What CHROs Need to Know about Scheduling Rights

Bills Would Limit How Employers Can Alter Employee’s Schedules, Provide Individual Bargaining Rights

In the past year, efforts to provide scheduling rights to employees have ramped up, with enactments at the local level as well as the introduction of legislation in Congress. The proposals are being packaged as part of a “family-friendly” agenda that includes paid leave and other new benefits. While the Republican Congress is unlikely to move any of these bills, Democratic candidates at all levels will be promoting them in the 2016 election campaigns. Similarly, President Obama or his successor could issue an Executive Order establishing these requirements for federal contractors.

On March 18, 2015, congressional Democrats introduced the Flexibility for Working Families Act (FWFA), which gives employees the right to request flexible scheduling arrangements and establishes a federal insurance program funded by employer and employee contributions to provide paid family and medical leave. The bills (S. 777/H.R. 1450) were introduced by Sen. Robert Casey (D-PA) and Rep. Carolyn Maloney (D-NY). On July 15, 2015 Elizabeth Warren (D-MA) introduced a similar bill, the Schedules That Work Act (S. 1772/H.R. 3071) (STWA). In 2014, a scheduling rights ordinance was enacted in San Francisco. In 2015, legislation has been introduced in ten states.

**Bargaining Rights** Both bills would enable an employee to request from an employer a temporary or permanent change in the terms or conditions of employment as it relates to:

- The number of hours the employee is required to work;
- The times when the employee is required to work or be on call for work;
- Where the employee is required to work; or
- The amount of notification the employee receives of work schedule assignments.

However, the STWA also gives employees the right to request schedule changes in order to minimize fluctuations in the number of hours the employee is scheduled to work on a daily, weekly, or monthly basis. Both bills would also require employers to meet with employees about scheduling requests and to provide a written decision, including any grounds for denying the request. If the employer rejects the employee’s request, the employer may propose an alternative change in writing.

**Ability of Employer to Reject Requests** The FWFA provides that if an employee is dissatisfied with the result and the alternative, the employee has the right to reconsideration by the employer’s supervisor, if there is one. The supervisor would then be required to provide the employee with a written decision within a reasonable amount of time and with reasons for the rejection. Both bills would also make it unlawful to retaliate against an employee who requests scheduling changes. The STWA provides that, if the request is related to caregiving, education or training, or a second job the employer must grant the request unless there is a bona fide business reason for denial.
Notice and Minimum Pay for Certain Employees  The STWA also includes certain additional rights for retail sales, food service, or building cleaning employees, and other employees designated by the Secretary of Labor by regulation. These rights include:

- The employees must be paid for at least four hours for each day the employee reports to work but is given less than a four hour shift;
- The employees must be paid for at least one hour for each call-in or on-call shift;
- The employees must be paid one additional hour each day they work a split shift;
- Schedules must be provided two weeks in advance;
- The employees must be paid for one additional hour when a schedule is changed with less than 24 hours’ notice unless it is due the unforeseen unavailability of an employee who had been previously scheduled to work that shift; and
- Employers must identify on pay stubs any additional pay due to the provisions in the STWA.

State and Local Laws  In 2014, San Francisco became the country’s first jurisdiction to pass a scheduling rights act. Connecticut, Illinois, Indiana, Maine, Maryland, Michigan, New York, New York City, Oregon, and Washington, D.C. are considering similar measures. On the heels of San Francisco’s law, a similar bill was introduced in California. California’s Fair Scheduling Act applies to food and general retail businesses with at least 500 employees in the state and with at least ten establishments in the United States, and is designed only impact large national chains and their franchisees. The California bill would require establishments to:

- Provide employees with at least two weeks’ notice of schedules;
- Pay employees additional pay for each previously scheduled shift that is moved to another date or time or cancels;
- Pay employees additional pay for each previously unscheduled shift an employee must work;
- Pay employees a specified amount for each on-call shift for which the employee is required to be available but is not called in to work;
- Allow an employee to, upon request, be absent from work without pay for up to eight hours twice a year to attend any required appointments at the county human services agency, with reasonable notice to the employer unless advanced notice is not feasible.

The provisions in the California bill would not apply in certain circumstances that are out of the employer’s control, such as threats to employees or property, a state of emergency, and public utility failures. The Fair Scheduling Act was ordered inactive for 2015.

Reporting Time Pay Laws  Eight states also have laws requiring certain employers that send paid hourly workers home before the conclusion of their scheduled shift to pay them for a minimum number of hours. In Connecticut, New York, and the District of Columbia employers must pay either a set number of hours or the number of hours in the regularly scheduled shift, whichever is less. In Massachusetts, New Hampshire and New Jersey employers are required to pay for a set amount of hours, and California and Oregon require employers to compensate employees for half of their scheduled shift. In California, recent lawsuits argue that on-call shifts should be treated the same as a regular shift. The lawsuits argue that on-call shifts are essentially the same as reporting to work and to deny employees payment is a form of “wage theft.”