

HB 1491 - 2019-20

Concerning employer and employee scheduling.

Sponsors: **Macri, Lekanoff, Frame, Davis, Fitzgibbon, Cody**

Companion Bill: **SB 5717**

Bill History

2019 REGULAR SESSION

- Jan 23 First reading, referred to Labor & Workplace Standards.
- Feb 5 Public hearing in the House Committee on Labor & Workplace Standards at 3:30 PM.
- Feb 21 Executive action taken in the House Committee on Labor & Workplace Standards at 8:00 AM.
LAWS - Majority; 1st substitute bill be substituted, do pass.
Minority; do not pass.
- Feb 22 Referred to Appropriations.
- Feb 25 Public hearing in the House Committee on Appropriations at 1:30 PM.

HOUSE BILL REPORT

HB 1491

As Reported by House Committee On:
Labor & Workplace Standards

Title: An act relating to secure scheduling.

Brief Description: Concerning employer and employee scheduling.

Sponsors: Representatives Macri, Lekanoff, Frame, Davis, Fitzgibbon and Cody.

Brief History:

Committee Activity:

Labor & Workplace Standards: 2/5/19, 2/21/19 [DPS].

Brief Summary of Substitute Bill

- Requires food service, hospitality, and retail establishments with more than 250 employees worldwide, but exempting employers in rural counties, to provide employees 14 days' notice of work schedules, compensate employees for schedule changes, grant employee requests for schedule changes under certain conditions, and meet other requirements.
- Requires employers to give access to additional hours to existing employees before hiring externally.
- Provides for administrative remedies and a civil cause of action.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Sells, Chair; Chapman, Vice Chair; Mosbrucker, Ranking Minority Member; Chandler, Assistant Ranking Minority Member; Gregerson and Ormsby.

Minority Report: Do not pass. Signed by 1 member: Representative Hoff.

Staff: Joan Elgee (786-7106).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

State law does not address when and how workers are scheduled. How much notice an employer gives an employee regarding a schedule change, for example, is up to the employer unless there is a collective bargaining agreement or employment contract that specifies the amount of notice required. A number of jurisdictions, including Seattle and Oregon, have enacted scheduling laws.

The Minimum Wage Act covers most employees in the state. Exemptions include some executive, administrative, and professional employees.

Summary of Substitute Bill:

Coverage.

Employees covered by the state's Minimum Wage Act who work at a fixed point of sale location are covered by provisions establishing scheduling requirements for certain employers. Employers are food service, hospitality, and retail establishments with 250 or more employees worldwide, except that employers located in rural counties are exempt. A rural county is a county with a population density of less than 100 persons per square mile or smaller than 225 square miles. A restaurant must also have 40 or more locations worldwide. Franchisees associated with a franchisor or network of franchisees with more than 250 employees in the aggregate are covered except that a franchise employing fewer than 25 employees aggregated across all locations operated by that franchisee is exempt. Nonprofit service organizations and temporary employment agencies are also exempt.

Requirements.

- *Good Faith Estimate of Work Schedule.* Upon hire, employers must provide employees with a good faith estimate of the employee's work schedule, which must include the expected median hours per week and whether the employee is expected to work on-call shifts. An employer must revise the estimate annually and when there is a significant change to the employee's work schedule.
- *Work Schedule Input.* Employees may identify any limitations or changes in availability, and may request schedule and location preferences. Employers must engage in an interactive process regarding requests not to work certain shifts or at certain locations or preferences for hours or locations of work. If the request is due to a major life event, the employer must grant the request unless the employer has a bona fide business reason for denial. A "major life event" is changes in the employee's transportation or housing; or the employee's serious health condition, responsibilities as a caregiver, enrollment in career-related education or training, or other job. An employer may require verifying information from the employee.
- *Rest Between Work Shifts.* Employers may not require employees to work shifts separated by fewer than 10 hours, and an employee who requests or agrees to work such hours is entitled to one and a half times the regular rate of pay for shifts separated by fewer than 10 hours.

