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Partners in Employment Management

Monthly Minute Memo: *December 10, 2020 – Chicago's Fair Workweek Ordinance*

Building Services, Healthcare, Hotels, Manufacturing, Restaurants, Retail, and Warehouse Services employers in the City of Chicago need to be aware of the Chicago's Fair Workweek Ordinance ("Ordinance"). Although the ordinance took effect on July 1, 2020, the City of Chicago delayed the effective date for an employee's private right of action under the Ordinance until January 1, 2021 due to the COVID-19 pandemic. The Ordinance allows employees to decline scheduled hours that are added within 10 days of the beginning of the work schedule, provides for pay for employees when certain hours/shifts are cancelled, and provides a right to certain rest periods. This Minute Memo summarizes the requirements under the Ordinance and the penalties an employer may face for violations but may not be exhaustive.

Who qualifies for protections under the Ordinance?

In order to be a "covered employee" under the Ordinance, the employee must satisfy all of the following criteria: (1) work as an employee or if working for a day and temporary labor service agency, the individual must work for an employer for 420 hours within an 18-month period; (2) spend the majority of their time working for an employer within the City of Chicago; (3) perform a majority of their work in one of the following industries: Building Services, Healthcare, Hotels, Manufacturing, Restaurants, Retail, and Warehouse Services; (4) earn $50,000 or less per year as a salaried employee or $26.00 or less per hour as an hourly employee.

Which employers are covered under the Ordinance?

A "covered employer" must meet all of the following requirements: (1) globally must employ 100 or more employees among all of its locations (both in and outside of Chicago); (2) must employ at least 50 "covered employees"; and (3) must be primarily engaged in the specific industries set forth in the Ordinance. Different rules apply for franchise restaurants.

Employers are required to provide a "good faith estimate" regarding a work schedule.

By the first day of employment, an employer must provide a covered employee with a written good faith estimate of the projected days and hours of work for the first 90 days of employment. This good faith estimate must include: (1) the average number of weekly work hours the covered employee can expect to work each week; (2) whether the covered employee can expect to work any on-call shifts; and (3) a subset of days, times or shifts that the covered employee can expect to work or not be scheduled to work. Additionally, the estimate must identify the address of the location(s) the employee will work and specify what proportion of time and on what workdays the employee will work at the location(s). An employee may request the employer to modify the good faith estimate. The employer, in its sole discretion may accept or reject the request in writing within three (3) days of the request.

Although the good faith estimate is not a contractual offer of employment, an estimate not made in good faith, is considered a violation of the Ordinance.

What are the rules for posting a work schedule?

For schedules between now and June 30, 2022, the employer must post the work schedule no later than 10 days before the first day of any new schedule. For schedules beginning July 1, 2022, the schedule must be posted no later than 14 days before the first day of any new schedule. There are some exceptions to posting for employees who are victims of domestic or sexual violence or have a family/household member who is a victim.

An employer must post the schedule in a conspicuous place that is readily accessible and visible to employees. If an employer uses other means of posting schedules, such as e-mail or text, it may continue to do so or use a combination of methods. The schedule must include the shifts and on-call status of all current employees at the worksite. If requested by the employee, an employer is required to transmit a schedule electronically. There are certain exceptions for employees of a venue that hosts ticketed events or "self-schedules." (Self-schedule is defined under the Ordinance as the practice of an employee to self-select work shifts without employer pre-approval pursuant to a mutually acceptable agreement.)

An employer may change the work schedule after it is posted or transmitted, up to the deadline (10 or 14 days) without penalty. If the employer changes the schedule after the deadline, the changes are subject to the notice and compensation requirements of the Ordinance. An employer must post an amended work schedule within 24 hours of a schedule change. If the change to the shift is 15 minutes or less, the employer is not obligated to pay the employee additional pay for the shift change pursuant to the Ordinance.

Employee's Right to Decline

An employee may decline any previously unscheduled hours where the employer has provided less than 10 days (14 days for schedules after July 1, 2022) before the first day of any new schedule.

