

# A PRACTICAL ANALYSIS OF SAN FRANCISCO'S PREDICTIVE SCHEDULING AND FAIR TREATMENT FOR FORMULA RETAIL EMPLOYEES ORDINANCE

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*Difficult Challenges for both  
Employees and Employers in  
Implementation*

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# A Practical Analysis of San Francisco's Predictive Scheduling and Fair Treatment for Formula Retail Employees Ordinance

*DIFFICULT CHALLENGES FOR BOTH EMPLOYEES AND EMPLOYERS IN IMPLEMENTATION*

## EXECUTIVE SUMMARY

We were retained by the California Retailers Association to provide an independent and objective analysis of the impacts of the *Predictive Scheduling and Fair Treatment for Formula Retail Employees* ordinance ("Predictive Scheduling Ordinance" or "Ordinance") in the City and County of San Francisco, California. For purposes of this analysis, we examined the practical impacts of implementation of the Predictive Scheduling Ordinance upon both *Formula Retail Establishment* employees and *Formula Retail Establishment* employers ("FRE").<sup>1</sup> The Predictive Scheduling Ordinance requires *Formula Retail Establishments* to provide employees with two weeks' notice of work schedules, notice of changes to works schedules, and compensation for schedule changes made on less than seven days' notice and unused on call shifts. The Ordinance also provides Part-Time employees with the same starting rate of hourly pay, access to time off, and eligibility for promotions, as provided to Full-Time employees. In practice, the Ordinance changes the way Employers communicate with and schedule Employees across all Formula Retail Establishments.

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<sup>1</sup> Under the Predictive Scheduling Ordinance initially enacted on November 18, 2014, "Formula Retail Establishment" shall mean a business located in San Francisco that falls under the Planning Code's definition of "Formula Retail Use," as amended from time to time, except that the business must have at least 20 retail establishments located worldwide. "Employer" shall mean any Person that owns or operates a Formula Retail Establishment with 20 or more Employees in the City, including corporate officers or executives, who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency entity, employs or exercises control over wages, hours, or working conditions of any individual.

## METHODOLOGY

The objective of this analysis is to independently determine the actual and practical implications of San Francisco's Predictive Scheduling Ordinance upon both FRE employees and FRE employers. The Predictive Scheduling Ordinance went into effect on July 3, 2015. Although all Formula Retail Establishments across San Francisco have been expected to comply with the mandates of the Predictive Scheduling Ordinance since the effective date, enforcement regulations and guidelines have yet to be issued by San Francisco's Office of Labor Standards Enforcement as of December 30, 2015. Nevertheless, we were able to analyze and enumerate the impacts of the Predictive Scheduling Ordinance during the busiest retail season of the year by surveying a substantial cross-section of both FRE employees and FRE employers across San Francisco in December 2015. According to the language of the Ordinance, as of September 2014, there were approximately 1,250 FRE's in San Francisco, accounting for 12% of all retailers. There were approximately 35,000 persons employed by these FRE's, accounting for approximately 5 to 6% of San Francisco's total wage and salary employment. Therefore, our findings are solely based upon the data surveyed, examined, and presented in this report.

## CONCLUSIONS AND MAJOR FINDINGS

The San Francisco Predictive Scheduling Ordinance has resulted in difficult challenges for both FRE Employees and FRE Employers. Based upon our initial observations and analysis of the Ordinance's effects, there is a greater need for a more balanced approach that provides both predictability for employees in their schedules, but also more flexibility to meet the current lifestyle obligations of both Part-Time and Full-Time

FRE employees as well as the ever-changing retail competitive demands for FRE Employers.

FRE Employees have encountered problems with scheduling flexibility and lifestyle changes, including but not limited to the demands of school, parenting, caregiving, and day-to-day exigencies. In addition, FRE Employees in need of extra income are having more difficulty adding extra work hours. Moreover, FRE Employers have experienced added unnecessary administrative burdens, removal of their ability to be flexible in running their businesses with changing economic and inventory demands, increased administrative and penalty costs for Predictive Pay and scheduling mandates, and unreasonable interference in their communication and relationships with their employees – many of whom went into retail for the scheduling flexibility due to school, family, and lifestyle choices.

Lastly, the impact upon the local economy could become significant with decreased retail profitability, lower retail sales taxes, and the reduction in work hours and income to Employees across the City.

