

Seven-Day Forecast of Clear Skies and Predictive Work Schedules:
Oregon's Fair Work Week Act

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In June 2017, Oregon State legislature passed S.B. 828, “The Fair Work Week Act,” which is a statewide predictable scheduling law. Oregon was the first state to pass a statute of this kind, although other cities in the United States such as San Francisco, New York City, and Seattle have similar ordinances on the local level.¹ These laws are intended to reconcile problems that unpredictable and unstable work hours pose on individuals in characteristically low-wage industries. As a result, covered employers in these industries with 500 or more employees will have to implement changes to their scheduling policies in order to ensure compliance with the Fair Work Week Act.

The main provisions of the Fair Work Week Act (“FWWA”) apply to employers with 500 or more employees worldwide that provide services related to “retail trade,” which includes hotels, motels, or food services.² In addition, the definition includes employees employed in a “chain or an integrated enterprise.”³ The law does not apply to salaried employees in these businesses, rather it is intended to cover non-exempt hourly employees.

The FWWA was passed in order to give hourly employees in these industries predictability in scheduling since unanticipated scheduling changes affect employee’s ability to arrange for caregiving needs, maintain concurrent employment, attend school, and plan finances.⁴ The State of Oregon Bureau of Labor Industries (“BOLI”) promulgated proposed rules in April 2018, which gave businesses concrete guidance in order to ensure compliance.⁵ Although this law was passed in 2017, it was not implemented until July 2018, and is fully enforceable beginning January 2019. Now is the time for covered employers to revisit the FWWA act and implement policies to comply with the new law.

At the time an employee is hired, an employer must provide new employees with a written “good faith estimate” of his or her work schedule, which includes an estimate of the median number of hours an employee can expect to work in an average one-month period.⁶ The proposed rules state that this estimate is a “reasonable prediction which may be based on

¹ Lisa Nagele-Piazza, *Oregon Enacts First Statewide Predictable Scheduling Law*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Aug. 10, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/oregon-enacts-first-statewide-predictable-scheduling-law.aspx>.

² Jenna Mooney & Brent Hamilton, *Prepare Now for Oregon’s Predictive Scheduling Law—Part 1*, DWT BLOG (Jun. 05, 2018), <https://www.dwt.com/Prepare-Now-for-Oregons-Predictive-Scheduling-Law----Part-1-06-05-2018/>

³ S.B. 828, 79th Leg. Assemb. (Or. 2017) at 2.

⁴ Sara Fowler, *Fair Game? Predictable Scheduling Laws – The Sensation Sweeping the Nation*, SEYFARTH SHAW (Aug. 31, 2017), <https://www.seyfarth.com/publications/RD083117-LE>.

⁵ OREGON OFFICE OF THE SECRETARY OF STATE BUREAU OF LABOR AND INDUSTRIES, Adopt Administrative Rules Regarding Employee Work Schedules 12 (2018)

⁶ *Id.*

forecasts, prior hours worked by an employee or a similarly situated employee, or other information.”⁷ Further, this estimate must be provided in the language the employer typically uses to communicate with the employee.⁸

For current employees, the employer must provide notice of their work schedules in writing at least seven calendar days in advance of the *first day of the shift*, and employers should note that this requirement increases to fourteen calendar days starting in 2020.⁹ To ensure accessibility, the notice must be posted in a “conspicuous and accessible” area in the workplace.¹⁰ In the event that an employer needs to change the schedule, it must provide the employee with *timely* notice, which entails a “good faith effort” to contact the employee promptly and without undue delay after learning of the need to change the employee’s work schedule.¹¹

Despite whether employers comply with the notice requirement, any alterations to employees’ hours worked within the relevant notice period may require additional compensation.¹² This rule includes activities such as adding and subtracting shifts, sending employees home early, asking employees to stay late, and changing start or end times within the current notice period.¹³ The FWWA also requires employers to provide rest periods of at least ten hours between shifts.¹⁴ Even if an employee consents to work during a rest period, employers are required to compensate the employee 1.5 times his or her regular rate during this time.¹⁵

Similar to the Americans with Disabilities Act, the FWWA creates an “interactive process” obligation whereby employers are required to engage in dialogue with employees about their scheduling preferences and scheduling accommodation requests.¹⁶ In other words, it gives employees the right to request input into their own work schedules.¹⁷ For example, the FWWA expressly authorizes employees to request that employers avoid scheduling them for certain shifts or locations.¹⁸ Although employers are not required to grant these requests, they may require the employee to provide “reasonable verification of the need for the request.”¹⁹ Finally,

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 13.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 13.

¹² Sara Fowler & Lynn Kappelman, *As Predicted...On July 1, Oregon Will Become the First State with A Predictable Scheduling Law*, SEYFARTH SHAW (Jun. 28, 2018), <https://www.laborandemploymentlawcounsel.com/2018/06/as-predicted-on-july-1-oregon-will-become-the-first-state-with-a-predictable-scheduling-law/>.

