

SEPTEMBER 20, 2016

## Seattle City Council Approves Secure Scheduling Ordinance

BY DOUG SMITH

As widely anticipated, on September 19, 2016, the Seattle City Council passed the Secure Scheduling Ordinance (SSO), CB 118765,<sup>1</sup> by a unanimous vote. The SSO mandates that large retail and food service employers provide two weeks' advance notice to employees of their schedules, and compensate employees for alterations to their scheduled hours. Seattle Mayor Ed Murray has publicly supported the SSO, and is expected to sign it promptly. Even if Mayor Murray does not approve the SSO, it will take effect pursuant to Seattle Municipal Code § 1.04.020 on July 1, 2017.

### Which Seattle employers are affected?

The SSO covers certain categories of employers, including retail chains of all types and both full-service and fast-food restaurants.

With respect to retailers, the SSO applies to “retail establishments that employ 500 or more employees worldwide regardless of where those employees are employed.” This definition includes integrated enterprises,<sup>2</sup> as well as franchises, for purposes of aggregating employees.<sup>3</sup> With respect to food services establishments, the SSO similarly covers employers with 500 or more workers worldwide. The SSO defines food services establishments to include food services contractors, caterers, mobile food services, bars (defined under the SSO as “drinking places (alcoholic beverages)”), full-service restaurants, limited-service restaurants, cafeterias, buffets, and snack and nonalcoholic beverage bars.

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1 Text of the ordinance can be accessed here: <http://seattle.legistar.com/LegislationDetail.aspx?ID=2813153&GUID=F61A4199-EBA1-4521-87D7-647C7ADBB099&FullText=1>.

2 The SSO identifies factors to be considered when evaluating whether separate entities constitute an integrated enterprise. Seattle, Wash. Mun. Code ch. 14.22.020.C.

3 *Id.* ch. 14.22.020.A.1 (covering “franchises associated with a franchisor or network of franchises that employ more than 500 employees in the aggregate”).

The SSO contains an additional factor concerning full-service restaurants. To be covered by the SSO, those employers “also must have 40 or more...locations worldwide, including but not limited to locations that are part of a chain, integrated enterprise, or franchise.”

### Which Seattle employees are covered?

The SSO broadly covers all types of employees, whether full-time, part-time, or temporary. Its protections extend to employees who work at least 50% of their time at a fixed location within the City of Seattle’s geographic boundaries. As a result, an employee can be covered even if he or she works at more than one site for the employer, including a site not physically in Seattle.<sup>4</sup>

### What are the key requirements imposed by the SSO?

The SSO addresses the scheduling of employees and requires employers to offer available work to current staff before hiring new people. While the SSO is quite comprehensive, essential provisions are summarized below.

- **Estimated Hours.** Seattle employers must give new hires “a written good faith estimate of the employee’s work schedule at the time of hire.” This estimate must indicate whether the employee likely will be scheduled for on-call shifts and must include an average total of weekly work hours. The employer is required to give a similar estimate to existing employees annually, or otherwise as needed.
- **Employee Input.** All employees have the right to identify preferences for their scheduled hours or work locations. The employer must engage in an interactive process with the employee about any such request and, in some instances, must explain its decision in writing.<sup>5</sup>
- **Right to Rest Between Shifts.** Without employee consent, an employer may not require an employee to work “less than 10 hours after the end of the previous calendar day’s work shift,” thus eliminating the possibility of mandatory “clopening” (when an employee is scheduled to close and open the retail or service establishing). The employer also may not schedule an employee for a shift taking place “less than 10 hours following the end of a work shift that spanned two calendar days.” If an employee works a shift beginning within the 10-hour rest period, the employer must pay him or her time-and-a-half “for the hours worked that are less than ten hours apart.”<sup>6</sup> For example, if an employee’s next shift begins only eight hours after last leaving work, he or she is entitled to time-and-a-half for the two-hour shortfall.<sup>7</sup>
- **Advance Notice of Work Schedules.** Under the SSO, employers must issue staff “a written work schedule at least 14 calendar days before the first day of the work schedule.”<sup>8</sup> The schedule shall be posted conspicuously, include all on-call shifts, and be written in English as well as any other primary languages spoken by employees at that location.
- **Employer-Initiated Changes.** If an employer alters the existing work schedule—either by adding or deleting hours—it must timely notify the employee in person or by telephone, email, text, or similar means. Significantly, the employee is not obligated to accept any additional hours. If an employee agrees to work either additional hours or a shift (of the same total hours) with different starting or ending times, the