- *Advance Notice of Work Schedule.* Employers must provide the work schedule to employees at least 14 days before the first day of the schedule. An employer must post the work schedule in English and the primary languages of all the employees at the workplace and transmit it to each employee. An employer who fails to timely post the work schedule must compensate each employee \$100 for each day the schedule is not posted.
- *Work Schedule Changes.* Employees may decline any schedule changes made by the employer after the advance notice. If an employee requests a change in the schedule after the advance notice, the employer may ask or require the employee to find a replacement as follows:
 - if another law prohibits asking the employee or protects the absence from employer interference, the employer may not ask or require the employee to find a replacement;
 - if the reason is an emergency or major life event, an employer may ask but not require the employee to find a replacement; and
 - for other reasons, the employer may require the employee to find a replacement.
- *Compensation for Work Schedule Changes.* For employer-requested changes after the advance notice, the employee is entitled to additional compensation as follows:
 - 1 hour of regular pay for adding hours or changing the date or start or end time of a work shift with no loss of hours, or changing the location; and
 - one-half the regular pay for any scheduled hours not worked, including on-call hours not worked.

Exceptions include additional hours that an employee agrees to work in response to a mass employer communication used only for hours that are the result of an other employee being unable to work, additional hours that an employer requests employees currently working to work to address present and unanticipated customer needs, mutually agreed shift swaps or coverage, employee-requested changes, and when operation closes because of a natural disaster.
- *Underscheduling.* An employer may not engage in a pattern or practice of systemic underscheduling in which the total hours actually worked are significantly greater than the hours in the work schedule. Employers must periodically provide data to the Department of Labor and Industries (Department) with aggregate data on discrepancies between hours scheduled and hours worked.
- *Access to Hours for Existing Employees.* Before hiring external employees, including temporary employees, employers must offer additional hours to current employees as follows:
 - Employers must post notice of the available hours for five days and must offer the hours to qualified existing employees. Details of the notice are specified.
 - Employees are not qualified if overtime pay would be required or if other laws would bar the employee from working.
 - The employer must give the employee offered hours at least five days to accept the offer.
 - The priorities for offering shifts to employees are specified.

- If no employee responds to the notice of additional hours or accepts offered hours within the timeframes specified, or all employees decline hours, the employer may hire externally.

An employer who fails to offer additional hours as required must compensate each employee \$100 for each occurrence. An employer who fails to award hours to a qualified employee must compensate the employee \$1,000.

Enforcement.

- *Administrative Enforcement.* The Department must investigate complaints and may order payment to the employee of unpaid compensation plus interest, statutory damages of twice the unpaid compensation, and payment to the Department of the costs of the investigation and enforcement. A prevailing employee is entitled to attorneys' fees and costs.
- *Civil Penalties.* The Department may also order payment of a civil penalty of not less than the greater of \$1,000 per violation or 10 percent of unpaid wages, up to \$20,000 per aggrieved party. Penalties may be waived if the employer pays the full remedy due to the employee within 10 days of the final order.
- *Whistleblower Enforcement.* An employee may seek the civil penalties through a civil action on behalf of the Director of the Department and other employees. The process for a whistleblower action is specified, including that the whistleblower must notify and give the Department an opportunity to investigate. An employee may designate an organization to represent it in the whistleblower proceedings. Penalties are distributed 70 percent to the Director for enforcement and education of employers and employees, and 30 percent to the aggrieved employees. Twenty percent of the Director's share of the penalties must be allocated to community-based enforcement partnerships.
- *Private Cause of Action.* An employee or class of employees may bring a civil action for remedies similar to those available in an administrative action.
- *Retaliation.* Retaliation for filing a complaint or taking other action under the provisions is prohibited. Prohibited retaliation includes demoting, reducing hours, and actions or threats relating to perceived immigration status or work authorization. An adverse action against an employee within 90 days of the employee's exercise of rights is presumed retaliatory. If an employer is found to have retaliated, the Director or court must order an additional payment to the employee of up to \$5,000.

