A SCHEDULING NIGHTMARE: COMPLYING WITH THE CHICAGO FAIR WORKWEEK ORDINANCE

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The Chicago Fair Workweek Ordinance (the "Ordinance") goes into effect on July 1, 2020 and has the potential to cause headaches for some manufacturers that have employees working in Chicago. Below are some key questions and answers about the Ordinance.

Are all Manufacturers Who Are Located in Chicago or Have Employees Working in Chicago Subject to the Ordinance?

No. While "manufacturing" is one of the seven covered industries under the Ordinance, only those manufacturers who meet the definition of a "Covered Employer" are subject to its provisions. The Ordinance defines a "Covered Employer" as an employer that employs 100 or more employees at all its locations, including outside of Chicago. However, even if a manufacturer employs 100 or more employees, for it to be a Covered Employer under the Ordinance, at least 50 of its 100 employees must be "Covered Employees." The Ordinance defines a "Covered Employee" as an employee who spends a majority of his/her time working in Chicago and, if salaried, earns less than or equal to $50,000.00, or if hourly, earns less than or equal to $26.00 per hour.

Many manufacturers contract with temporary or day staffing agencies for workers. After July 1, 2020, if that worker performs services for a covered manufacturer for 420 hours within an 18-month period, the Ordinance applies to that worker. Independent contractors are exempt and are not afforded the rights under the Ordinance.

How Much Advance Notice of Schedules and Scheduling is Required?

Beginning July 1, 2020, prior to or on a Covered Employee's first day of employment, the employee must be provided with a good faith estimate in writing of his/her work schedule for the first 90 days of employment. This good faith estimate does not create an employment contract and/or alter the individual's at-will employment status, however.

Beginning July 1, 2020, through June 30, 2022, Covered Employers must provide Covered Employees with written notice of their work schedule no later than 10 days before the first day of any new schedule. Beginning July 1, 2022, the 10-day notice period increases to 14 days prior to the beginning of any new schedule.

Importantly, under the Ordinance a Covered Employee has the right to decline any previously unscheduled hours that Covered Employers attempt to add to the employee's work schedule with less than 10 days' notice of any new work schedule and, may do so with complete immunity from discipline.

Under these circumstances, Covered Employers need to be mindful not to retaliate (unintentionally, hopefully) against a Covered Employee who exercises his or her right to decline any unscheduled hours added to his/her shift without proper notice. Courts in Illinois recognize as retaliation any conduct that may have a "chilling effect" (i.e. discourage) on an employee from exercising protected conduct. So, for example, a Covered Employer tells a Covered Employee that if he declines the request to work, he will no longer be eligible for overtime, so the employee agrees. While the employee did not suffer any immediate or tangible adverse action, the employer's words have a potentially chilling effect on the employee in the future, as he may believe that he cannot now (or ever) decline a request to work unscheduled hours, or risk never being asked to work overtime.

What are the Penalties for Schedule Changes?

If a Covered Employer "alters" a Covered Employee's work schedule with less

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than the required 10-day written notice, the employer must provide the employee with one hour of "predictability pay" at the employee's regular rate of pay. The Ordinance defines "alter" as (1) adding hours of work; (2) changing the date or time of the work shift with no loss of hours; or (3) with more than 24 hours' notice, canceling or subtracting hours from a regular or on-call shift.

Separately, if the Covered Employer cancels or reduces a Covered Employee's hours with less than 24 hours' notice of the impacted shift, the employer must pay the employee one-half his/her regular rate of pay per hour for any hours not worked as a result of the change in schedule.

Any changes to a Covered Employee's work schedule after the work schedule has been posted, must be reposted within 24 hours of the scheduled changed.

The Ordinance also protects a Covered Employee from working consecutive shifts that are less than 10 hours after the end of the employee's previous day's shift. In this situation, the employee has the right to decline to work that shift. If, however the employee agrees to work, Covered Employers must pay the employee 1.25 times his/her regular rate of pay for all such hours worked. And, for any hours in the shift that constitute overtime hours, those hours must paid at 1.5 times the employee's base rate of pay.

