THE OREGON FAIR WORK WEEK ACT

Noah Scott Warman
McKanna Bishop Joffe LLP
1635 NW Johnson Street
Portland, Oregon 97209
503-821-0959 – phone
503-226-6121 – fax
nwarman@mbjlaw.com

***WHY* SB 828?**

- Failure of federal government to extend worker protections
- States and localities as a result have taken the lead on worker benefits and protections
- Oregon is first to enact state-wide fair scheduling legislation at state level

***WHO* is affected?**

Employers:

- Applies solely to retail, hospitality, or food services establishments
    - Does *not* cover building trades, manufacturing, health care, or other employers – targets industries with low or no union density
    - Covers private sector employers only
- Employer must employee 500 or more employees "worldwide, including but not limited to a chain or integrated enterprise" for 20 or more work weeks for either the current or prior calendar year
    - "Chain" means an establishment that is part of an affiliation of two or more establishments within the United States, each of which is owned by the same person or entity and operate under identical or substantially similar trade names or service marks, both as defined in ORS 647.005. (§2(1))
    - Oregon's Bureau of Labor and Industries (BOLI) is tasked with the responsibility of defining "integrated enterprise"

Employees:

- Employees do *not* include salaried employees, leased employees, or an "employee of a business that provides services to or on behalf of an employer"
- For the purposes of the law, the employee herself must be engaged in "providing services relating to" retail trade, hotels, motels, casinos, or food services. Other employees do not count and are not covered.

WHERE **does the law apply?**

- Oregon only – but uniformly throughout the entire state
- Preempts Oregon cities, counties, and other political subdivisions from regulating any requirements relating to "work schedule" – "the days and times during which an employer is required to perform the duties for which the employee will receive compensation." Note that preemption applies beyond those industries and employees covered by the Fair Work Week Law.
    - They may still regulate "employee time off for medical reasons or sick time."
    - Public employers may regulate public employees; they may set work schedules in specifications for public contracts or subcontracts.
    - The law does not apply to schedule changes necessary to accommodate an employee under state or federal laws regulating disability, family, or medical leave
    - The law does not apply if a collective bargaining agreement provides for a remedy equal to or better than that created by law

WHEN **does the law take effect?**

- The sections preempting local legislation are now in effect.
- Effective July 1, 2018 – Sections 2-5, 6 to 10, and 12: good faith estimate of work schedule; voluntary standby list; advance notice of work schedule; rest between work shifts; input into work schedule; compensation for schedule changes; notice, posting, and record keeping; and non-retaliation
- Effective January 1, 2019 - Section 11 – creating a right of enforcement through filing a lawsuit or a complaint with BOLI.
- Effective July 1, 2020 – employees must receive 14 days' notice of work schedules instead of 7

WHAT **does the law do?**

The "good faith estimate" of work schedules – Section 4

- New employees are entitled to a "written good faith estimate of the employee's work schedule" at the "time of hire." That includes:
    - The "median" – not the average – number of hours an employee can be expected to work in an average one-month period;
    - An explanation of any voluntary standby list;
    - A written synopsis of how that list works (required by §4a); and
    - An indication whether an employee *not* on the voluntary standby list can be expected to work 'on call' shifts; if so, the estimate must provide an "objective standard" for when this can happen.
- The estimate need be only in "good faith" – not 100% accurate. It may be based on a prior year's schedule if the work is "seasonal or episodic."
- The estimate must be in the language the employer uses to communicate with the employee.

Voluntary standby lists – Section 4a

- Employers may, but are not required to, have a "voluntary standby list" to cover unanticipated customer needs or unexpected employee absences.
    - An employee must request or agree *in writing* to be included on the list.
    - The employer must notify each employee *in writing*:
        - Participation is voluntary; an employee may remove herself at any time or may remain on the list but decline any hours offered
        - How an employee may be removed from the list
        - How the employer will notify employees on the list of additional hours
        - How an employee may accept those hours
        - That an employee on the list does not qualify for additional compensation under §7 of the law for any changes to the employees written work schedule
- The employer may notify an employee on the list of additional hours by almost any means possible: in person, on the phone, by e-mail, by text, "or other accessible electronic or written format.
- An employer may not retaliate against an employee who does not want to be on the list, wants to be removed from the list, or declines an offer of additional hours while on the list.
- An employer is not required to include the list of employees on the standby list in the written work schedule described in section 5.
- BOLI may assess a civil penalty of up to $2,000 against an employer who coerces an employee into being added to the list for each day and each employee.

