On-Call Shift Scheduling Subject to Increased Scrutiny

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Recent heightened scrutiny of certain employer scheduling practices may be a sign of an impending dramatic change in the way employers schedule their employees' shifts. In recent months, state and federal officials, lawmakers and judges across the country have been increasingly critical of employers' use of "on-call shifts"—that is, shifts that typically require employees to e-mail, 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.

These shifts, critics say, risk running afoul of state reporting time pay laws (which require employees to be paid for a certain minimum number of hours just for reporting to work) and negatively affect employees. In light of growing public opinion criticizing the use of on-call shifts, as well as an uptick in state and federal proposals for "fair shift scheduling" legislation aimed at penalizing employers for their use of on-call shifts, employers should be prepared for an impending attack on this strategy of establishing employee work schedules.

Background: On-Call Shifts and Reporting Time Pay

Employees scheduled to work on-call shifts are often provided short notice by their employer about whether they are 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 industries because it provides employers with the flexibility to determine how many workers are needed for a particular shift before bringing in employees to actually work during those shifts. Employers often rely on technology to analyze sales patterns and other data to determine the need in real time, and use on-call shifts to increase efficiency and profitability based on that 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 or does not work long enough to earn the required minimum compensation.

Eight states and the District of Columbia currently have reporting time pay laws in place. New York's law, for example, provides that an employee who reports to work 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 or her regular rate of pay for each workday that he or she is required to report to work—even if the employee is not actually put to work.

Federal Attention to the Issue

On July 15, 2015, Senator Elizabeth Warren, D.-Mass., and 79 other members of Congress introduced the Schedules That Work Act, which would penalize retail, food service and cleaning industry employers that do not notify employees of their work schedules at least two weeks in advance. If passed, it would also require those employers to pay employees extra when they are put on call without any guarantee that work will be available, when they report to work and are sent home early, and when their schedule is changed with less than 24 hours' notice. Under the bill, if an employee requests a change to his or her schedule because of a health condition, child or elder care responsibilities, a second job, or education/job training, an employer would have to grant it unless it has a legitimate business reason not to.

Proponents of the Schedules That Work Act argue that the bill would curb "abusive" scheduling practices against employees, such as getting work schedules with only one or two days' notice, being required to be "on call" with no guarantee of being able to work, being sent home early without pay, and receiving hours that vary from week to week. However, a similar bill was introduced in Congress over a year ago, and it did not pass. These bills have generated strong opposition from groups like the National Retail Federation and the National Restaurant Association, which criticize such bills as "one-size-fits-all" legislation that ignore the realities of the workplace and add additional burdens to the employer-employee relationship. In addition, opponents add, the Schedules That Work Act will inevitably open the door to new and what they say will be unnecessary litigation.

Increasing Legal Scrutiny of On-Call Shifts

Outside of Congress, 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, warning that their practice of using on-call shifts might violate the New York 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 interim appeal to a potential 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 as a "novel question of law": whether the phrase "report to work" in the state reporting time pay law requires an employee to physically show up to a jobsite 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 judge 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 his or her employer before physically showing up at the jobsite.

If a court determines 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, employers could be penalized for using 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 as such that it requires employers to pay employees a certain minimum amount every time the employees must call in to check if they are required to report to the jobsite—even if, as a result of the check in, they are told they are not required to physically show up to work.

City and State Initiatives to Regulate 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, which went into effect on July 3, 2015, requires employers to provide employees with two weeks advance notice of their work schedules and to pay employees one hour 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 hours of pay (if the changed shift is four hours or less) or four hours of pay (if the changed shift is longer than four hours). In addition, the law mandates that, if an employee is "on call" but is not called in to work, the employer must provide him or her with two hours of pay (if the on-call shift was to last four hours or less) or four hours of pay (if the on-call shift was to exceed four hours). An employer that provides at least 24 hours' notice that an on-call shift has been canceled or moved to another day is not required to provide this compensation to the employee. 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 scheduling 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

A column in *The Washington Post* on July 23 bemoaned employers' use of on-call shifts, calling the practice a "scheduling shell game" used by employers who "want workers who are available at a moment's notice, but … don't want to pay them to work a moment longer than they're needed." Last year, *The New York Times* published an editorial recounting the struggles of a low-income single mother working at a company that uses technology to predict employer scheduling needs. The article advanced the position that employer use of data-driven scheduling practices is "injecting turbulence into" the lives of employees.

This June, websites such as BusinessInsider.com and Consumerist.com began reporting that, in response to the increased scrutiny of its scheduling practices and the potential class action filed against the company last year, Victoria's Secret will end its use of on-call scheduling 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 the ability of public opinion to potentially affect employers' scheduling decisions, even without legislative action or court rulings. 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.

What This Means for Employers Across the Country

The timing of 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 that broadens their coverage and limits employer scheduling flexibility. A trend in city, state and federal legislative initiatives to penalize the use of on-call shifts is developing nationwide, and the recent effective date of the San Francisco Retail Workers Bill of Rights is a reminder of the ability 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 law regarding scheduling practices in the jurisdictions where they have employees. As more and more voices become involved 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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