Mark it on the calendar – predictive scheduling law is coming

COMPLIANCE CORNER

Heather Fossity

Last summer, the Oregon Legislature passed Senate Bill 828 – the first state predictive scheduling law. Similar ordinances are in place in select cities – including San Francisco, Seattle and New York – and are currently under consideration in Chicago. There seems to be a growing trend to increase employee protection in industries such as food and beverage, where schedule predictability has historically been an issue. Since the majority of the Oregon law takes effect July 1, 2018, and the Oregon Bureau of Labor and Industries last month issued proposed rules implementing the law, now is a particularly important time to revisit this topic.

The Fair Work Week Act applies to employers with 500 or more employees worldwide in retail, hospitality or food services ("covered employers"). This also includes separate entities that form an integrated enterprise, based on interrelation of operations, shared common management, centralized control of labor relations, and common ownership or financial control. The Fair Work Week Act applies to the covered employers' nonexempt employees.

Under the Fair Work Week Act, covered employers must provide employees advance notice of their work schedule or the employer will face penalties. As of July 1, 2018, covered employers must give employees a written work schedule at least seven calendar days in advance (and 14 calendar days in advance beginning July 1, 2020). Further, at the time of hire, covered employers must provide a good faith estimate of employees' work schedules, including the median number of hours expected to work in an average month and information about voluntary standby and on-call shifts.

With this change, covered employers should exercise particular caution when modifying employees' work schedules. Under the Fair Work Week Act, employees are entitled to additional compensation for work schedule changes without advance notice. For example, in addition to the wages earned, the employer must pay the equivalent of one hour of the employee's regular rate of pay if the employer adds more than 30 minutes of work to the employee's shift, changes the date or start or end time of the employee's shift without a loss of hours, or schedules the employee for an additional work shift or on-call shift.

The covered employer is also responsible for additional compensation in the amount of one half times the employee's regular rate of pay for scheduled hours the employee does not work if the employer subtracts hours from the employee's shift, changes the date or start or end time of the shift resulting in a loss of hours, cancels the employee's work shift, or does not ask the employee to perform work when the employee is scheduled for an on-call shift.

As some relief, covered employers are not responsible for additional compensation when employees mutually agree upon shift swaps, the schedule is modified by fewer than 30 minutes, the employee requests the changes, there are documented disciplinary reasons for changes to the schedule, and in circumstances involving threats to employees or property, failed public utilities, natural disasters and ticketed event cancellation.

Although these procedures may undermine necessary flexibility, the Fair Work Week Act does provide a voluntary standby list as a mechanism to address unanticipated needs. To comply with the law, employees must request or agree in writing to be a part of the standby list, and employers must provide written notification that the list is voluntary, how the employer will notify employees of additional hours, that the employee is not required to accept the additional hours offered, and that the employee is not entitled to additional compensation due to the change.

The Fair Work Week Act also allows employees to express schedule preferences, although employers are not required to honor the requests. Employers can ask for reasonable verification of the need for the request, but when requesting medical verification, the employer must pay reasonable costs including lost wages if the costs are not paid under a health benefit plan. Further, employers cannot retaliate against an employee for expressing scheduling preferences.

The Fair Work Week Act will also impact scheduling the same employee for closing and subsequent opening shifts as it requires hourly employees have 10 hours of rest in between shifts. Otherwise, if the employee works during this rest period, the employer must compensate the employee at one and one half times the employee's regular rate of pay.

Although the Fair Work Week Act imposes new burdens on covered employers, there may be some benefits as well. For example, predictable schedules also mean predictable wages, and idealistically, a happy and healthy workforce is an asset to any company.

As major provisions of this law take effect this summer, we highly encourage employers to reach out to counsel to finalize any updates to policies, procedures and training, and to clarify any remaining questions.

Heather Fossity is an attorney at Barran Liebman LLP. She defends employers and management in a variety of employment matters, while serving as proactive counsel. Contact her at 503-276-2151 or hfossity@barran.com.