

Wage and Hour Defense Blog

Insight and Commentary on Wage and Hour Law Developments Affecting Employers

Los Angeles Passes Ordinance Regulating Retail Employers' Scheduling Practices

By Benjamin Runge on December 28, 2022



The Los Angeles City Council passed the **Fair Work Week Ordinance** (“FWWO”) that seeks to “implement enforcement measures for the new fair work week employment standards” for employees in the retail sector. Going into effect April 1, 2023, the FWWO will apply to any person, association, organization, partnership, business trust, limited

liability company or corporation in the retail business or trade sector that directly or indirectly exercises control over the wages, hours or conditions of at least 300 employees globally. This includes employees through an agent or any other person, including through the services of a temporary staffing agency.

The ordinance applies to the geographic boundaries of the City of Los Angeles.

Employees are provided with the protections of the FWWO if they (i) perform at least two hours of work within the City of Los Angeles for an employer in the retail sector and (ii) are entitled to minimum wage under California's minimum wage laws.

Under the North American Industry Classification System, within the retail trade categories and **subcategories 44 through 45**, which generally consist of establishments primarily engaged in selling merchandise and rendering services incidental to the sale of merchandise. Industries within the retail trade category include health and personal care retailers, clothing retailers, motor vehicle and parts dealers, food and beverage retailers, building material and garden equipment supplies dealers, general merchandise retailers, furniture and appliance retailers, gasoline stations, electronic retailers, as well as sporting goods, hobby, musical instrument, and book retailers.

The ordinance requires an employer to provide employees with written notice of their work schedules at least fourteen calendar days before the start of the work period by either posting the work schedule in a conspicuous and accessible location or transmitting the work schedule by a manner reasonably calculated to provide actual notice to each employee. If an employer changes a work schedule after it has been posted or sent to employees, written notice must be provided, and the employee has a right to decline any hours, shifts or work location changes not included in the work schedule. If an employee voluntarily consents to work hours or shift changes, such consent must be in writing, and the employee may be entitled to "predictability pay" of an additional hour of pay at the employee's "regular rate of pay" – which we have previously discussed **here** – for each change.

The FWWO also requires employers to provide each prospective, new employee with a written good faith estimate of the employee's work schedule, including when they will be required to be on-call. The good faith estimate is not a binding, contractual offer.

However, if the employee's actual work hours substantially deviate from the good faith estimate, the employer must have a documented, legitimate business reason to substantiate the deviation.

Prior to hiring a new employee or using a "contractor" (although that term is not defined within the FWWO), temporary service, or staffing agency to perform work, an employer must offer available work to current employees if one or more of the current employees is qualified to do the work and the additional work hours would not result in the payment of overtime or double time. The offer must be made to current employees either in writing or by posting the offer in a conspicuous location at least 72-hours prior to hiring anyone new.

The FWWO also seeks to prevent "clopening" shifts, where an employee is scheduled back-to-back closing and opening shifts. The ordinance prohibits employers from scheduling an employee to work a shift that starts less than ten hours from their last shift without the employee's written consent. An employer is also required to pay an employee a premium of time and a half for each shift not separated by at least ten hours.

Under the FWWO, a worker is presumed to be an employee, and an employer has the burden of establishing that a worker is an independent contractor. Taking adverse action against an employee within ninety days of the employee's exercise of any protected rights under the ordinance shall raise a rebuttable presumption of having done so in retaliation for exercise of such rights. An alleged violation is only actionable if the employer does not take action to cure the alleged violations within 15 days from receipt of written notice. A violation of the ordinance can subject an employer to paying damages and statutory penalties, in addition to an employee's attorneys' fees and costs.

The ordinance makes it critical for affected retail employers doing business within the City of Los Angeles to not only prepare employees' schedules well in advance, but also adhere to those schedules in order to avoid potential understaffing on a shift or having to pay wage premiums. It is equally critical for such employers to obtain employee consent in writing for changes to work schedules or when scheduling "clopening" shifts to prevent claims of alleged violations of the FWWO.

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