



Chicago's Fair Workweek Ordinance will bring predictive scheduling requirements to the city

Employment Alert

9 September 2019

By: Ryan Vann | Miriam Petrillo | Karun Ahuja | Erin S. Johnson

Chicago is entering the growing collection of jurisdictions enacting predictive scheduling requirements with the recent passage of the Fair Workweek Ordinance (FWO), which is set to take effect on July 1, 2020. The FWO will impact employers with Chicago-based employees in the building services, healthcare, hotel, manufacturing, retail, warehouse services, and restaurant industries, and it will require employers to provide advance notice of work schedules and pay a premium for certain schedule changes.

Predictive scheduling ordinances are a developing trend across the country – requiring employers to provide more stable and predictable work schedules, based on the premise that unpredictable scheduling practices (eg, on-call or "just-in-time" scheduling) prevent workers from attending to their family, health, and other obligations

For employers with Chicago operations, that will mean increased cost, additional notification and communication requirements, and less flexibility to cover absences and react to urgent workforce staffing needs.

Employers and employees covered by the FWO

Covered employers

Employers with Chicago-based employees in the following industries are covered by the FWO if they meet certain employee headcount thresholds:

- building services (including care and maintenance of property, such as janitorial services, building maintenance services, and security services)
- healthcare (including healthcare services or long-term care services that require an Illinois license and dialysis services at a facility that provides outpatient maintenance dialysis)
- hotels
- manufacturing
- retail (sale of products for personal, household, or family use, such as appliances, clothing, electronics, groceries, and household items)
- warehouse services (storage of goods or commodities, which may include loading, packing, sorting, stacking, wrapping, distribution, and delivery) and
- restaurant (any business licensed to serve food in Chicago which has, globally, at least 30 locations and at least 250 employees in the aggregate, but excluding a business with three or fewer locations in Chicago that are owned by one employer and operating under a sole franchise).

Employers with Chicago-based employees in the above industries are covered if they (i) employ 100 or more employees (250 or more for non-profits) globally; and (ii) employ at least 50 Chicago-based employees entitled to the protections under the FWO. To reach the 50-employee threshold, the number of employees will be aggregated among a group of employers that are related through common ownership and have integrated business activities.

Covered employees

Employees covered by the FWO's protections are Chicago-based salaried employees who earn \$50,000 or less annually and hourly employees who earn \$26/hour or less, if a majority of their work is in one of the above-listed industries for an employer covered by the law. (These wage amounts will increase yearly in proportion with the consumer price index published by the US Department of Labor.) Day or temporary laborers (eg, non-professional, non-clerical workers) employed by a service agency, who have been on assignment to a covered employer for 420 hours within an 18-month period, are also included among the employees that may be covered by law. There are additional, specific rules for the hotel industry to determine whether employees are covered. Employers and employees can agree to waive application of the FWO requirements with an express waiver in a collective bargaining agreement. However, the FWO makes it unlawful for an employer to avoid coverage under law by (i) changing a regular rate of pay, (ii) interfering with or changing scheduled work days or hours, or (iii) hiring, rehiring, terminating, or suspending employees.

Key obligations under the FWO

Initial estimate of work schedule

Before or at the start of employment, employers must provide covered employees a good faith estimate in writing of the projected days and hours the employee will be scheduled to work for the first 90 days. The notice must include:

- the average number of weekly work hours
- whether the employee can expect to work on-call shifts and
- the days and the times/shifts the employee can expect to work or not work.

An employer must consider an employee request to modify the projected work schedule. An employer can accept or reject the request in its discretion if it notifies the employee of the decision in writing within 3 days of the employee's request.

Advance notice of work schedule

An employer must provide advance written notice of work schedules by posting a work schedule to its covered employees:

- no later than 10 days before the first day of any new schedule, for new schedules from July 1, 2020, to June

30, 2022 or

- no later than 14 days before the first day of any new schedule, for new schedules beginning June 30, 2022.

The written work schedule must include the shifts during a calendar week (including start and end times for each shift) and on-call status of all current covered employees at the worksite. Employees who are (or have family or household members who are) victims of domestic or sexual violence may have their work schedules withheld from other employees.

An employer may post the work schedule in a visible and accessible place to all covered employees or by using its usual methods of communication, although it must provide an electronic version upon employee request.

These advance notice requirements do not apply to employees who self-select work shifts without the employer's pre-approval, or employees who work at certain venues that regularly host ticketed events.