Advance, written notice of work schedules – Section 5

- Employees must get at least 7 days' notice (14 days in 2020) in writing and in advance of the first day of their work schedule.
- The written notice must be posted in a "conspicuous and accessible location," in English and in any other language used to communicate with workers
- Notice to a new employee must occur on or before her first day of work (not necessarily seven full days). If a current employee is on leave, notice must be given on the employee's first day back.
- The written work schedule must include all work shifts and all on-call shifts for the covered work period.
- If an employee is asked to change her schedule after the 7-day notice, the employer must provide "timely notice" whether orally or in writing; the employee has the right to decline the schedule change.
- If an employee wants a schedule change after the 7-day notice period (whether adding the employee to a different shift or to the on-call list), not at the employer's initiative, the notice requirement is waived.

Right to Rest – Section 6

- Unless an employee agrees otherwise, an employer may not schedule or require an employee to work during the first 10 hours after the end of a scheduled or on-call shift.
- If an employee does work in that time frame the employer shall pay time-and-a-half the employee's regular rate for all time that falls within that rest period.

- The regular rate of pay is an employee's base hourly rate of pay without regard to tips, bonuses, or any kind of premium pay such as holiday pay or shift differential.

The "Employee right to input into work schedule" – Section 6a

- An employee may ask for changes to her schedule, but nothing in this law obligates an employer to grant them.
- Employers cannot retaliate against an employee for asking.
- If an employer asks an employee to verify the need for a requested schedule change, the employer shall pay any reasonable costs for "providing verification that is medical verification required under this subsection, including lost wages, that are not paid under a health benefit plan in which the employee is enrolled."

Penalties for Schedule Changes – Section 7

- The law does not bar employers from making schedule changes; it does make them pay for involuntary changes
- If an employer changes an employee's schedule without the required advance notice, it must pay the employee as follows:
    - One hour of pay at the employee's regular rate of pay (total, not for each hour worked), in addition to wages earned for the time actually worked, when the employer
        - adds more than 30 minutes to the employee's work shift;
        - changes the date or start or end time of the employee's work shift (even without changing the total hours to be worked); or
        - schedules the employee for an additional work shift or on-call shift.
    - Half-pay for each scheduled hour *not* worked when the employer:
        - subtracts hours from the employee's work shift before or after the employee reports for duty;
        - changes the date or start or end time of the employee's work shift, resulting in a loss of work shift 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.
- No extra pay if an employer changes the schedule by 30 minutes or less.
- No extra pay if employees themselves agree to swap shifts. An employer may require the employees to get its approval first. Employers cannot arrange such swaps.
- No extra pay if the employee requests a schedule change and documents that request in writing.
- Employees on the standby list who accept an offer of work do not get penalty pay.
- Reductions in hours for disciplinary reasons are not subject to penalty pay, provided the employer documents the matter in writing.
- Penalty pay is not required in the event of emergencies: threats to employees or property, a utilities failure (e.g., water or gas line break), natural disasters, or the like.
- No penalty pay if an employer's hours of operation change when a "ticketed event" – a sporting, entertainment, civic, charitable or other event that requires a ticket for admission – is canceled, rescheduled, or changes its hours outside of the employer's control.

- Finally, no penalty pay if an employer asks an employee to work additional hours "to address unanticipated customer needs or unexpected employee absence," the employee agrees in writing to do so, the employer has already attempted unsuccessfully to use its standby list if it has one (contacting all employees on that list), *and* the employer has either used "group communication" to make the request of multiple employees or individually asked an employee working at the time of the need for coverage in person.

Retaliation and records

- Employers may not retaliate or discriminate against employees who invoke their rights under the Fair Work Week Law.
- Employers will be required to post a notice of employees' rights under the law.
- Employers must keep records showing their compliance with the law for at least three years.

HOW will it be enforced?

- Private litigation – through filing suit
- Administrative action – through a complaint to BOLI
    - BOLI enforcement appears to provide greater financial penalties to employers than private litigation
- Possibly grievance arbitration

CONSIDERATIONS FOR LABOR

- Every aspect of this legislation is already a mandatory subject of bargaining
- If representing employees in a covered industry – ensure your CBAs comply
- If representing employees outside of the scope of the law – incorporation by reference
- A floor for negotiations
- Preemption – only by bargaining, not lobbying, will workers get better scheduling provisions
- Building trades and contractors can get fair scheduling through public contracts if not through legislation
- "Best practices" – good benchmarks for most employers
- Organizing tool? …