# The Rising Tide of State and Local Scheduling Leave Laws

*The Legal Intelligencer*
By **Lee C. Durivage** | November 14, 2017

It has been a long time since the U.S. Congress has enacted any type of comprehensive employment legislation. Based upon the current political climate, it does not appear that things will be changing any time soon. In the absence of movement from Congress to enact laws that will uniformly impact employers across the country, state and local governments have taken it upon themselves over the last few years to introduce and enact progressive measures designed to expand employment rights for employees.

For instance, on Jan. 1, 2018, the New York Paid Family Leave Benefits Law will go into effect which will provide employees with paid family leave benefits and job protection rights, similar to the unpaid benefits currently provided by the Family and Medical Leave Act. While many other states have previously legislated some type of unpaid family leave to employees, the New York Paid Family Leave Benefits Law appears destined to be the model for increased paid leave benefits to bond with a new child and care for a loved one with a serious health condition. In fact, New York is one of four states to offer some type of paid family leave. New York's law, however, greatly expands prior efforts by state and local governments to provide paid family leave to employees. For instance, The California Paid Leave insurance program provides up to six weeks of paid leave to employees but the benefit is approximately 55 percent of an employee's weekly wage. New Jersey, similarly, provides paid leave up to two-thirds of an employee's weekly wages (up to $524/week) for six weeks. New York, in contrast, will initially offer eight weeks of paid leave (at 50 percent of one's salary) on Jan. 1, 2018, and will increase the number of weeks to 10 on Jan. 1, 2019. New York's law also gradually increases the amount of paid leave, maxing out at twelve weeks of paid leave (at 67 percent of one's salary) in 2022.

Because New York is often viewed as the center of progressive employment laws, it is highly likely that many states and municipalities will adopt New York's approach to enact paid family leave laws for their residents. Indeed, Philadelphia has been one of the jurisdictions that has been at the forefront of requiring employers to offer paid leave for a variety of reasons; it is only a matter of time before the city council passes some version of a paid family leave law. While there is overwhelming support by employees for paid family leave (some surveys reflect 83 percent of employees are in favor of it), the real question for businesses is what that law may look like. Indeed, the federal FMLA statute applies to businesses with 50 or more employees. However, New York's paid family leave applies to all private employees, which may make it more difficult for small businesses to operate within the city limits—particularly if they are required to hold positions for an

employee during the course of that employee's leave of absence. While the continuing change of local employment laws is nothing new, employers must take active notice of these changes and the legislative process in order to make certain that paid laws are not too detrimental to the operation of their businesses.

Small businesses in other jurisdictions are also feeling the effects of "predictive scheduling laws," which are designed to require employers to provide advance notice of employee schedules and, if they fail to do so, to pay certain premiums to employees if the employee schedules are modified outside of the time limits referenced in the laws. San Francisco, San Jose and Seattle have all enacted these types of laws over the last several years. Oregon recently became the first state to enact this type of legislation. New York City, meanwhile, has gone "all in" with a series of "Fair Workweek" bills, with Mayor Bill de Blasio commenting that "predictable scheduling and predictable paychecks should be a right, not a privilege." These bills, set to go into effect on Nov. 26, will greatly expand the rights of retail and fast food employees within New York City. For instance, the bill impacting retail establishments prohibits "on call" scheduling, bans the ability to cancel an employee's shift within 72 hours of the shift (or to add a shift unless that employee consents in writing), and requires employers to post a copy of the work schedule 72 hours in advance of the shift.

The bill impacting fast food establishments goes even further, with employers literally paying a premium to employees for scheduling employees as they had always done in the past. Specifically, fast food establishments are required to pay employees $100 in additional compensation if an employee is required to work a shift with less than 11 hours between their shifts. This practice, referred to as "clopening," generally occurs when an employee works until closing and then is required to come back to work to open the restaurant the next morning. While the bill does permit an employee to voluntarily consent in writing to work these shifts without the noted additional compensation, it is doubtful that an employee informed of this bill would willingly agree to do so. Moreover, the "consent" called for to avoid the additional compensation will undoubtedly be scrutinized by counsel during litigation on any of these issues.

Similarly, pursuant to another bill, fast food establishments will also be limited in their ability to hire additional staff for their restaurants. In particular, these establishments will be required to offer their current employees additional hours (and actually post information about additional shifts) before transferring employees from other locations or hiring new staff for these shifts. Indeed, this type of practice will essentially eliminate an employer's ability to manage its business during times of need, as employers will be required to provide additional hours to potentially weaker employees, rather than hiring a new candidate that may be better suited for a particular position or work shift.

Fast food establishments have even more onerous requirements for posting schedules than retail establishments—mandating that schedules be posted 14 days in advance of the covered shift. Moreover, the bill has built in premiums (ranging from $10 to $75) to be paid to the employees if there are any changes to that schedule. For instance, an employer will be required to pay an employee $10 for each change in which

additional hours and/or shifts are added (or if a shift is changed but the employee does not lose any hours) and those changes are made with less than 14 days' (but more than seven days') notice. The required premiums are increased depending on the amount of notice provided to the employee, with the largest premium ($75) required if a shift is cancelled or hours are subtracted from a regular shift with less than 24 hours' notice. The law further requires that a fast food employer must provide a newly hired employee "with a good faith estimate in writing setting forth the number of hours a fast food employee can expect to work per week for the duration of the employee's employment."

While similar legislation has not (yet) been considered in Philadelphia, it is likely that city council will take notice of what is occurring in New York City and might eventually attempt to bring Mayor de Blasio's "predictable scheduling and predictable paychecks should be a right, not a privilege" concept to Philadelphia. While "predictable schedules" may be attractive to any employee who has ever worked in a retail or restaurant establishment, it remains to be seen how restrictive these laws may ultimately be. Indeed, while New York City's laws regarding fast food establishments are designed to target large corporate entities and large franchisees, Philadelphia's Fair Practices Ordinance applies to employers with one or more employees. Small businesses, of course, need the flexibility of sending employees home early or cancelling a work shift if there is not a business need for the employees to be at work, on the clock. Of course, requiring payment of a premium to do this may undermine the effective management of a small business in the city. Since momentum is gaining for these types of laws, employers must remain vigilant and continue to be active in voicing their concerns about unnecessary regulations in the scheduling of their employees. At the very least, employers would be well counseled to begin adopting consistent policies or practices regarding when schedules will and should be posted and maintaining those schedules in the regular course of business. Such policies and practices will be helpful to prepare employers if and when "predictive scheduling" laws are passed in jurisdictions where they do business.

---

*Lee C. Durivage is a shareholder in the Philadelphia office of Marshall Dennehey Warner Coleman & Goggin and a member of the employment law practice group. He concentrates his practice in the defense of employers throughout Pennsylvania's federal and state courts and at the administrative agencies. Additionally, he counsels and trains management personnel on compliance with local, state and federal employment laws. He can be reached directly at 215-575-2584 or at lcdurivage@mdwcg.com.*