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4 The SSO includes a caveat for unionized workers. It does “not apply to any employee covered by a bona fide collective bargaining agreement to the extent that such requirements are expressly waived,” so long as “the employees have ratified an alternative structure for secure scheduling.” *Id.* ch. 14.22.145.

5 *Id.* ch. 14.22.030. Employers must provide written explanations if they deny an employee’s request where the request is based on a major life event. *Id.* ch. 14.22.030.B.2.

6 *Id.* ch. 14.22.035.B. Note that split shifts do not trigger the additional pay requirement. *Id.*

7 See Councilmembers Lisa Herbold and Laura González & Mayor Ed Murray, *Secure Scheduling*, available at <http://www.seattle.gov/council/issues/secure-scheduling> (last visited Sept. 15, 2016).

8 Seattle, Wash. Mun. Code ch. 14.22.040.

employer must compensate him or her with an extra hour of pay, on top of the employee's wages for the work performed. If an employee loses hours due to the employer's schedule change, the employer must pay him or her "one-half times the employee's scheduled rate of pay per hour" for cancelled hours. In other words, the employer must pay the employee for half of the shift not worked. This provision applies if hours are reduced, cancelled, or if the employee is not needed for an on-call shift. The SSO includes numerous exceptions to these compensation requirements. For example, employees can mutually agree to swap shifts if they like, without financial consequence to the employer. Under certain circumstances, employees can also accept additional hours to cover shifts made available because other employees could not work their schedules. Employees can also voluntarily release hours by submitting requested changes in writing. Further exceptions include hours subtracted for disciplinary reasons, due to threats or natural disaster, or because of a loss of power or other utility service.

- **Employee-Initiated Changes.** Employees should continue to utilize their employer's normal procedure for requesting changes to the written schedule whenever practicable. If an employee presents a scheduling conflict "due to an emergency or major life event," the employer may ask, but cannot require, the employee to find a replacement.<sup>9</sup> If the employee does not have a protected reason for the inability to work, the employer may require him or her to secure a replacement.
- **Pay for Scheduled On-Call Time.** In addition to requiring payment for employer-initiated scheduling changes, the SSO also requires employers to pay employees "one-half times the employee's scheduled rate of pay per hour" for scheduled on-call shifts for which the employee does not need to report to work. In other words, if an employee is scheduled to be on call for a specified number of hours, but is not actually called into work during that on-call shift, the employer must pay the employee one-half his or her scheduled hourly rate for all of the on-call hours.
- **Access to Hours for Existing Employees.** The SSO sets out a procedure by which employers must offer additional hours of work to existing staff before hiring outside applicants to meet a need. In brief, employers must post a written notice describing the hours available for at least three days. If a qualified current employee responds to the posting, the employer must offer him or her the additional hours. This requirement includes a few exceptions; most notably, the SSO does not require employers to offer additional hours that would entitle workers to overtime pay.
- **Additional Provisions.** In addition to these substantive components, the SSO imposes related notice and record-keeping requirements. It also prohibits retaliation against individuals exercising their rights under the SSO.

## What agency will enforce the SSO?

The Seattle Office for Civil Rights (SOCR) will implement, investigate, and enforce the SSO's provisions.<sup>10</sup>

## What are the consequences for noncompliance?

The SSO authorizes monetary damages, penalties, and fines for employer violations. If the SOCR determines that an employer has violated the SSO, the employer will be liable for all unpaid wages owed the employee plus interest. The SOCR may also assess liquidated damages, not to exceed double the amount of unpaid compensation.