Required Payments to Employees for Changing the Schedule

The ordinance provides two different scenarios where an employee is entitled to additional pay for employer's changes in their work schedule:

> Changes made less than 10 days (14 days after July 1, 2022): In addition to the regular rate of pay, the employee receives one hour of "predictability pay" for each shift where the employer (1) adds hours of work; (2) changes the date or time of a work shift with no loss of hours; (3) with more than 24 hours' notice, cancels or subtracts hours from a regular or on-call shift.
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> Changes made with less than 24 hours' notice: The employee receives "cancellation pay" of no less than 50% of the covered employee's regular rate of pay for any schedule hours the employee does not work because the employer subtracts hours from a regular (or on-call) shift or cancels a regular (or on call shift).
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> Examples:

On January 2nd, an employer adds additional hours to a shift taking place on January 15th, during the work schedule running from January 10th – 17th. The employer must pay predictability pay in addition to the regular rate of pay because the employer added hours with only 8 days' notice.

On January 2nd, an employer adjusts the start and end time of an 8-hour shift on January 15th, during the work schedule running from January 10th – 17th. The employee does not lose any hours. The employer is still required to pay predictability pay in addition to the regular rate of pay because the employer only gave 8 days' notice.

How is predictability pay calculated?

The calculation of predictability pay is centered on the base rate of pay, regardless if the cancelled or altered shifts would be paid at an overtime rate. Tipped employees are calculated at the base rate before tips or the minimum wage, whichever is higher. Salaried employees (under $50,000 a year) are calculated by dividing the salary by 52 weeks and then by 40 hours, assuming a full-time work schedule.

Right to Rest

Under the ordinance, employees can decline shifts that begin less than 10 hours following the end of the previous day shift. If an employee agrees to work, the employee is paid at 1.25 times their base rate of pay for the entire shift. If any hours are considered overtime, the employee is paid 1.5 times the base rate for any overtime hours. The employee's agreement to work must be in writing.

Are there exceptions to the Ordinance?

There are several exceptions to the Ordinance where an employer may be exempt from honoring an employee's right to decline, predictability pay, and/or cancellation pay. However, these exceptions do not apply to the Right to Rest provision of the Ordinance.

Some exceptions apply broadly to all companies (acts of nature or pandemics) whereas other exceptions are specific to certain industries such as manufacturing (events outside employer's control resulting in changes in the need for employees) and health services (patient care requires specialized services or an unexpected substantial increase in demand for healthcare outside the control of the employer).

The exceptions also apply to mutually agreed shift trades or coverage agreements between employees and written work schedule changes mutually agreed to between the employee and employer. However, agreements where an employee agrees to waive any right to predictability pay for future unscheduled hours or shifts are not allowed under the ordinance. Finally, if COVID-19 causes a material change to an employer's operations that creates the need for a schedule change, the employer is exempt from certain provisions of the Ordinance.

What are the notice and posting requirements under the Ordinance?

If an employer is covered under the Ordinance, a notice advising the employees' rights under this Ordinance must be posted in a conspicuous place in each facility where an employee works. Additionally, every employer must provide with the first paycheck a notice advising the employee

of their rights under the Ordinance. The notice is available here: https://www.chicago.gov/content/dam/city/depts/bacp/OSL/fwwnoticejuly1letter.pdf

What are the fines/penalties for violating the Ordinance?

The Ordinance provides for fines and penalties for employers who are found to have acted in violation of the Ordinance. The Ordinance specially provides each employee affected and each day a violation occurs is a separate and distinct offense.

Employees do have a right to file a private cause of action against an employer, however, the Ordinance provides specific steps that must be followed, including filing a complaint with the Department of Business Affairs, prior to filing a lawsuit. An employee who prevails in a civil action is entitled to an award of compensation for damages sustained, including the payment of Predictability Pay unlawfully withheld, including litigation costs, expert witness fees, and reasonable attorney's fees. Any claim or action filed pursuant to this Ordinance must be made within two (2) years of the alleged conduct resulting in the complaint.

Retention of Records

Employers are required to maintain for at least three years, or the duration of any claim, civil action, or investigation (whichever is longer), a record of the employee's name, hours worked, pay rate, and records necessary to demonstrate compliance with the Ordinance (i.e. good faith estimates of work schedules).