

Predictably Unpredictable:

Navigating Fair Workweek Laws

Across the United States

July 11, 2024

Today's Webinar Host:

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Marketing Director

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- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:
Deliver expert guidance in a fraction of time and cost vs traditional methods

Simplify the complexity of employment law



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Create and maintain an up-to-date and legally compliant employee handbook



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The Reference Center

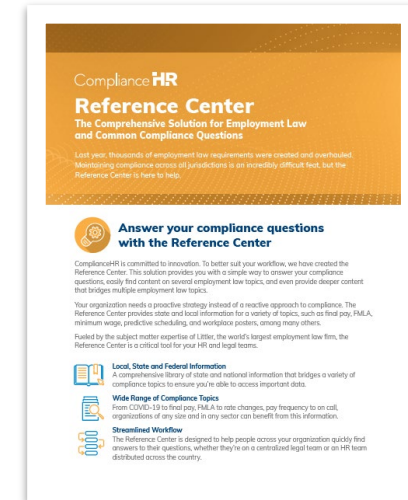
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The Document Center

Efficiently generate state and federal compliant documents throughout the employee lifecycle

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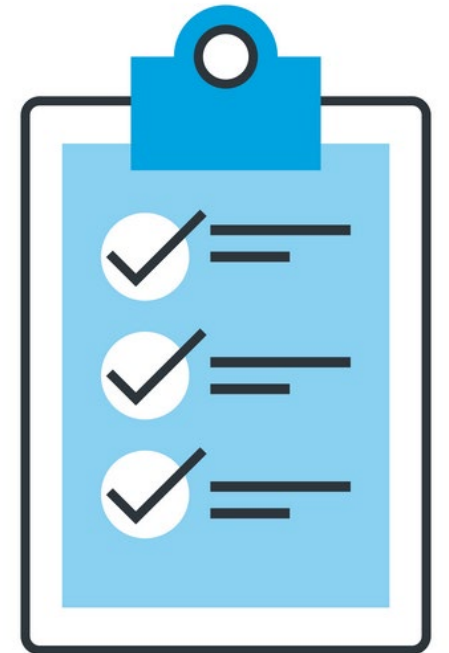


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Agenda

- Overview
- Covered Employers and Employees
- Good Faith Estimates (“GFE”)
- Advance Notice of Schedules
- Schedule Changes – Notice, Re-Posting Schedule, Consent, and Premium Pay
- Clopenings - Right to Rest Between Shifts
- Access to Hours before External Hiring
- Job Protections
- Notices, Postings, Recordkeeping
- Recent Developments