Other.

- *Recordkeeping.* Employers must maintain specified records documenting compliance for three years. A failure to retain adequate records creates a presumption, rebuttable by clear and convincing evidence, that the employer violated the provisions.
- *Rulemaking/Technical Assistance.* The Department must adopt implementing rules and provide technical assistance to employers.

Substitute Bill Compared to Original Bill:

The substitute bill:

- raises the employer threshold to 250 employees, adds the rural county exemption, and adds the exemption for franchisees with fewer than 25 employees;
 - reduces the rest time;
 - adds the exemptions from additional pay for employees responding to employer communications;
 - removes unemployment insurance good cause quit provisions;
 - adds the exclusions for nonprofit service organizations and temporary employment agencies;
 - removes the definition of "work shift;" and
 - adds clarifying language regarding coverage and other matters.
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Appropriation: None.

Fiscal Note: Requested on February 21, 2019.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The nature of work has changed, and it is important to respect people's time away from work. Employees around the state have challenges balancing work and personal lives and multiple jobs. This bill will help families. Employees need reliable work schedules. Inconsistent schedules make it difficult to plan, such as for school and appointments. Arranging child care and transportation is hard with notice of only a day or two. Staff have to show up and then are sent home. Employees are pressured to have open availability and requests for schedule changes are not granted. Women are over-represented in industries with scheduling issues. It is very hard to budget when a person does not know how many hours they will work and what their paycheck will be. Inconsistent hours also make it impossible to find a second job.

Working opening and closing (known as "clopenings") compromises sleep. Workers should not have to choose between health and making a living. The Seattle ordinance has improved the lives of Seattle workers who no longer have to work clopenings. There have been few investigations, which shows the law is working. If schedules change, only a small predictability payment is required. The bill still allows flexibility; for example, employees could switch shifts for medical appointments.

(Opposed) The bill is unclear in its coverage. The coverage is unfair in that fine dining is exempt but hardware stores are covered. Temporary agencies are included. Thousands of small businesses are covered, even convenience stores. The bill prohibits shifts of less than six hours, which does not work in some industries. The requirements are not workable for industries with clients that call with two days' notice of needs, for example. This is one more expense. Seattle employers are having trouble adjusting to the ordinance and are closing down stores.

The bill creates restrictive scheduling and removes the flexibility that employees want. An employee may not agree to a different schedule. Employers are penalized when trying to adjust schedules. Employees who want clopenings to get a long weekend, would no longer be allowed to work these shifts. Immigrant workers will be harmed. Full-service restaurants, whose workers were not allowed to participate in the bill's development, should be exempt.

The bill is broader than the Seattle ordinance. There is a conflict with notice under paid family leave. The penalties encourage people to remove the posted schedules and a person has a remedy in court even if the Department waived the penalties. An employer may not be able to provide translations. The requirements are inconsistent with collective bargaining agreements.

Persons Testifying: (In support) Representative Macri, prime sponsor; Lee Ervin; Mckyndree Rogers; Randy Hoggarth; Lindsey Moore; April Frazier; Erin Bishop; Joel Nelson, United for Respect; Adam Scriptor; Josh Fogt, Working Washington; David Rojas; Amy Dayley Angell; and Nicole Bloam.

(Opposed) Bob Battles, Association of Washington Business; Lisa Castro, The UPS Store; Julia Gorton, Washington Hospitality Association; Paula Craft; Simone Barron; Dee Firmschild; Benjermin Leslie; Sean Beavers; Tracie Schmitt, Ridge Motorsports Park; Naresh Bhatt, The UPS Store–Seattle; Jack Graham, The UPS Store–Tumwater; Carolyn Logue, Washington Food Industry Association; Tyler Myers, The Myers Group and Kress Independent Grocers Alliance; Patrick Connor, National Federation of Independent Business; and Holly Chisa, Northwest Grocery Association.

Persons Signed In To Testify But Not Testifying: Melissa and Joshua Baker, Dirty Deeds Cleaning.