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Labor & Employment ADVISORY ■

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Employers Should be Wary of Increased Scrutiny of On-Call Shift Scheduling

On July 3, San Francisco labor officials began to enforce the city's one-of-a-kind "Retail Workers Bill of Rights," an ordinance that penalizes businesses that use on-call shifts. On-call shifts typically require employees to email, text, or call in to work prior to the start of a tentatively scheduled shift to find out if they actually need to report to work. Although San Francisco was the first U.S. jurisdiction to pass legislation penalizing the use of on-call shifts, recent actions by state and federal officials, lawmakers, and judges across the country demonstrate a nationwide trend of increased scrutiny of employers' use of the scheduling practice. More specifically, these executive actions, legislative initiatives, and court rulings suggest that employers who use on-call shifts risk running afoul of state reporting-time pay laws requiring that employees who merely report to work must be paid for a certain minimum number of hours. Public opinion criticizing the scheduling practice appears to be growing as well. As a result, employers in San Francisco and elsewhere should monitor this developing trend in city and state wage and hour law, as it may signify an impending attack on their ability to establish flexible employee work schedules.

On-Call Shifts and Reporting-Time Pay

Employees scheduled to work on-call shifts are often provided short notice by their employer to show up to work on any given day. Typically, employees are required to call in a few days to a few hours before the scheduled shift to learn whether they must report. The practice is frequently used in the restaurant and retail clothing industries because it provides employers with the flexibility to determine how many workers are needed for a particular shift before having them actually report to work during those shifts. Employers frequently rely on technology to analyze sales patterns and other data to determine employee need in real time and use on-call shifts to increase efficiency and profitability based on such data.

Currently, no federal or state laws expressly restrict or prohibit an employer's use of on-call shifts as part of its scheduling practice. But plaintiffs' lawyers, as well as state lawmakers and enforcement agencies, have been scrutinizing the practice with increasing frequency in recent months. Their purported concern is that on-call shifts may violate state reporting-time pay laws, which require employers to pay a certain minimum amount to an employee who physically shows up to work but is not assigned any actual work.

Eight states and the District of Columbia currently have reporting-time pay laws. New York's law, for example, provides that an employee who reports to work on any day must be paid for at least four hours of work or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage. Under California law, an

employee must be paid for at least two hours of work at his regular pay rate for each day the employee is required to report to work – even if the employee is not actually put to work.

Increasing Legal Scrutiny of On-Call Shifts

Recently, state and federal executive officials, lawmakers, and judges have begun to question whether reporting-time pay laws prohibit or limit an employer's use of on-call shifts. In April, New York Attorney General Eric Schneiderman sent letters to 13 national retailers about their use of on-call shifts. In the letters, Schneiderman warned retailers that the practice of using on-call shifts might violate the state's reporting-time pay law. The letters requested information about the retailers' scheduling practices and expressed concerns about the "unpredictable work schedules" that are caused by employers' use of on-call shifts.

Perhaps not coincidentally, on the day before Schneiderman issued the letters, a federal judge in California granted a rare interlocutory appeal to a putative class of Victoria's Secret employees seeking compensation for on-call shifts. The decision gave the employees the right to immediately appeal the court's December 2014 ruling dismissing their claim that they were entitled to compensation under California's reporting-time pay law for on-call shifts for which they were not required to appear at work. The December ruling focused on what the judge described to be a "novel question of law" – whether the phrase "report to work" in the state reporting-time pay law requires an employee to actually physically show up to a job site at a scheduled time in order to trigger the law's requirements. The court held that the phrase meant that reporting-time pay is restricted to instances where an employee "physically presents him or herself at the place of work but is sent home without working." The court noted, however, that reasonable minds could also determine that the phrase "report to work" in California's reporting-time pay law applies to instances in which an employee is placed on an on-call shift and must check-in with her employer before she physically shows up at her job.

A judicial determination that the phrase "report to work" in a particular jurisdiction's reporting-time pay law applies to situations in which employees are required to call-in but do not physically show up to work could result in the penalization of employers' use of on-call shifts in that jurisdiction. This could be the case even if the state legislature that drafted the reporting-time pay law did not intend for it to regulate the use of on-call shifts. Faced with the issue, employee-friendly judges could interpret a state's reporting-time pay law such that it requires employers to pay employees a certain minimum amount every time the employees must call in to work to check if they are required to report – even if they are not required to physically show up.

City and State Initiatives to Penalize the Use of On-Call Shifts

In December 2014, San Francisco became the first U.S. jurisdiction to pass legislation penalizing the use on-call shifts. The San Francisco Retail Workers Bill of Rights requires employers to provide employees two weeks' advanced notice of their work schedules and to pay employees one-to-four hours of pay at the employees' regular hourly rate if changes are made to their work schedules with less than a week's notice. If less than 24 hours' notice is provided, the penalty rises to two-to-four hours of extra pay, depending on the amount of notice and the length of the shift. San Francisco's ordinance applies to "formula retail" establishments, which include retail stores, restaurants, hotels and banks with 11 or more stores nationwide and at least 20 employees in San Francisco.

California state lawmakers introduced nearly identical legislation in February as part of the "Fair Schedule and Pay Equity Act." If passed, the act would make California the first state in the nation to require large retailers and restaurant

chains to post employee work schedules at least two weeks in advance. Like San Francisco's law, the act would also mandate additional pay for last-minute schedule changes.

Similar "fair shift scheduling" legislation has also been introduced in Connecticut, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, and Oregon in recent months.

Public Opinion and Employer Response

This June, websites such as BusinessInsider.com and Consumerist.com began reporting that Victoria's Secret will end its use of on-call scheduling in response to the increased scrutiny of the scheduling practice and the putative class action filed against the company last year. According to the sites, Victoria's Secret stores plan to terminate their use of on-call scheduling altogether and notify employees in advance about their upcoming shifts.

If these reports are accurate, they demonstrate the strength of public opinion about the use of on-call shifts and its ability to affect an employer's scheduling decisions. Even without legislative action or court rulings, recent increased scrutiny of employers' use of on-call shifts may affect employers' business decisions and adversely impact the ability of companies to implement cost-minimizing, efficient, and flexible employee schedules. A simple Google search of the phrase "on-call shifts" pulls up dozens of websites and articles – credible or not – that openly criticize the scheduling practice, expressing concerns that on-call shifts are "abusive," "erratic" and "hurtful" to employees. Employers may be inclined to limit or stop their use of on-call shifts based solely on such strong public opinion about the practice alone.

What this Means for Employers Across the Country

The temporal correlation between the Victoria's Secret opinion and Schneiderman's letters may indicate that the New York Attorney General's Office will adopt an expansive reading of what it means to "report to work" for purposes of the state's reporting-time pay law. Moreover, the Victoria's Secret opinion suggests the possibility of a judicial interpretation of state reporting-time laws in a way that broadens their coverage and limits employer scheduling flexibility. A trend in city and state legislative initiatives to penalize the use of on-call shifts is developing nationwide, and the recent effective date of San Francisco's Retail Workers Bill of Rights is a reminder of the ability and willingness of local jurisdictions to adopt and enforce legislation that financially penalizes businesses for their scheduling practices. Finally, the relatively vocal public opinion against on-call shifts may force businesses to change their scheduling practices, even without being required by law to do so.

Employers across the country should stay up-to-date on the state of the law regarding scheduling practices in the jurisdictions in which they have employees. As more and more voices are raised in the discussion, employer best practices become less clear. San Francisco may be the first jurisdiction to expressly regulate on-call shift scheduling, but recent and increased scrutiny of the practice across the country suggests that it may not be the last.

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