- **Fair Workweek Laws:**

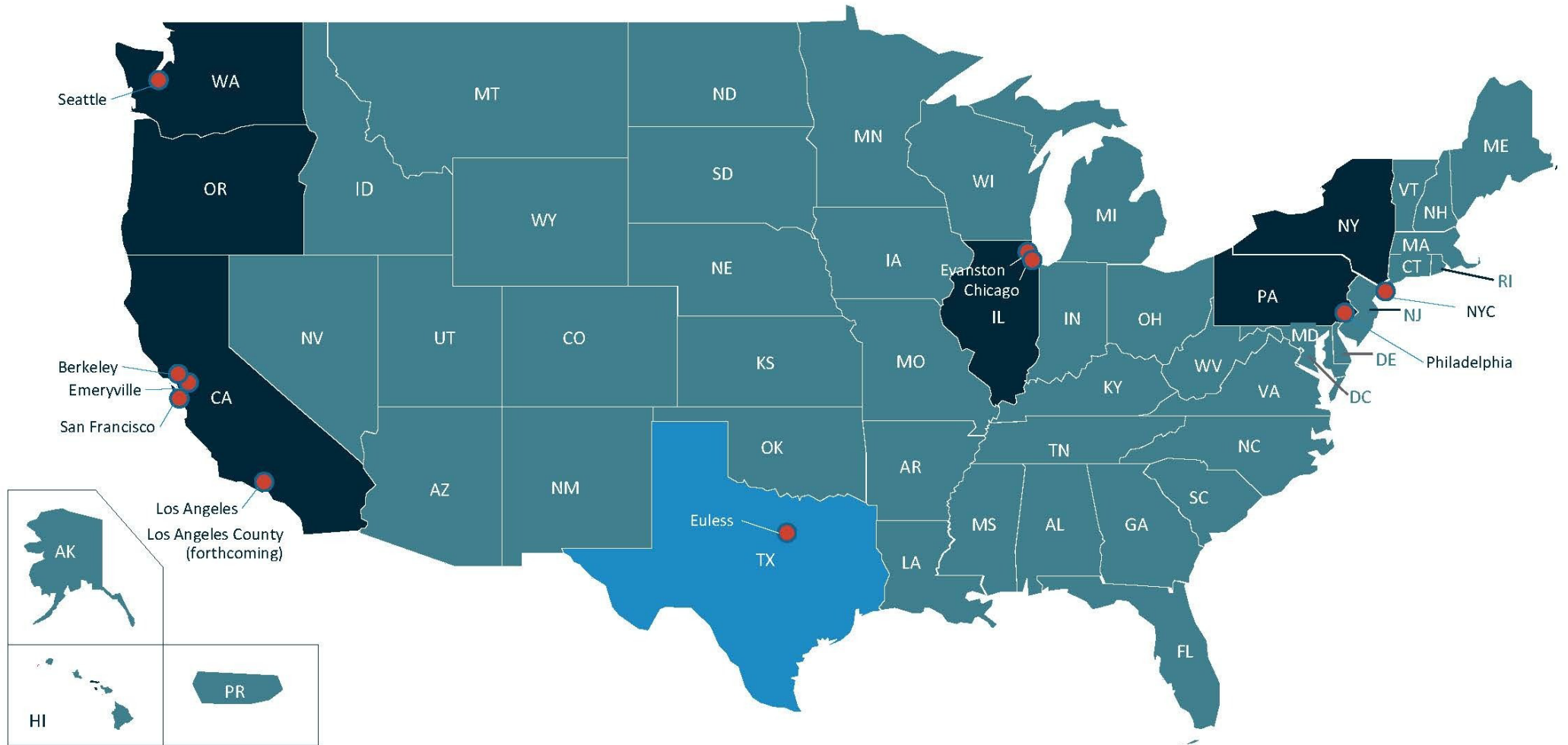
- Good faith estimates
- Advance notice of schedules
- Schedule change processes and premium pay
- Right to rest
- Access to hours before external hiring



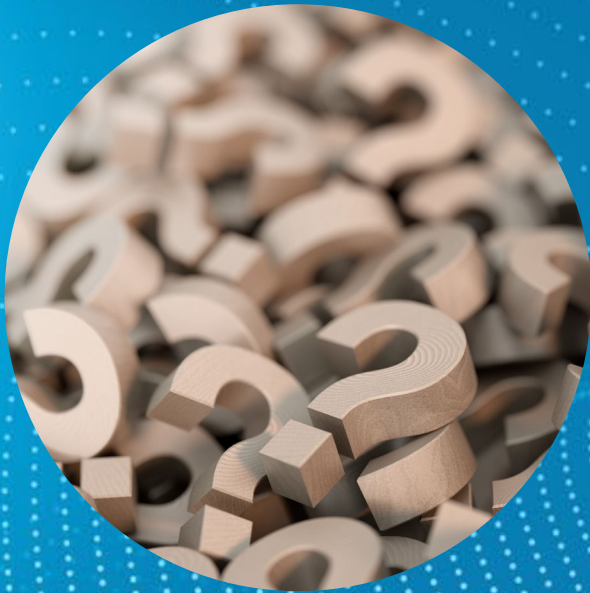
- **Related Laws**

- Access to hours (*CA - San Jose; WA - Renton, SeaTac & Tukwila*)
- Process for employee schedule requests and prohibition on retaliation (*NH, VT*)
- Worker Bill of Rights (*NJ temp workers*)

Fair Workweek Jurisdictions



Who is Covered?