¹³ *Id.*

¹⁴ S.B. 828, *supra* note 3, at §6.

¹⁵ Lisa Nagele-Piazza, *supra* note 1.

¹⁶ Sara Fowler, *Fair Game? Predictable Scheduling Laws – The Sensation Sweeping the Nation*, SEYFARTH SHAW (Aug. 31, 2017), <https://www.seyfarth.com/publications/RD083117-LE>.

¹⁷ S.B. 828, *supra* note 3, at §6(a)(1).

¹⁸ *Id.*

¹⁹ *Id.* at §6a(2)(a).

the statute prohibits the employer from retaliating against an employee for making a request under this subsection.²⁰

Employers that do not adhere to FWWA's requirements could incur civil penalties between \$1,500 to \$2,000.²¹ Specifically, the proposed rules allow BOLI to assess penalties up to \$1,500 for failure to: provide employees with a written schedule within the time period required; follow schedule posting requirements; compensate employees as required when an employer requests a change to the schedule without advanced notice; compensate employees for working within the ten-hour rest period; and follow the record retention requirements.²² Additionally, BOLI can assess penalties of up to \$2000 on employers who coerce employees into signing onto the voluntary standby list or making it a term of employment.²³

Employers rest assured, not every schedule change triggers financial penalties. Section 7 of the FWWA delineates several scenarios that employers are permitted to alter employees' schedules without facing financial penalties.²⁴ First, the FWA creates an exception for "voluntary standby lists." As such, an employer can post a "voluntary standby list," whereby employees can opt to "voluntarily" trade shifts with one another.²⁵ Interested employees write their name on a standby list, and if shifts become available, the employer may ask employees on this list to fill in without paying additional compensation.²⁶ However, the employees on the standby list can take their names off the list at any time and are not obligated to work if the employer offers them a shift.²⁷ This exception is a low cost procedure for employers to implement and serves as an important concession within the FWA to employers. Second, employers can avoid financial penalties by implementing schedule changes that are thirty minutes or less, since the FWA only requires compensation for schedule changes for an hour or more.²⁸ Third, employees who request a schedule change in writing do not subject the employer to financial penalties if the employer grants such a request.²⁹ Finally, employers are permitted to subtract hours from an employee's schedule for "legitimate disciplinary reasons for just cause," which requires the employer to document the incident in writing.³⁰ While the model rules nor the FWA define "legitimate disciplinary reasons," the Proposed Rules define "just cause" as "conduct that is of such a serious nature or extent that reducing the employee's work hours may be considered an appropriate step to correct the behavior."³¹

²⁰ *Id.* at §6(a)(3).

²¹ Jenna Mooney & Brent Hamilton, *supra* note 2.

²² OREGON OFFICE OF THE SECRETARY OF STATE BUREAU OF LABOR AND INDUSTRIES, *supra* note 5, at 12.

²³ Jenna Mooney & Brent Hamilton, *supra* note 2.

²⁴ See S.B. 828, *supra* note 3, at §7(3)(a)-(k).

²⁵ Fowler & Kappelman, *supra* note 11.

²⁶ S.B. 828, *supra* note 3, at §7(3)(j).

²⁷ Fowler & Kappelman, *supra* note 11.

²⁸ S.B. 828, *supra* note 3, at §7(3)(a).

²⁹ *Id.* at §7(3)(d).

³⁰ *Id.* at §7(3)(e).

³¹ OREGON OFFICE OF THE SECRETARY OF STATE BUREAU OF LABOR AND INDUSTRIES, *supra* note 5, at 839-026-0050(2)(f).

The FWWA will be enforced predominately through private litigation and administration action. As of January 1, 2019, employees may pursue private civil causes of action for discrimination and/or retaliation claims under FWWA.³² For all other violations of this law, employees may file complaints with BOLI, and violations can trigger fines of \$500 to \$2,000 per day for each violation.³³

Provided the new requirements the FWWA imposes on employers in “retail trades” with 500 or more employees, employers should review their scheduling policies to ensure compliance with the FWWA and train employees in management positions about the penalties associated with violating this law. For employers interested in receiving training on the FWWA, BOLI instituted a technical assistance seminar for employers to help human resources personnel, managers, and line supervisors in retail trade industries “tackle” some of the anticipated issues in implementing the FWWA.³⁴

³² S.B. 828, *supra* note 3, at §11(1).

³³ *Id.* at §11(3).

³⁴ *Technical Assistance for Employers: Seminars*, OREGON OFFICE OF THE SECRETARY OF STATE BUREAU OF LABOR AND INDUSTRIES, https://www.oregon.gov/boli/TA/Pages/Pred_Schedule.aspx (last visited Feb. 23, 2019).