Are There Any Exceptions to the Predictability Pay Requirement for a Schedule Change?

Fortunately, there are several. First, no penalty is assessed if the total change to the work schedule does not exceed fifteen minutes. Nor is a Covered Employer penalized if the Covered Employee clocks in early, or out late and unilaterally alters his work schedule. The Ordinance provides a litany of other exceptions to a Covered employer's obligation to provide predictability pay, including, the following:

- Specifically, for manufacturers, if an event outside of their control occurs resulting in the work schedule change, for example, a customer requests a delay in production, or there is a delay in raw materials or other parts are needed for production;
- Threats to Covered Employers, Covered Employees, or property, or when civil authorities recommend that work not begin or continue;
- Public utilities fail to supply water, electricity, or gas; or the sewer system fails to serve the location of the work;
- Acts of nature that prevents operations from continuing;
- War, civil unrest or strikes, threats to public safety, or a pandemic;
- The schedule change is the result of mutually agreed upon shift trade or coverage arrangement between Covered Employees;
- The Covered Employer and Covered Employee mutually agree to a proposed schedule change, it is confirmed in writing, and time and dated stamped;
- The Covered Employee requests the shift change because the employee is sick or taking vacation, and it is confirmed in writing. In this situation, however, the Covered Employee whom the Covered Employer asks to work unscheduled hours because an employee called off sick or is otherwise using paid time off, is entitled to predictability pay unless the employee mutually agrees in writing to the schedule change. And, Covered Employees are not required to find a substitute if they cannot work a scheduled shift;
- A Covered Employer subtracts hours due to disciplinary reasons, and documents the incident leading to the discipline.

Significantly, the Ordinance was amended to state that scheduling changes made because of the COVID-19 pandemic do not have to follow procedures outlined in the Ordinance. However, Covered Employers should be cautious about relying on this exemption, which only applies when the pandemic has caused an employer to "materially change its operating hours, operating plan, or the goods or services provided by the Employer, which results in the work schedule change." This exemption will continue until Mayor Lightfoot's pandemic Emergency Executive Order has been withdrawn.

How Are Collective Bargaining Agreements Affected?

No changes need to be made to collective bargaining agreements in effect prior to July 1, 2020. However, the Ordinance does apply to Covered Employers subject to collective bargaining agreements that take effect after July 1, 2020, unless the agreement includes a clear and unambiguous waiver of the Ordinance's requirements.

Are There Any Notice, Posting or Record Retention Requirements?

The Ordinance requires Covered Employers to post a notice advising employees of their rights in a conspicuous place in each facility where any Covered Employee works that is within the geographic boundaries of the City. Covered Employers also must provide this same notice with all Covered Employee's first paycheck after July 1, 2020 and each July 1 thereafter. The notices must be provided in any language spoken by a Covered Employee, but only if a notice in that language has been made available from the Department of Business Affairs and Consumer Protection ("BACP").

The Ordinance also requires Covered Employers to keep for at least 3 years, or the duration of any claim filed with the BACP, lawsuit, or investigation, whichever is longer, records that include the employee's name, hours worked, pay rate, and all other records necessary to maintain compliance with the Ordinance.

Can Employers by Sued for Non-Compliance and What Are the Penalties?

Covered Employees may file a complaint with the Office of Labor Standards, BACP. However Covered Employees will not be allowed to file a complaint for violations of the Ordinance occurring before January 1, 2021. Employers who violate the Ordinance are subject to a fine of not less than $300, and not more than $500 for each offense. Each Covered Employee whose rights have been violated constitutes a separate and distinct offense. And, each day that a violation has occurred constitutes a separate and distinct offense and subject to a separate fine. Finally, if a Covered Employer retaliates against a Covered Employee for exercising his/her rights under the Ordinance, it will be subject to a $1000 fine. ◆