Covered Employers: Complex

Jurisdiction		Retail	Restaurants & Food Servs	Hospitality	Mfg	Others	# Employees anywhere and in locale
CA	Berkeley	Y	Y	Y	Y	<ul style="list-style-type: none"> Warehousing Building Services Healthcare City Government 	<ul style="list-style-type: none"> ≥ 56 + ≥ 10 in city ≥ 100 (restaurants, franchisees & nonprofit)
CA	Emeryville	Y	Fast Food				<ul style="list-style-type: none"> ≥ 56 retail ≥ 20 & 12 locations (fast food franchises)
CA	Los Angeles	Y*					<ul style="list-style-type: none"> ≥ 300
CA	LA County**	Y*					<ul style="list-style-type: none"> ≥ 300
CA	San Francisco	Y	Y			<ul style="list-style-type: none"> Other Formula Retail & Their Property Service Contractors*** 	<ul style="list-style-type: none"> ≥ 40 stores & ≥ 20 employees in city

*Includes retail stores and warehouses

**Effective July 1, 2025

Covered Employers: Complex

Jurisdiction		Retail	Restaurants & Food Servs	Hospitality	Mfg	Others	# Employees anywhere and in locale
IL	Chicago	Y	Y	Y		<ul style="list-style-type: none"> Warehousing Building Services Healthcare 	<ul style="list-style-type: none"> ≥ 100 (250 for nonprofits) & 50 in city who are covered ≥ 30 locations & 250 ee's (restaurants)
IL	Evanston	Y	Y	Y	Y	<ul style="list-style-type: none"> Warehousing 	<ul style="list-style-type: none"> > 100
NY	NYC	Y	Fast Food			<ul style="list-style-type: none"> Utility Safety 	<ul style="list-style-type: none"> >20 in city (retail) ≥ 30 locations (fast food)
OR	Statewide	Y	Y	Y			<ul style="list-style-type: none"> ≥ 500
PA	Phila	Y	Y	Y			<ul style="list-style-type: none"> ≥ 250 & 30 locations
TX	Euless	y	Y	Y	Y	<ul style="list-style-type: none"> All but hospitals & nonprofits 	<ul style="list-style-type: none"> ≥ 200
WA	Seattle	Y	Y				<ul style="list-style-type: none"> ≥ 500 ≥ 500 & ≥ 40 locations (full-service restaurants)

Employer Coverage: Complex

- Industry
 - NAISC code or other definition?
 - Definitions refer to other laws – e.g., Formula Retail
 - Primarily engaged in the industry?
- Establishments/Locations: Which get counted and which are covered?
- Employees: which get counted?
 - FT, PT, temps
 - Count all and/or those covered (employee coverage also complex)
- Franchises: Count locations anywhere and/or in jurisdiction



Covered Employees: Complex

CA	Berkeley	Non-exempt employees, earning < monthly salary equivalent of 40 hours x 2 x Berkeley min wage
CA	Emeryville LA/LA County San Francisco	Employees who are eligible for minimum wage protection (not Executive, Administrative, Professional exempt)
IL	Chicago	Employees earning < \$61,149.35 salary* or \$31.85/hr* (but not banquet employees paid gratuities) (*CPI adjustments each July 1)
IL	Evanston	Employees who are eligible for minimum wage protection
NY	NYC	<u>Fast Food</u> : Non-exempt employees providing specified services at fast food restaurants <u>Retail and Utility Safety</u> : Retail store employees & utility safety workers
OR	Statewide	Non-exempt employees providing retail, food or hospitality services at fixed point of sale locations
PA	Phila	Non-exempt employees providing retail, food or hospitality services at fixed point of sale locations
TX	Eules	Non-exempt employees
WA	Seattle	Employees as defined in Seattle Mun. Code 12A.28.200 (exclusions include EAP exempt and outside sales), working at a fixed point of sale location (not just front of house) in the City ≥ 50% of time

Good Faith Estimate of Work Schedule



What is a Good Faith Estimate of Work Schedule?

- Generally, an estimate, and not a contractual offer
- Required contents vary widely
 - Minimum # shifts/month & estimated days/hours (*San Francisco*)
 - Median # hours/month (*Oregon*)
 - Median # hours/week in 3-month increment for 1 year & if on-call hours (*Seattle*)
 - Estimated Schedule (*Berkeley, Emeryville*)
 - Average hours, if on-call hours, location, and range of days/times can expect to work (*Los Angeles, LA County, Chicago, Evanston, Philadelphia*)
 - “Regular Schedule” with 15% cap on reduction without consent (*NYC Fast Food*)



Good Faith Estimate of Work Schedule

- Deadlines to provide GFE vary
 - Before hire, with offer letter (*Los Angeles and LA County*)
 - At time of hire (*Oregon and Seattle*)
 - Before start of employment (*San Francisco, Chicago, Evanston*)
 - No later than first day (*Berkeley, Emeryville, and NYC Fast Food*)
 - No later than first day or last day of new hire training (*Philadelphia*)
- Compliance Strategy: Incorporate into hiring / onboarding along with required Fair Workweek Notices and Policies.



