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Labor and Employment Alert: New York City Requires Predictive Scheduling For Retail Employees

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Benjamin A. Shepler

Michael C. Griffaton

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CLIENT ALERT | 6.1.2017

“Predictable schedules and predictable paychecks should be a right, not a privilege.” ~ Mayor Bill de Blasio

On May 30, 2017, New York City became the third city behind San Francisco and Seattle to prohibit the practice of “on-call scheduling” for retail employees. With on-call scheduling, an employee must be available to work and contact or wait to be contacted by his or her employer to determine whether he or she must report to work. The city’s legislation now requires predictive scheduling for retail employees. Mayor de Blasio stated the law “will ensure that workers will be able to budget for the week ahead, schedule childcare, and plan evening classes.”

The law becomes effective in 180 days (so around November 2017 – just in time for the holiday shopping season). When it becomes effective, a retail employer employing 20 or more employees in New York City is prohibited from:

1. Scheduling a retail employee for any on-call shift. An “on-call shift” means any time period other than an employee’s regular shift when the employee must be available to work, regardless of whether the employee actually works and regardless of whether the employer requires the employee to report to a work location
2. Cancelling any regular shift for a retail employee within 72 hours of the scheduled start of such shift. A “regular shift” means a span of consecutive hours starting when an employer requires an employee to report to a work location and ending when such employee is free to leave a work location.
3. Requiring a retail employee to work with fewer than 72 hours’ notice, unless the employee consents in writing.
4. Requiring a retail employee to contact a retail employer to confirm whether or not the employee should report for a regular shift fewer than 72 hours before the start of such shift.

A retail employer may grant a retail employee time off if the employee so requests and may allow retail employees to trade shifts. Work schedules can be changed with less than 72 hours' notice if operations cannot begin or continue due to threats to the retail employees or the retail employer's property; the failure of public utilities or the shutdown of public transportation; a fire, flood or other natural disaster; or a state of emergency.

A retail employer must provide retail employees with a written work schedule no later than 72 hours before the first shift on the work schedule. The work schedule must be conspicuously posted at the work location at least 72 hours before the beginning of the scheduled hours of work. The retail employer must update the schedule as needed and then directly notify affected retail employees after making any changes. In addition to posting, retail employers must transmit the work schedule electronically if it regularly provides scheduling information in that manner. Retail employers also will be required to post the city-designated notice informing retail employees of their rights.

The law prohibits taking adverse action penalizing an employee for exercising or attempting to exercise these rights. It also prohibits actions that are reasonably likely to deter an employee from exercising these rights. This includes:

- threatening
- intimidating
- disciplining
- discharging
- demoting
- suspending
- harassing an employee
- reducing the hours or pay of an employee
- informing another employer that an employee has engaged in protected activities
- discriminating against the employee, including actions related to perceived immigration status or work authorization

The law provides for both administrative enforcement and a private right of action. In addition to compensatory and statutory damages and civil penalties, an aggrieved employee may recover reasonable attorney's fees.

Retail employers must retain records documenting their compliance with these requirements for three years. Upon request by a retail employee, a retail employer must provide the employee's work schedule in writing for any week worked within the prior three years and the most current version of the work schedule for all retail employees at that work location, whether or not changes to the work schedule have been posted.

Retailers in New York City must now balance unpredictable demands of customers, weather and employee turnover with the law's predictive scheduling mandates. Governor Cuomo's office is reportedly drafting its own regulations for retail and restaurant workers that would apply statewide, and legislation regarding

predictive scheduling has been introduced in Congress and in at least 12 states. Contact your Vorys lawyer if you have questions about predictive scheduling requirements.