Our analysis of the San Francisco Predictive Scheduling Ordinance uncovered the following observations and impacts upon FRE Employees and FRE Employers:

#### **IMPACTS UPON EMPLOYEES**

- o FRE Employees often do not know their own availability two weeks in advance and are frustrated with not being able to change their schedules when needed.**
- o FRE Employees have asked for extra hours and the FRE Employer cannot accommodate the requests.**

- o The Ordinance, and the narrow definition of "Employer-initiated," severely limits the posting of additional hours as they become available and Employee pick up of additional hours cannot be done within 7 days of the hours available, further limiting the flexibility and benefits of adding hours.
- o The onus is further placed upon the FRE Employee to find replacements if they cannot meet the 14-day advance schedule.
- o The size of the FRE and number of Employees also provides additional challenges as fewer Employees limit further the flexibility to change work schedules or exchange additional hours.
- o FRE Employees have also questioned the need for the change in scheduling requirements, the lack of communication, and the ultimate benefit they derive from the implementation of the Predictive Scheduling Ordinance.

## IMPACTS UPON EMPLOYERS

- o One of the most important impacts upon FRE Employers has been the change in store culture, away from open communication to a more scripted dialogue due to the limitations on communications caused by the Ordinance's ambiguous and unclear language, especially as it relates to "Employer-initiated" actions. Rather than incur the potential for "coercive" action and thereby enforcement of penalties, FRE Employers would choose to leave a work shift unfilled.
- o In cases of employees on medical leaves of absence, FRE Employers have relied to their detriment on employee doctor notes stating expected return to work dates in setting the work schedules. Often doctors extend return to work dates at the last minute, and in those cases such employees must be removed from the schedule sometimes on the day they are scheduled to work.
- o The requirement of two week schedules also negatively impacts quality of new hire training. Rather than scheduling training with the most appropriate staff

members, FRE Employers have had to pair up new hires with whoever is available. Employees who feel they are not properly trained sometimes leave employment soon after being hired.

- o In the retail environment, labor hours are allocated and schedules written based on anticipated sales volume and consumer demand. Under the Ordinance, schedules cannot be changed to meet unexpected consumer demand that occurs within the 14-day window without incurring counterintuitive penalties.
- o The expense of Predictability Pay penalties is also seen as overly punitive and counterproductive. Severe penalties result in FRE Employers making business decisions to avoid situations that could trigger Predictability Pay. The end result is that last minute unfilled work hours continue to go unfilled and extra hours are not available to those Employees that desire them.

## SUMMARY OF ANALYSIS AND MAJOR FINDINGS

### I. Overview of Predictive Scheduling Ordinance

The *Predictive Scheduling and Fair Treatment for Formula Retail Employees Ordinance No. 241-14* was initially enacted by the City and County of San Francisco Board of

Supervisors unanimously on November 18, 2014. The Ordinance requires Formula Retail Establishments (retail chains with 40 or more locations worldwide that employ 20 or more people within the City) to provide employees with two weeks' notice of work schedules, notice of changes to work schedules, and compensation for schedule changes made on less than seven days' notice and unused on-call shifts; and provides part-time employees with the same starting rate of hourly pay, access to time off, and eligibility for promotions, as provided to full-time employees. On December 9, 2014, San Francisco Mayor Edwin Lee sent the Ordinance back to the Board of Supervisors unsigned, with a letter asking for a more collaborative process on the legislation. A broad business coalition worked with the Mayor's office to provide some compliance relief by providing incremental change to the original legislation. The Ordinance became effective on July 3, 2015. Although enforcement regulations and guidelines have yet to be issued by the San Francisco's Office of Labor Standards Enforcement, all Formula Retail Establishments across San Francisco are expected to be in compliance with the mandates of the Ordinance.

## **A. Summary of Predictive Scheduling Ordinance**

### **1) Predictive Scheduling:**

- Post employee schedules 14 days in advance.
- Changes with less than 7 days but more than 24 hours or more, the employee will get 1 hour or *Predictability Pay*; changes made with less than 24 hours' notice, the employee will get 2 hours of pay for each shift of four hours or less; changes with less than 24 hours' notice, 4 hours of pay at regular rate for each shift that is more than 4 hours. The *Predictability Pay* is in addition to the pay that the employee will otherwise get for working their assigned shift.
- Provides Part-Time (PT) employees (34 hours a week or less) with access to time off and eligibility for promotions as Full-Time (FT) employees (35 hours a week or more).