Good Faith Estimate of Work Schedule



- Interactive process on the GFE is formal in some jurisdictions
 - Employee has right to ask for schedule modifications
 - Employer may be required to respond in writing, in specified # of days
 - Denials of employee schedule requests may need business justification
 - Check specific rules in jurisdiction for obligations to accommodate scheduling requests
- Asking for availability before issuing the GFE can often avoid this process

Good Faith Estimate of Work Schedule

- Scheduling to GFE and issuing new GFEs – expectations vary
 - No duty to update is required (*Evanston*)
 - Not addressed (*Berkeley, Emeryville, San Francisco, Chicago*)
 - May have to re-issue upon request if hours vary (*Seattle*)
 - Need an unanticipated, documented legitimate business reason for substantial deviations (*Los Angeles & LA County*)
 - Issue a new GFE if a “significant change” in 6 of 12 weeks (hrs vary $\geq 20\%$ from average, or are on a day outside range, or ≥ 1 hr outside range) (*Philadelphia*)
 - Update “Regular Schedule” before issuing a schedule with the change (*NYC Fast Food*)

Advance Notice of Schedules



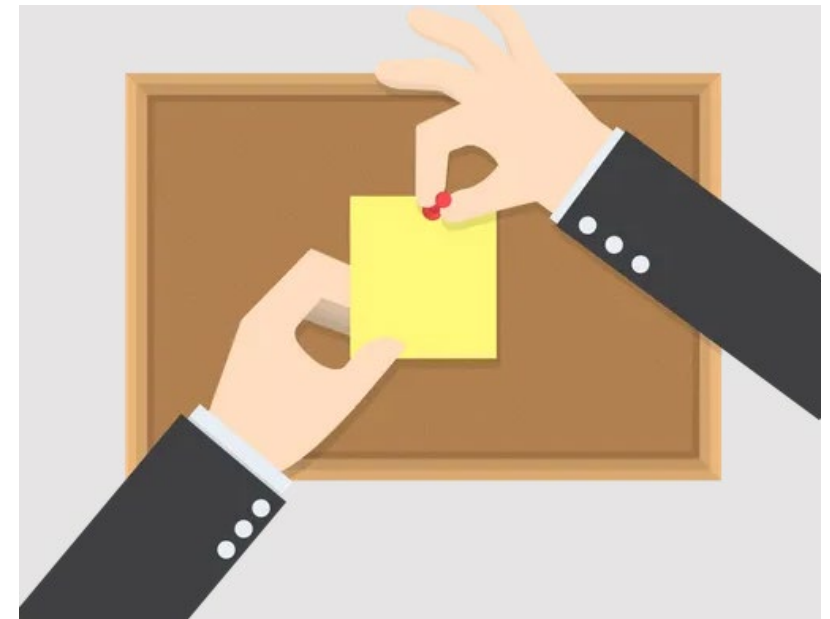
Advance Notice of Schedule

- General Rule across most jurisdictions
 - First day: Provide written schedule through date of posted schedules (keep proof, e.g., date-time-stamped/signed copy)
 - Thereafter: **14 days before workweek starts**, except:
 - 10 days (*Eules*)
 - 72 hrs before first shift on schedule (*NYC Retail/Utility Safety*)
- In stricter GFE jurisdictions, are the schedulers referring to the GFE when they write the schedule?
- Benefits of posting more than 14 days in advance



Advance Notice of Schedule (Continued)

- Post physically or electronically
- Date and time stamp to show when posted / effective
- List all employees, even if not scheduled
 - Domestic violence exception
- Include on-call shifts
- Specify location as necessary



Schedule Changes



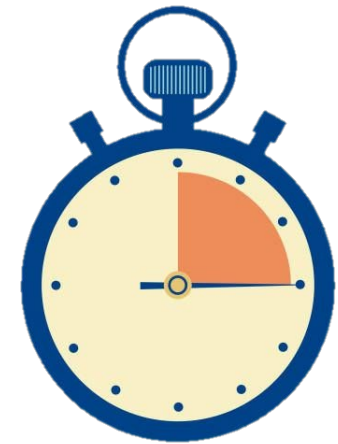
What Is a Schedule Change?

