Predictive scheduling laws pick up steam

Does your organization sometimes cancel employees' shifts at the last minute, schedule extra workers for peak times (then send some of them home) or require employees to be prepared to call in to work at any time? If so, a growing trend of local laws could make those practices unlawful.

Employers in several cities, including San Francisco and New York, have been adjusting to new fair-scheduling laws the past two years. And Chicago this summer passed the most expansive predictive scheduling law in the country to date.

Chicago will require covered employers to publish employees' work schedules at least 10 days in advance. Employers who make changes after the 10-day period must pay at least one hour of "predictability pay" for each shift in which the employer adds work or changes the shift.

If an employer cancels the shift or reduces the hours with less than 24 hours' notice, the worker is entitled to predictability pay of at least 50% of his regular pay for the scheduled hours.

Example: Say an employee was scheduled to work eight hours at $15 per hour, but the company cut that to four hours with less than 24-hour notice. The employee gets $7.50 for the four cut hours, or $30 extra. No penalty applies if the change in schedule is agreeable to the employee.

The Chicago law covers specific industries—including health care, retail, construction and manufacturing—and takes effect July 2020.

"These are well-intentioned laws. However, there have been unintended negative consequences for the business community," including increasing litigation, says attorney Ari Hersher in the San Francisco office of Seyfarth Shaw.

Some national employers are taking action before laws kick in. Several large retailers—including Aéropostale and Walt Disney—stopped requiring employees to call before a scheduled shift to find out if they have to work that day.

Employees may be due partial pay if they show up for work, only to be sent home

When many retail employers schedule workers, they build in some "on call" hours. If it turns out the employees aren't needed, then they are either told not to come in to work or to go home if they have already arrived.

Historically, California's wage order system has required at least partial payment for such cancelled or shortened shifts. In effect, that functions as a penalty for employers that schedule more workers for shifts than they ultimately need. California Wage Order No. 7 requires employers to pay employees "reporting time pay for each workday an employee is required to *report for work* and does report but is not put to work or is furnished less than half said employee's usual or scheduled day's work."

Some employers have tried to get around the wage order by scheduling hourly retail workers for multiple shifts

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but then having them call in a few hours before coming to work. Then they are told whether to show or not.

Those employers have contended that because the workers weren't required to show up at the start of the shift, they weren't due any pay for the cancelled hours. Now the Court of Appeal of California has nixed that workaround in a class-action lawsuit.

Recent case: Skylar worked as an hourly sales employee for Tilly's, a clothing retailer.

After she quit the job, she filed a class-action lawsuit accusing the company of violating California's wage-and-hour laws with its on-call scheduling plan.

She said the process worked like this: Employees were assigned on-call shifts, but were not told until they called in two hours before their shifts whether they would actually have to come in to work. If they were told to come in, they were paid for the shifts; if not, they received no compensation at all for having been "on call."

Skylar's lawyers argued that the meaning of "report for work" must include being required to call in before a shift starts. Otherwise, they argued, it has no meaning in the modern world. Employers could simply avoid liability by always requiring a pre-arrival phone call.

Tilly's countered that even at the time the wage order was originally issued, telephones made it possible to call in before a shift started. Therefore, it said, the order was only meant to apply to actually physically arriving at work. The lower court agreed with Tilly's.

However, now the Court of Appeals of California has reversed the decision. It concluded that being required to call in was the same as reporting to work. Therefore, the workers should have received reporting pay under Wage Order No. 7. (*Ward v. Tilly's*, Court of Appeal of California, 2019)

Final notes: It's likely this wide-ranging decision will be appealed to the California Supreme Court. Although the appeals court said its decision was limited to the specific fact of this case—that is, a two-hour pre-shift call-in requirement—simply creating earlier call-in deadlines isn't going to make an employer safe from a legal challenge. The court drew no sharp line in the sand. Consult your attorney if you have a requirement similar to Tilly's.

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