

Predictive scheduling laws: What are they and why do they matter

Predictive scheduling laws can wreak havoc with your efforts to control labor costs and manage peak demand periods. That's especially true for retail and other consumer-oriented industries. Gone are the days when you could schedule workers for anticipated busy times but send them home if business slowed. Now, many state and city laws have passed scheduling laws with schedule change penalties built-in. These are also sometimes referred to as fair workweek laws.

Some of these laws make you create schedules further ahead. You may, for example, have to post schedules two weeks or more before scheduled work begins. Others require you to offer additional hours to part-time workers before hiring additional part-timers. The aim is to increase hours worked for some who may want full-time work. This may be more expensive for employers, as full-time workers may be eligible for benefits that you don't provide part-timers.

Finally, some states and cities have passed so-called "right to request" laws. These require employers to consider employee schedule preference requests and reasonably accommodate those requests.

Here's what you need to know so you can revise your scheduling process and train first-line managers and supervisors.

What is predictive scheduling?

Predictive scheduling is generally defined as advanced notice of one's work schedule. The intent is to allow workers to plan their lives around their work schedule. For example, having a schedule set at least two weeks ahead may allow a worker to plan childcare or classes. Or a worker may need to coordinate hours with a second job. Knowing when she will work without worrying about a last-minute change can ease stress.

Unfortunately for employers, laws that require predictive scheduling are varied. They may include one or more of the following:

- Advanced notice of one's schedule;
- Record-keeping requirements like copies of schedules and proof that workers received their schedule within the law's time limits;
- Penalties for canceled schedules or last-minute changes, including pay for canceled hours;
- Prohibitions on split scheduling;
- At-hire notification of anticipated hours to be worked;
- Authorization for bringing a lawsuit;
- A requirement that current workers be offered any additional hours before hiring additional workers; and
- A requirement that a worker who wants his schedule changed be offered an 'interactive process' to discuss the request.

Does a predictive schedule law apply to your organization?

There is no federal predictable scheduling law. The Fair Labor Standards Act (FLSA) does not specify that employees receive any advance notice of their schedules. The FLSA simply requires that employers pay workers for all hours worked and that all hours worked be tracked. Split scheduling, in which a worker is completely relieved of work duties for a period of time, is allowed. Employees don't need to be paid for the off-duty time between schedule gaps.

Since the FLSA does not regulate scheduling, states and cities have sometimes stepped in to fill the gap. Employers need to check scheduling laws everywhere they have employees. Remember that more predictive scheduling and workweek fairness laws are pending in state legislatures and city councils across the country. Here's a sampling of predictive scheduling and fair workweek laws.

- **California:** California has long required that employees send home before their scheduled shift ends must be paid for at least half the scheduled time. The California Supreme Court recently ruled an employer's call-before-you-show policy. The employer posted schedules and told workers to call for work availability. If the employer didn't need them, it canceled their shift. The court said calling in started the shift and the half-shift pay obligation. California also regulates split shifts by requiring minimum wage be paid for the gap between shifts.
- **Oregon:** Oregon has a predictive schedule law in place. It covers hourly workers for retail, hospitality, and foodservice businesses with 500 or more employees worldwide. New hires must receive a good faith estimate of their work schedule. They must also receive their schedules in writing and at least seven days in advance. In 2020, the law changes the notice requirement to 14 days and adds a monetary penalty if the employer changes the schedule.
- **Vermont:** The state of Vermont has a right to request type law. It encourages employees to request schedules to suit their needs. Workers can request changes in hours, arrival and departure times, telecommuting or job-sharing. Their employers are required to discuss the request in good faith, considering things like consumer demand, cost, and morale.
- **New York City:** Schedules must be posted no less than 72 hours in advance. Once posted, employers can't make changes. The city also has a so-called 'clopening' provision for retail workers. An employer cannot require an employee to work to closing and then return for the next day's opening without consent. The rule applies if there are less than eleven hours between closing and opening. Workers can volunteer for a 'clopening' provided the employer pays an additional \$100.
- **Philadelphia:** Effective January 1, 2020, retail, hospitality, and foodservice employers with at least 250 employees in 30 locations worldwide must provide predictive scheduling. Workers must get a good faith schedule estimate when hired. Schedules are due 10 days in advance, extended to 14 days in 2021. Changes mean a penalty of one hour pay. There is a 'clopening' penalty of \$40 if the worker has less than 9 hours off between shifts.
- **San Francisco:** Employers must post schedules at least two weeks in advance. Changes result in extra pay for affected workers, based on when the employer makes the changes. The ordinance applies to retail employers.
- **Washington, DC:** The District requires retail employers post schedules 21 days in advance.

Creating predictive scheduling policies

If you have employees in a predictive schedule or fair workweek jurisdiction, you will need to update your employee handbook. Your first decision will be whether you want to create separate rules for each location or create one comprehensive policy. Even if you don't have workers subject to one of the laws, it may make sense to create scheduling rules. Predictable schedules are a huge selling point in a tight labor market. A policy sets you apart as a family-friendly, desirable place to work.

- First, review current scheduling practices. If you have left scheduling to an individual manager or supervisor's discretion, see what they have been doing.
- Second, determine which scheduling laws apply, highlighting the most restrictive rules. Consider whether it makes sense to apply those rules company-wide. That way, you won't have different rules for different locations.
- Third, consider the impact the new rules have on those who will implement them. For example, will providing more hours cost supervisors bonuses?
- Finally, let workers know about your new rules – especially if you have included the right to request provisions. Workers will need to know who to ask and what to expect.

How to train supervisors and managers on predictive scheduling

Employers typically delegate hourly worker scheduling to supervisors and managers. You've trusted them with scheduling because they know their workforce and location staffing requirements. If you have restricted when and how scheduling occurs, you will have to retrain them and remove some discretionary decision-making.

If you built management bonus programs on the premise of meeting a labor budget, you may have to make changes. Bonuses for staying on budget are a frequently cited reason for schedule changes, split shifts and short break times between shifts. Managers may not want to commit to guaranteed hours if that means losing a bonus. Nor do they want to offer additional hours to part-time workers if it pushes them over the limit for full-time. Doing so may have a big impact on the labor budget when you add benefits like health coverage. Alter the bonus program to take into account that your labor budget will increase to comply with predictive scheduling laws.

Your managers may use scheduling software to maximize coverage during busy times and minimize total hours worked. If so, contact the software maker to see if the technology can accommodate predictive scheduling rules. Can it, for example, calculate the potential penalty for scheduling shifts too close together? Or for sending workers home early once their shifts have started, depending on which state those workers are in? Will it prompt supervisors to publish schedules that meet fair workweek notice laws? Can it flag the cost of a change being contemplated versus allowing the worker to complete the shift?

Final note: Predictive scheduling and fair workweek laws are spreading. Unfortunately, each legislature is putting its own spin on scheduling rules. There's no model legislation for them to turn to. Employers operating out of multiple locations must be on constant alert for new and unique legislation.