- Schedule Changes – in advance of shift and day-of
 - Employer-requested: Change in business needs
 - Employee requested: Vacation, sick, shift swaps, etc.
- Hours worked that vary from the schedule
 - Employee clocked out late
 - Employee does not comply with the schedule - late, no call/no show –can argue this is NOT a “Schedule Change”



Not Counted As Schedule Changes

- Small variances from scheduled start or stop time
 - ≤ 10 minutes & ≤ 30 minutes if completing service to a customer (*Berkeley*)
 - ≤ 10 minutes (*Emeryville*)
 - ≤ 15 minutes (*Seattle, NYC Retail & Utility Safety*)
 - ≤ 20 minutes (*Philadelphia*)
 - ≤ 30 minutes (*Oregon*)
- Small variances from scheduled total work time
 - ≤ 15 minutes (*Los Angeles, LA County, Chicago, Evanston*)
- Not addressed (*San Francisco, Eules, NYC Fast Food*)



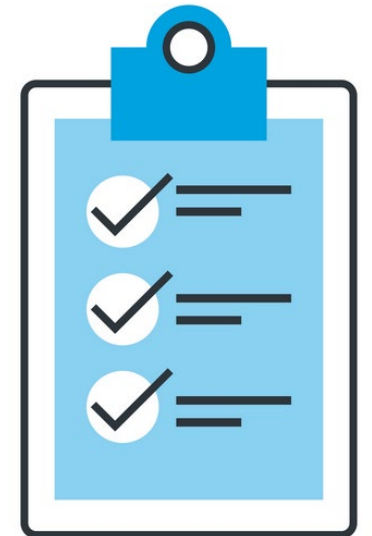
Who Initiated the Schedule Change?



Employer-Initiated Schedule Changes

Some or all of 4 steps required

1. Prompt Notice to Employee: In writing in some jurisdictions
 - Documented notice (*Emeryville, San Francisco*)
 - Written notice (*Los Angeles*)
 - Updated schedule in writing (*Chicago, Evanston, NYC*)
2. Re-Post Schedule in 24 Hours (*Chicago, Evanston, NYC, Philadelphia*)



Employer-Initiated Schedule Changes

3. Right to Decline/Consent: Employee has right to decline hours not included in timely posted schedule.

NOTE: Some jurisdictions require WRITTEN CONSENT, which is a significant compliance challenge

- Written consent before change required (*LA County, NYC*)
- Written consent required (*Philadelphia, Chicago, Euless*)
- Written consent required but can be annual (*Los Angeles*)
- Must document acceptance (*Emeryville, San Francisco*)
- Not specified—consent presumed if shift worked? (*Berkeley, Evanston, Oregon, Seattle*)

Employer-Initiated Schedule Changes

4. Premium Pay. Pay Premium Pay for the schedule change, unless an exception applies.
- Generally, the amount depends on whether hours were lost
 - Generally, premium pay is triggered for any changes after 14-day schedule posting deadline
 - Higher premium pay if less than 24 hours notice in some jurisdictions



Employer-Initiated Schedule Changes

4. Premium Pay: Amount depends on amount of notice and whether hours are lost:

Notice	No Lost Hours	Lost hours	Jurisdiction
After Schedule Posting Deadline	1 hour	½ pay for hours cut	LA, LA County, Philadelphia, Oregon, Seattle
	N/A	½ pay for hours cut	Eules
24 hours-7 days	1 hour	1 hour	San Francisco
After schedule posting deadline but ≥ 24 hours	1 hour	1 hour	Berkeley, Emeryville, Chicago, Evanston
After schedule posting deadline and < 24 hours	1 hour	Pay for hours cut up to cap of 4 hours	Berkeley, Emeryville
	1 hour	½ pay for hours cut	Chicago, Evanston
		2 hours of pay for shift ≤ 4 hours 4 hours of pay for shift > 4 hours	San Francisco