### **2) Offering Additional Hours and Estimated Hours:**

- Before hiring new employees, employers must offer additional hours to existing PT employees: 1) if they are qualified and 2) the work is the same or similar to work the employee has performed.
- Employers are to offer PT employees only the number of hours needed to get them to 35 hours per week, which according to the Ordinance, is FT.
- Employers are required to make offers in writing and must retain the written offer for no less than 3 years.
- These requirements extend to companies that subcontract services with Formula Retailers, e.g. security and janitorial workers.

**3) Change of Ownership (to another Formula Retailer):**

- Requires employers to retain workers for a 90-day period where there is a sale, assignment, transfer, contribution or other disposition such as a consolidation, merger, and reorganization.
- The 90-day retention provisions only apply to employers with 200 or more employees.
- Under the 90-day retention provision, the successor employer must provide a "retention list" with the names, contact info, date of hire, rate of pay, average number of hours worked in the last 6 months before the change.
- Successor employers must employ the existing employees for 90 days and cannot discharge them without cause.
- Successor employers must publicly post a notice of the change in control at their store locations for at least 30 days and provide very specific noticing requirements.

## II. Impacts of the Predictive Scheduling Ordinance Upon FRE Employees

The impacts of the Predictive Scheduling Ordinance upon FRE Employees have presented some difficult dilemmas for Employee flexibility as well as added challenges for Part-Time Employees. A survey of FRE Employees revealed more complaints about the ordinance than those in favor, in particular the requirement to schedule two weeks in advance and the prohibition on adding hours when sales conditions may change. Part-Time FRE Employees have made it known they would like to be scheduled additional hours that may become available even at the last minute. Likewise, FRE Employees have been upset by two week schedules because they have had matters for

which they would like to have the day off but either did not know in advance of the need or forgot to provide their manager with notice such as school finals and exams, doctor's appointments, and volunteer and/or family commitments. In sum:

- FRE Employees often do not know their own availability two weeks in advance and are frustrated with not being able to change their schedules when needed. For example, prior to the adoption of the Ordinance, many FRE Employees were assigned work hours within a range of hours the FRE Employees selected themselves. FRE Employees were able to advertise their shifts for others to pick up if they were not able to or did not want to work those hours. Others could pick up those shifts without the intervention of a Manager and the pick-up of hours was strictly Employee initiated.
- FRE Employees have asked for extra hours and the FRE Employer cannot accommodate the requests. Prior to the Ordinance, additional hours as they became available were posted on an on-line board or bulletin boards within the retail store for Employees. Managers did not assign these additional hours, and these additional hours could be picked up until the day of the schedule and provided primarily PT FRE Employees the added flexibility to balance work and their personal lives.
- The Ordinance, and the narrow definition of "Employer-initiated," severely limits the posting of additional hours as they become available and Employee pick up of additional hours cannot be done within 7 days of the hours available, further limiting the flexibility and benefits of adding hours. All extra work hours have always been voluntary – an FRE Employee could elect to pick them up or not – it has been the Employee's choice. Unfortunately, the Ordinance does not recognize this possibility and results in disadvantaging the Employee who may want to work more hours and earn more income.

- The onus is further placed upon the FRE Employee to find replacements if they cannot meet the 14-day advance schedule.
- The size of the FRE and number of Employees also provides additional challenges as fewer Employees limit further the flexibility to change work schedules or exchange additional hours.
- FRE Employees have also questioned the need for the change in scheduling requirements, the lack of communication, and the ultimate benefit they derive from the implementation of the Predictive Scheduling Ordinance.

### III. Impacts of the Predictive Scheduling Ordinance Upon FRE Employers

The impacts of the Predictive Scheduling Ordinance upon FRE Employers has uncovered a number of complex and difficult challenges of their own. Our survey of various San Francisco FRE Employers highlighted the following difficulties and issues:

- One of the most important impacts upon FRE Employers has been the change in store culture, away from open communication to a more scripted dialogue due to the limitations on communications caused by the Ordinance's ambiguous and unclear language, especially as it relates to "Employer-initiated" actions. Rather than incur the potential for "coercive" action and thereby enforcement of penalties, FRE Employers would choose to leave a work shift unfilled.
- In cases of employees on medical leaves of absence, FRE Employers have relied to their detriment on employee doctor notes stating expected return to work dates in setting the work schedules. Often doctors extend return to work dates at the last minute, and in those cases such employees must be removed from the schedule sometimes on the day they are scheduled to work. When this occurs the stores are left with insufficient scheduled labor because they cannot make

changes to add last-minute staff. This is also exacerbated with the presence of San Francisco's Paid Sick Leave Ordinance, which results in high levels of sick leave.

