexibility to employers that experience seasonal shifts and does not accommodate small, independent franchisees.

Which San Francisco employees are affected?

The Retail Workers Bill of Rights covers individuals who qualify as "employees" under the City's Minimum Wage Ordinance (Administrative Code Chapter 12R), as well as any individual who, in a particular week, is scheduled for an on-call shift of at least two hours for any employer within the geographic boundaries of the City, regardless of whether the person is required to report to work for such shift.

What are the new requirements for affected employers?

The following are some of the more notable requirements under Ordinance No. 140880:

- Employers must first offer, in writing, any *additional hours of work* to *current* part-time employees *before hiring new employees or using subcontractors* (including janitorial or security services contractors), *temporary services*, or a *staffing agency* to do work, but only if the part-time employees are qualified to do the additional work and the additional work is the same or similar to work the employees have performed for the employer already. Employers are not required to provide employees with additional hours of work that would cause the employee to work more than 35 hours in the workweek.
- If the employer's business *changes ownership*, the new owners must retain the existing employees (excluding the supervisory, managerial, or confidential employees) for at least 90 days from sale or other transfer of the business.

The following are some of the more notable requirements under Ordinance No. 141024:

- Employers must provide notice to employees of any change to the employee's posted or transmitted work schedule, and if the employer changes or cancels an employee's previously-scheduled shift, the employer must provide the affected employee with a specified amount of "predictability pay"⁴ of up to four hours of pay at the employee's regular rate of pay.
- Prior to the start of employment, employers must provide new employees with a "good faith estimate," in writing, of the employee's expected minimum number of scheduled shifts per month, as well as the days and hours of those shifts.⁵
- Employers must provide their employees with at least two weeks' notice of their work schedules by either: (a) posting the work schedule; or (b) transmitting the work schedule by electronic means.
- Part-time employees must receive the same starting hourly wage provided to starting full-time employees who hold jobs that require equal skill, effort, and responsibility, and that are performed under similar working conditions.
- Employers must provide part-time employees with the same access to employer-provided paid and unpaid time off that the employer provides to full-time employees for the same job classification. However, the part-time employee's eligibility for employer-provided paid or unpaid time off may be pro-rated based on the number of hours the part-time employee works.
- Part-time employees must receive treatment equal to that of full-time employees concerning eligibility for promotions for the same job classification. Employers may condition eligibility for promotion on the employee's availability for full-time employment and on reasons other than the part-time status of the employee, such as nature and amount of work experience.

4 Section 3300G.4(c)(2) of Ordinance No. 141024 sets forth the "predictability pay" as follows: (A) one hour of pay at the employee's regular rate if the employee receives less than seven days' notice but at least 24 hours' notice; (B) two hours of pay at the employee's regular hourly rate for each shift of four hours or less if the employee receives less than 24 hours' notice; and (C) four hours of pay at the employee's regular hourly rate for each shift of more than four hours if the employee receives less than 24 hours' notice.

5 Section 3300G.4(a)(1) of Ordinance No. 141024 notes that this estimate "shall not constitute a contractual offer and the Employer shall not be bound by the estimate."

What agency will enforce the new ordinances?

The San Francisco Office of Labor Standards Enforcement (OLSE) (<http://sfgsa.org/index.aspx?page=391>) will enforce the Retail Workers Bill of Rights.

What are the penalties for noncompliance?

If the OLSE determines that an employer violated this ordinance, the agency may order the employer to provide any “appropriate relief,” including payment to employees for lost wages and a penalty of \$50 to each employee or person whose rights under this ordinance were violated for each day that the violation occurred or continued.

Employers may receive an administrative fine of up to \$500 per eligible employee employed by the employer for specific violations of the ordinance (e.g., failure to make an offer of additional available hours to part-time employees in writing).⁶

When do the new ordinances take effect?

Each resolution provides that its provisions will become operative 180 days after the ordinances’ effective date. The ordinances’ effective date is 30 days after their date of passage.⁷ Thus, the estimated operative date is approximately June 24, 2015.

Mayor Edwin Lee neither signed nor vetoed the ordinances, instead opting for a third course permitted by the San Francisco City Charter: he allowed them to become law without his signature.⁸

How should affected employers prepare to implement these ordinances?

- Modify policies and procedures inconsistent with the new law and consider including the new law’s requirements in policies and procedures.
- Train human resources and managerial staff on the law’s new requirements.
- Begin to draft the necessary notices of work schedules to be used when the ordinances are implemented, as well as other notices required under the ordinances.
- Consider adding a description of the affected employees’ rights in existing employee handbooks.

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6 Ordinance No. 140880.

7 Date of passage was November 25, 2014. See San Francisco City Charter, Art. II, sec. 2.105 (ordinances and resolutions).

8 San Francisco City Charter, Art. III, sec. 3.103 (veto power).