Employer-Initiated Schedule Changes

4. Premium Pay: NYC Fast Food – flat rate based on amount of notice

NYC Fast Food	No Lost Hours	Lost hours
7 days ≤ Notice < 14 days	\$10	\$20
24 hrs ≤ Notice < 7 days	\$15	\$45
Notice < 24 hours	\$15	\$75

Employer-Initiated Schedule Changes

Predictability Pay Exceptions: Vary widely across jurisdictions and some are expressly allowed in some jurisdictions and disallowed in others

1. Changes were Employee-Initiated, *e.g.*, absence, vacation, sick, late, and shift swaps/coverage arrangements (arranged by employees)
2. Changes were within shift start/end grace period
3. Termination/multi-day documented suspension due to policy or law violation
4. Force majeure events, *e.g.*, threats, failure of public utilities, acts of nature, pandemic, war, civil unrest, etc.

Employer-Initiated Schedule Changes

Predictability Pay Exceptions: Vary across jurisdictions (continued)

5. Asking for volunteers to leave early (*Philadelphia*)
6. Accepting hours in Access to Hours posting (*LA County, Seattle*)
7. Mutual agreement in writing to schedule change (*Chicago*)
8. Extra hours paid at OT rate (*Emeryville, Los Angeles, LA County, San Francisco*)
9. Volunteering in response to mass written communication, but rules differ (*Philadelphia, Los Angeles, LA County, San Francisco*)
10. Voluntary stand-by list or asking employee to cover unexpected customer need or employee absence after calling the standby list (*Oregon*)

Employer-Initiated Schedule Changes

Predictability Pay Exceptions: Vary across jurisdictions (continued)

11. Employee self-scheduling (*Evanston, Chicago*)
12. Ticketed event change-rules differ (*Philadelphia, Oregon*)
13. Hotel banquet department event change (*Philadelphia, Chicago*)
14. Manufacturing production or supply chain delays (*Berkeley, Chicago*)
15. Healthcare emergency triggering emergency plans, patient care needs specialized skills, unexpected substantial increase in demand (*Berkeley, Chicago*)

Employee-Initiated Schedule Changes



Employee-Initiated Schedule Changes

- Most schedule changes and variances are Employee-initiated
- Challenge to document and separate them from Employer-initiated schedule changes
- Approaches
 - Paper logs
 - Attendance tracking
 - Timeclock affirmations
 - Apps



Hypothetical – Volunteers?

Employer has three Covered Employees call off from the second shift. The first shift is still working. The manager walks around the business and asks out loud, “can anyone stay late?”

1. Is written consent needed?
2. Is predictability pay owed if someone volunteers to work this shift?

Hypothetical – Moved Shift Without Loss of Hours

Eli is scheduled for a shift on 4/28 from 9 to 5. Manager cancels the shift but adds a shift on 4/29 from 9 to 5 that wasn't previously scheduled (and gets Eli's consent to add the 4/29 shift).

Arguably, this is a shift change with no loss of hours, but

1. Do you pay premium pay for losing the 4/28 shift?
2. Do you pay premium pay for adding the 4/29 shift?

Right of Rest - Clopenings



Right of Rest Between Shifts – Clopenings

- Right of Rest: Generally, employees have a right of rest since end of prior day's shift or a shift that spanned 2 days
 - 9 hours (*Philadelphia*)
 - 10 hours (*Los Angeles, LA County, Chicago, Oregon, Seattle*)
 - 11 hours (*Berkeley, Emeryville, Evanston, NYC Fast Food*)
- Written Consent: Generally, must secure written consent to schedule an employee for a clopening shift that starts within the right of rest time
 - Can get written consent for multiple shifts ahead of time (*Philadelphia*)
 - Written consent must be date/time stamped and for each shift (*Chicago*)
 - Scheduling a shift starting within right of rest period is prohibited unless employee requests it or provides affirmative written consent (*Seattle*)

Right of Rest Between Shifts – Clopenings

Jurisdiction	For hours worked within the rest period	For all hours in shift that begins in rest period	Flat Rate
Berkeley, Emeryville, LA County, Oregon, Seattle	1.5 x regular rate		
Chicago, Evanston		1.25 x regular rate (unless shift is paid at an OT rate)	
Los Angeles		1.5 x regular rate	
Philadelphia			\$40
NYC Fast Food			\$100

Access to Hours before Employer Hires Externally



Access to Hours Before Employer Hires Externally

Access to hours process generally requires some or all of these

1. Policy: Must have, post and/or distribute a policy explaining process for posting and considering existing employees for available hours before hiring externally (*Emeryville, Philadelphia*)
2. Post available hours for required time period – duration varies by jurisdiction
3. Consider those who express interest and distribute hours to one or more qualified employees. Document the selection process.
4. External hires. If no qualified internal candidates express interest by expiration of posting and response period, then can hire externally
5. New hires must work hours actually posted.