Schedule changes trigger premium pay and employee rights

Right to decline additional hours. A covered employee has the right to decline any previously unscheduled hours that the employer adds to the employee's schedule after the advance notice deadline (*ie*, less than 10 or 14 days before the first day of a new schedule).

Predictability pay. If an employer changes an employee's work schedule after the advance notice deadline (*ie*, less than 10 or 14 days before the first day of a new schedule), the employer must pay a premium. In addition to the regular rate of pay for hours worked, the employee will receive:

- an additional hour of pay for each shift in which the employer: (i) adds hours of work; (ii) changes the date or time of a work shift with no loss of hours, or (iii) with more than 24 advance notice, cancels or subtracts hours from a regular or on-call shift and
- at least 50 percent of the employee's regular rate of pay for any scheduled hours the employee does not work because the employer, with less than 24 hours of notice, subtracts hours from a regular or on-call shift or cancels a regular or on-call shift.

Amended work schedule. For schedule changes after the advance notice deadline, the employer must amend the posted work schedule and send it to the covered employee within 24 hours.

Exceptions. There are several exceptions to an employer's obligations and employee's rights with respect to schedule changes, including, for example, schedule changes due to a request by an employee, mutual agreement between the employee and employer, discipline for just cause, or shift-trading between employees, along with schedule changes due to natural disasters, threats to person, property, or public safety, and other circumstances outside of the parties' control.

Employee right to rest

A covered employee has the right to decline hours that are less than 10 hours after the end of the previous day's shift. If the employee works a shift that begins less than 10 hours after the end of the previous day's shift, the employee must be paid 1.25 times his or her regular rate of pay for that shift.

Employee right to request flexible working arrangement

A covered employee has the right to request a modified work schedule, including additional shifts or hours, changes in work days or start/end times, permission to exchange shifts, limits on his or her availability, part-time employment, job sharing, reduction or change in work duties.

Additional hours offered to existing employees

If an employer needs to fill additional shifts, it must first offer the additional shifts to existing part-time covered employees (if practicable) and then other existing covered employees, if they are qualified to do the additional work. If these employees do not accept the additional shifts, then the additional shifts must be offered to temporary or seasonal workers who have worked for the employer for 2 or more weeks. Additional hours must be offered in a non-discriminatory manner.

Enforcement

The FWO is enforced by the Chicago Department of Business Affairs and Consumer Protection (BACP). A violation of the FWO by an employer is subject to fines up to \$500 for each offense, and for each employee affected and each day a violation occurs. Discriminating or retaliating against an employee for exercising his or her rights under the FWO is subject to a \$1,000 fine. Employees also have the right to sue employers for violations under the FWO. Employee actions must be filed within 2 years of the alleged violation.

Preparing for the FWO

Employers should review whether they will be covered under the FWO, and consider taking the following steps to prepare:

1. Develop work schedules in accordance with the FWO in advance of the July 1, 2020 effective date.
2. Review which shifts often lead to scheduling changes or are difficult to predict in advance, and develop strategies to manage these shifts in compliance with the FWO.
3. Update hiring paperwork to include required predictive information.
4. Inform and train managers and supervisors on employees' rights and the scheduling deadlines under the FWO.
5. Develop or adopt tracking capability to provide guidance on when an employee is permitted to decline work or receive premium pay. Consider increasing labor budgets to account for premium payments or additional scheduled hours.
6. Unionized employers should consider negotiating an express waiver of the FWO in collective bargaining agreements at the next bargaining opportunity.
7. The BACP is preparing a notice of employee rights under the FWO. Employers should be prepared to post a notice of rights at each Chicago facility with covered employees and also provide this notice along with each covered employee's first paycheck after July 1, 2020.
8. Records showing compliance with the FWO must be maintained for at least 3 years (or the duration of any claim or investigation, if longer).

Please contact any of the authors or any of the attorneys in DLA Piper's Employment group for assistance or with any questions on these developments.

AUTHORS



Ryan Vann

Partner

Chicago | T: +1 312 368 4000



Miriam Petrillo

Of Counsel

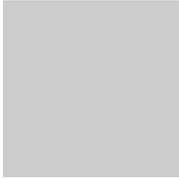
Chicago | T: +1 312 368 4000



Karun Ahuja

Associate

Chicago | T: +1 312 368 4000



Erin S. Johnson

Associate

Chicago | T: +1 312 368 4000