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<sup>9</sup> *Id.* ch. 14.22.045.B.3.b. The SSO also prohibits employers from asking employees to find coverage if the inability to work is a legally-protected reason, including "work schedule changes related to the use of paid sick leave and safe time" as provided elsewhere in the Seattle Municipal Code. *Id.* ch. 14.22.045.B.3.a.

<sup>10</sup> *Id.* ch. 14.22.075; see also *id.* chs. 14.22.085 (governing investigations), 14.22.090 (governing findings of fact and agency determinations), 14.22.095 (governing remedies), 14.22.100 (governing the appeals period), 14.22.105 (governing appeals procedure), 14.22.110 (governing timing for judicial review), and 14.22.115 (governing failure to comply with a final order). Information about the SOCR can be found at: <http://www.seattle.gov/civilrights>.

The SOCR may also impose civil penalties, in an amount up to \$500 per aggrieved employee for most first offenses. The SOCR will seek a penalty of up to \$1,000 per employee for any second offenses, and up to \$5,000 for any additional violations.<sup>11</sup>

Beyond damages and penalties, failure to comply with most of the requirements of the SSO may also result in a fine of \$500. Fine amounts increase for employers with subsequent violations.<sup>12</sup>

Retaliation offenses trigger enhanced relief under the SSO. Employers found liable for retaliation may be required to pay a civil penalty of up to \$5,000 to the complainant, along with a \$1,000 fine per aggrieved employee.

## **Do Seattle employees have a private right to sue employers under the SSO?**

Yes. The SSO authorizes individual and class action lawsuits for alleged noncompliance. A complainant may sue if he or she allegedly suffered financial injury as a result of an employer violation or was subjected to retaliation. In addition, the SSO awards prevailing plaintiffs their reasonable attorneys' fees and costs and provides for liquidated damages of up to double the amount of unpaid wages. It also authorizes penalties (up to \$5,000) in retaliation lawsuits.<sup>13</sup>

## **When does the SSO take effect?**

All provisions of the SSO become effective on July 1, 2017.<sup>14</sup>

## **How should employers prepare to comply with the new requirement of the SSO?**

In light of the passage of the SSO, employers with locations in Seattle should take steps to prepare for implementation of the new requirements.

- If an employer—particularly a franchisee or a potential integrated entity—has any doubt as to whether the SSO applies, the employer should investigate that status promptly.
- Ensure that management can access historical data on any Seattle location's level of business on a weekly or daily basis. This data will be useful in estimating business and staffing needs going forward, allowing more accurate scheduling of employees. If an employer does not currently maintain notes or reports on Seattle business levels, consider doing so.
- Modify policies and procedures inconsistent with the SSO and consider how best to incorporate its requirements into policies and procedures.
- Train human resources staff and managerial staff on the SSO's requirements.
- Begin to draft the necessary notices of work schedules to be used when the SSO becomes effective, as well as the other types of notices required.
- Consider adding a summary of covered employees' rights in existing employee handbooks or orientation materials.

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11 *Id.* ch. 14.22.095.F. The penalty for willful failure to post the appropriate SSO notice is \$750 for the first violation. *Id.* ch. 14.22.095.D.

12 *Id.* ch. 14.22.095.G. The SSO includes maximum fine amounts that could be recovered in a single year.

13 *Id.* ch. 14.22.125. The SSO does not require the employee to take any prerequisite steps prior to filing a lawsuit.

14 *Id.* chs. 14.22.147 & § 5. The Seattle City Council agreed to research and reevaluate the SSO for the baseline, one-year, and two-year periods after it takes effect. It will review studies on the impacts of the SSO to businesses and employees, among other topics, and may then revise and/or expand the SSO. *Id.* ch. 14.22.130.