Access to Hours Before Employer Hires Externally

Note:

1. Opt out: Employees can opt out of this process (*Los Angeles*)
2. Option to use access to hours list (*Seattle*)
3. Cannot discriminate based on protected classes, which in some jurisdictions include -- family caregiving responsibilities, status as a student, to avoid ACA
4. Predictability pay may be due in some jurisdictions (*Philadelphia*)
5. Steep penalties for failing to post and consider existing employees before hiring externally in some jurisdictions (*Philadelphia*)
6. NYC-Fast Food: Has different rules, including requirement to consider employees laid off in 1-year look back period



Job Protections



Job Protections – NYC Fast Food

- Just Cause. After 30 days of employment, cannot fire, cause constructive discharge, or reduce an employee's hours by more than 15% unless (1) there is just cause or (2) the business is suffering financially and employees with the least seniority are laid off as a result.
- Notice of Discharge. For any discharges, must issue a Notice of Discharge explaining the reasons for the discharge, any prior progressive discipline, and if the discharge was for a bona fide financial reason an explanation of the right to reinstatement if new shifts become available.
- Right to Reinstatement. Must reinstate laid off employees by seniority when hours become available (second in line after existing employees)

Notices Postings Recordkeeping

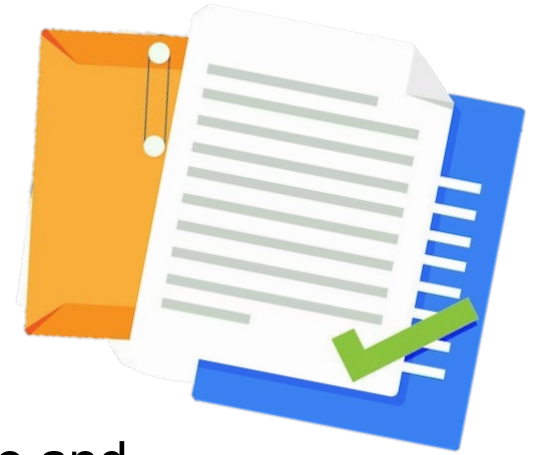


Notices and Postings

Some or all are required across jurisdictions

1. Mandatory Posters (multiple languages)
2. Offer / Hire / Onboarding
 - a. Good Faith Estimate
 - b. Notice of Rights (multiple languages)
 - c. Policy for Hiring Externally (multiple languages)
 - d. Any advance Consents that are permissible (to additional hours or start a work shift during the right of rest period)
 - e. First schedule through the date of posted schedules

Recordkeeping



1. Time period is generally 3 years to retain records.
2. Records that must be retained include all records to show compliance and coverage, especially if close to coverage thresholds.
3. Consider storing Fair Workweek documents all together to facilitate retrieval.
4. Workweek reconciliation and self-auditing will significantly augment compliance and lower exposure.
5. Some jurisdictions severely penalize recordkeeping violations (*Seattle*)

Compliance Strategy

Daily/Weekly reconciliations before payroll close of hours worked vs. scheduled, collect any required written consents or written communications of employee-initiated schedule changes and tally premium pay

Compliance Strategy

Periodic self-audit and submission of Fair Workweek records to designated Fair Workweek records storage.

Recent Developments



Enforcement Activity

Aggressive Agency Enforcement

- NYC Fast Food
- Seattle
- Philadelphia

Courts

- Philadelphia – Class actions
- Eules – Ordinance invalidated by TC preemption law, but the law was stricken by the courts, and now on appeal

Remedies

Per violation remedies in agency and court proceedings are punishing:

- Premium pay
- Penalties
- Fines
- Administrative fines
- Presumed damages
- Liquidated damages
- Interest
- Attorney's fees and costs



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Questions?

Please add any additional questions to the Q&A box

Thank you!

