On-Call Shifts Draw Regulator Attention—and Liability?

From the Experts

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“Don’t come in next week—just call in two hours before the start of your shift to see if we need you.”

“On call” or “call in” scheduling of part-time employees has become increasingly common as employers in certain industries attempt to manage payroll expenses in the face of increasing wages and fluctuating demand for goods and services. Retail and restaurants are but a couple of industries that make use of on-call scheduling to best fill their business needs.

While on-call scheduling permits much-desired flexibility for an employer to manage payroll costs and serve its customers, its part-time employees may bear the brunt of this type of scheduling. Faced with the possibility (but not the certainty) of working, on-call employees often place their personal lives on hold as they wait and hope for work. On-call shifts are not only disruptive to the personal lives of employees; unpredictable work shifts may prevent them from taking second jobs or having a predictable and reliable income. According to policy analysts, about 17 percent of the workforce experiences unstable work shift schedules, which includes irregular, on-call, split and rotating shifts.

The bane of part-time employees has garnered the attention of legislators, regulators, and plaintiffs’ lawyers. If you use on-call or other irregular employee scheduling, you should review your practices to ensure that they do not create an obligation to pay wages even if the employee never sets foot in the place of employment.

Laws Offer Some Protections

Under existing federal and state laws, employees may have
the right to be paid under some circumstances for hours spent “on call.” The mere fact that an employee is treated as on call does not end the inquiry, however. Whether an on-call employee must be paid requires a factually intensive probe centered on issues of employer control. This type of review often requires an administrative agency or a court to resolve the issue.

Existing law also protects the rights of an employee who shows up for a scheduled shift, but is sent home because business is slow. Despite the existence of some laws that protect on-call employees, federal, state and local legislators are serving up new laws designed to offer even greater protections to part-time employees.

The economic downturn that began in 2007 caused some employers to increase the number of on-call part-time employees. Faced with a brutal employment market, employees often had no input into their schedules and little leverage to insist upon greater predictability. As a result of the imbalance, legislators are now passing laws to reduce the uncertainty faced by employees in certain sectors.

For example, two ordinances being referred to as “The Retail Workers’ Bill of Rights” recently went into effect in San Francisco. The new laws apply to “formula retail establishments” with at least 20 retail sales establishments worldwide and 20 or more employees in San Francisco. Most chain stores and franchises doing business in San Francisco are likely to be subject to the new laws. Employers must now provide a new employee with a good faith written estimate of the employee’s expected minimum number of scheduled shifts per month, and the days and hours of those shifts.

To provide greater predictability for employees, employers are also required to post schedules at least two weeks in advance. Employees will receive one hour of pay at their regular rate of pay for schedule changes made with less than a week’s notice and two to four hours of pay for schedule changes made with less than 24 hours’ notice.

Employers must also provide two to four hours of pay to an employee at her regular rate of pay when she is required to be on call for a specified shift and the employer cancels the shift with less than 24 hours’ notice.

San Francisco is not alone in its determination to provide greater predictability in pay for part-time workers. In July 2014, George Miller (D-Calif.) introduced The Schedules That Work Act in the House of Representatives to address some of the same issues. The proposed federal legislation would require companies to pay their employees for an extra hour if they were ordered to work with less than 24 hours’ notice. Likewise, New York and Vermont lawmakers have proposed their own laws to provide greater schedule predictability to part-time workers.

The Fair Workweek Initiative, a national campaign backed by a number of worker advocacy groups, is pushing for legislation to restrict on-call practices in places including Milwaukee, New York and Santa Clara, Calif. Each is intended to provide employees with greater predictability in their schedules and incomes.

Critics suggest that the new laws may only result in fewer opportunities (and hours) for employees as the cost of compliance increases payroll expenses. Nevertheless, they are traps for the unwary.

Employers who use on-call schedules should review their practices with an experienced employment attorney who can help them navigate changes that may affect their ability to use flexible scheduling.

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