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Retailers' Employee Scheduling Practices Under Increasing Scrutiny

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It is not news that retailers' employment practices have been under intense scrutiny by various government agencies. Hiring practices, wage rates, and benefit coverage have all been the subject of investigation and lawsuits. Now the New York Attorney General, Eric Schneiderman, together with Labor Bureau Chief Terri Gerstein, is investigating scheduling practices. Additionally, California is considering legislation concerning scheduling practices and San Francisco recently passed the "Retail Workers Bill of Rights." These developments are discussed below.

New York Developments

At least thirteen retailers have received letters from New York's Attorney General questioning use of "on-call shifts," which require employees to contact the company before reporting for the day to determine if they will in fact be needed that day. The Attorney General's purported concern is that retailers have failed to comply with New York's "call-in" pay rule, which states that "[a]n employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage." This rule applies when an employee reports to work and is dismissed early.

For purposes of the call-in rule, the phrase "at the basic minimum hourly wage" is interpreted according to its literal meaning—i.e., the minimum wage, currently $8.75 in New York. But for purposes of the call-in pay regulation, the position of the New York State Department of Labor has consistently been that the employer "gets credit" for amounts paid above the minimum wage in the same work week. In a 2009 opinion letter, the NYSDOL confirmed its position that the call-in pay regulation "only requires additional payment where an employee's wages for the workweek are less than the minimum and overtime wage rate for all hours worked plus any call-in pay owed. In other words, if the amount paid to an employee for the work week exceeds the minimum and overtime rate for the number of hours worked and the minimum wage rate for any call-in pay owed, no additional payment for call-in pay is required during that workweek." NYSDOL Op. Ltr. RO-09-0133 (Dec. 2, 2009) (confirming earlier opinion RO-05-0103 (May 12, 2006)).

Under these opinions, and using an example, if a worker regularly scheduled to work Monday through Friday, seven hours per day, at $10 per hour, works 35 hours during the regular work week and then is called in to work one hour on a Saturday, he is owed no call-in pay (beyond his regular hourly rate of $10) for Saturday, because he has earned $360 for the week, well in excess of the minimum wage applicable to his hours worked (36 hours @ $8.75 minimum wage per hour, or $315).

Because an "on-call shift" policy may result in the employee not actually reporting to work, the more relevant legal issue, in our view, is whether such a policy triggers an obligation to pay the employee for the time spent "on call." Under federal regulations, "on-call" time refers to periods of time during which an employee is off duty, but is required to remain available to be called in to work. If, during that time, the employee cannot use his or her time effectively for his or her own purposes, the time may well be compensable. In determining whether an employee "on call" is able to use the time for his or her own purposes, courts often look to the degree to which the employee is free to engage in personal activities and any agreements between the parties. Employers rolling out or reviewing their "on-call shift" practices should consider the implications of the federal "on-call" time rules, as well as New York's "call-in" pay rule.

The Attorney General has requested time and payroll records for all New York employees who were paid for less than four hours in any day, as well as scheduling policies and records.

This is the latest effort to scrutinize the pay of workers in the industry and to address concerns that this type of scheduling practice creates a hardship for workers who have to schedule and reschedule childcare and eldercare arrangements and who may be prevented from working another job or pursuing additional education because of the lack of a predictable work schedule. The practice also prevents employees from having a predictable weekly income. The Attorney General is concerned about the hardship on workers and also potential violations of the labor law that may deprive workers of pay.

A number of the retailers that received letters do not actually utilize on-call scheduling. Nor is there evidence that any of these retailers have failed to comply with the minimum call rule.

California Developments

San Francisco sent shockwaves through the business community when it enacted the "Retail Workers Bill of Rights," two ordinances that impose significant new burdens on numerous retail employers operating in San Francisco. Developed in an effort to curtail "erratic" and "unpredictable" scheduling practices deemed to be "detrimental to San Francisco employees and their families," the Retail Workers Bill of Rights requires, among other things, that so-called "formula retail establishments" (commonly known as "chain stores") provide:

(1) A "good faith" written (but non-binding) estimate of an employee's "expected minimum number of scheduled shifts per month," including the expected days and hours of those shifts, prior to the start of employment;

(2) Two weeks' notice of scheduling changes that were not requested by the employee;

(3) "Predictability pay" if an employee is given less than seven days' notice of a scheduling change, except in certain limited circumstances;

(4) Written offers of additional work to qualified part-time employees before hiring new employees or using contractors or staffing agencies to perform additional work; and

(5) Equal treatment, subject to certain qualifications, for full-time and part-time employees regarding: (a) starting hourly wage; (b) access to paid and unpaid time off; and (c) eligibility for promotions.

Just a few months into his first term in the California legislature, Assemblyman David Chiu, who helped introduce the Retail Workers Bill of Rights during his term as President of the San Francisco Board of Supervisors, has launched an effort to spread the regulations throughout California through Assembly Bill 357 (AB 357), currently titled the Fair Scheduling Act of 2015.

While narrower than the “Retail Workers Bill of Rights”, the current draft of AB 357 suggests that significant changes may be on the horizon for "food and general retail establishments" in California, which, closely paralleling San Francisco's ordinances, are defined as a "retail sales establishment" that has "a physical location with in-person sales" in California, at least 500 or more California employees, at least 10 other such retail sales establishments in the United States, and maintains two or more of the following:

(1) A standardized array of merchandise;

(2) A standardized façade;

(3) A standardized decor and color scheme;

(4) Uniform apparel;

(5) Standardized signage; and/or

(6) A trademark or a service mark.

In its current form, AB 357 would impact "food and general retail establishments" in two ways. First, AB 357 would add a provision to the California Labor Code to prohibit food and general retail establishments from discriminating against employees who receive food assistance under CalFresh and those who receive (or have custody over children who receive) cash assistance under CalWORKS aid. This provision would also require food and general retail establishments to allow these employees to be absent from work without pay to attend required appointments with a county human services agency if the employee provides his or her employer with "reasonable notice" of the planned absence.

Second, and more significantly, AB 357, like its San Francisco counterpart, seeks to provide those employed by large retailers with "predictability and dignity in how they are scheduled to work" by requiring food and general retail establishments to provide their employees with at least two weeks' notice of their work schedules. If passed, AB 357 would require any covered employer that fails to provide an employee with sufficient notice of a change to his or her schedule to compensate the employee for each affected shift at a rate that varies with the amount of notice provided and the length of the affected shift. AB 357 also would require covered employers to compensate employees who are required to remain available for an “on call” shift but who are not actually called into work. AB 357 currently identifies seven limited circumstances where these penalties do not apply, such as last-minute scheduling changes resulting from a previously scheduled employee’s inability to work due to illness.

The scope of AB 357 has expanded rapidly since it was introduced two months ago and will likely to continue to expand. Given the obvious influence of San Francisco's ordinance on AB 357, it seems likely that any regulations promulgated under an enacted version of AB 357 would be equally broad and burdensome. The California Chamber of Commerce recently added AB 357 to its list of “job killers,” stating that it would impose “an unfair, one-size fits all, two-week notice scheduling mandate” on large California retailers.

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Retailers should monitor these developments and potentially changing requirements concerning employee scheduling. For more information, contact Allan Bloom, Katharine Parker or Anthony Oncidi, or your Proskauer relationship lawyer.

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