- The requirement of two week schedules also negatively impacts quality of new hire training. Rather than scheduling training with the most appropriate staff members, FRE Employers have had to pair up new hires with whoever is available. Employees who feel they are not properly trained sometimes leave employment soon after being hired.
- In the retail environment, labor hours are allocated and schedules written based on anticipated sales volume and consumer demand. For example, more labor is scheduled for holiday weeks such as Fourth of July, Thanksgiving, and Christmas when the number of customers and thus sales can be expected to increase. However, there are other factors that impact customer traffic and sales that cannot be predicted such as recently occurred in SF retail stores nearby to the ocean during the recent heat wave. The heat wave resulted in a significant increase in foot traffic at the stores nearby to the ocean and parks. Ideally, Managers in these stores would add Employees to the schedule but were unable to do so due to the Ordinance's narrow requirements. This results not only in lost sales, but also lost hours to PT Employees who wanted the work, and also long lines and inconvenience to customers.
- Similarly, events occur nearby to retail stores, such as company or charity events (races), celebrations, and/or parades that are not well publicized and/or unknown to FRE Employers until the last minute that impact sales and thus labor needs, for example events for which streets on which retail stores are situated are closed off and thus customers decrease. In these cases, FRE Employers required to schedule two weeks in advance are unable to schedule appropriately – they can be overstaffed or understaffed depending upon the consumer demand.

- The expense of Predictability Pay penalties is also seen as overly punitive and counterproductive. Severe penalties result in FRE Employers making business decisions to avoid situations that could trigger Predictability Pay. The end result is that last minute unfilled work hours continue to go unfilled and extra hours are not available to those Employees that desire them.

#### IV. Potential Economic Impacts of the Predictive Scheduling Ordinance

It is important to note that Retail Sales Taxes are one of the most important sources of revenue to the state and local government. According to the most recently available California State Board of Equalization Annual Report FY 2013-2014, Retail Sales Tax results in over \$48 billion in revenue to the state and local government or more than 79% of all collected revenues.<sup>2</sup> More specifically, Local Sales and Use Taxes provided more than \$174 million in revenues to the City and County of San Francisco in FY 2013-2014.<sup>3</sup> As a result, with limited revenue generation tools available to local governments not only in San Francisco, but across the state of California, any reduction in Retail Sales Tax could have a detrimental economic impact upon a local community.

As noted above, the Predictive Scheduling Ordinance has created a difficult and inflexible situation of potentially fewer work hours for FRE Employees with FRE Employers unable to fill open schedules within 7 days of availability. If additional work hours become available within less than 7 days, the end result is that the FRE Employer does not have the ability to fill these hours which negatively impacts customer service, coverage, and profitability. This could ultimately result in loss of jobs and hours, thereby affecting the bottom line. Lesser Retail Sales results in lesser Retail Sales Taxes – creating a negative economic impact upon important state and local government

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<sup>2</sup> California State Board of Equalization Annual Report FY 2013-2014, pg. 4.

<sup>3</sup> Ibid, pg. 14.

revenues. In addition, fewer available work hours results in lower incomes for Part-time Employees, further resulting in a negative impact to the local economy.

## V. Conclusion

The San Francisco Predictive Scheduling Ordinance has resulted in difficult challenges for both FRE Employees and FRE Employers. Based upon our initial observations and analysis of the Ordinance's effects, there is a greater need for a more balanced approach that provides both predictability for employees in their schedules, but also more flexibility to meet the current lifestyle obligations of both part-time and full-time FRE employees as well as the ever-changing retail competitive demands for FRE Employers.

FRE Employees have encountered problems with scheduling flexibility and lifestyle changes, including but not limited to the demands of school, parenting, caregiving, and day-to-day exigencies. In addition, FRE Employees in need of extra income are having more difficulty adding more work hours. Moreover, FRE Employers have experienced added unnecessary administrative burdens, removal of their ability to be flexible in running their businesses with changing economic and inventory demands, increased administrative and penalty costs for Predictive Pay and scheduling mandates, and unreasonable interference in their communication and relationships with their employees – many of whom went into retail for the scheduling flexibility due to school, family, and lifestyle choices.

Lastly, the impact upon the local economy could become significant with decreased retail profitability, lower retail sales taxes, and the reduction in work hours and income to Employees across the City.