

Legislation Text

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Amending Title 9 of The Philadelphia Code, entitled “Regulation of Businesses, Trades and Professions,” by adding a new Chapter to require certain covered employers to provide “Fair Workweek Employment Standards” for certain employees, including but not limited to reasonable notice of schedules, rest time between shifts, and opportunities for additional hours, and providing for enforcement and penalties, all under certain terms and conditions.

THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:

SECTION 1. Title 9 of The Philadelphia Code is hereby amended to read as follows:

TITLE 9. REGULATION OF BUSINESSES, TRADES AND PROFESSIONS.

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CHAPTER 9-4600. FAIR WORKWEEK EMPLOYMENT STANDARDS.

§ 9-4601. *Definitions.*

- (1) *Agency.* Such office as the Mayor shall designate to administer and enforce this Chapter.
- (2) *Work Week.* A period of seven consecutive days beginning on any designated day.
- (3) *Chain.* A set of establishments that do business under the same trade name and that are characterized by standardized options for decor, marketing, packaging, products and services, regardless of the type of ownership of each individual establishment. This Chapter shall not apply to establishments which offer individual products under an individual license agreement but which otherwise do not meet this definition.
- (4) *Covered Employer.* For purposes of this Chapter, limited to an Employer that is: A Retail Establishment, a Hospitality Establishment or a Food Services Establishment as defined in this Section, that employs 250 or more employees and has 30 or more locations worldwide regardless of where those employees perform work, including but not limited to chain establishments or franchises associated with a franchisor or network of franchises that employ more than 250 employees in aggregate. In determining the number of employees for purposes of this subsection, all employees performing work for compensation on a full-time, part-time or temporary basis shall be counted, provided that where the number of employees who work for an employer for compensation fluctuates, business size may be determined for the current calendar year based upon the average number of employees who worked for compensation per week during the preceding calendar year, and provided further that in determining the number of employees performing work for an employer that is a chain business, the total number of employees in that group of establishments shall be counted.
- (5) *Employee.* Any person employed or permitted to work at or for a Covered Employer within the geographic boundaries of the City of Philadelphia, who is required under state or federal law to be paid at an

overtime rate for hours in excess of a maximum number per workweek or Work Week; including but not limited to full-time employees, part-time employees, and seasonal and temporary workers. The person's job duties must involve the provision of retail trade services, food services or hospitality services at a Covered Employer, as further defined by regulation. An alleged employer bears the burden of proof that the individual is, under applicable law, an independent contractor rather than an employee of the alleged employer.

(6) *Employer. Any individual, partnership, association, corporation or business trust or any person or group of persons, or a successor thereof, that employs another person, including any such entity or person acting directly or indirectly in the interest of the employer in relation to the employee. More than one entity may be the "employer" if employment by one employer is not completely disassociated from employment by the other employer.*

(7) *Food Services Establishment. A food services contractor; caterer; mobile food service; drinking place (alcoholic beverages); full service restaurant; limited-service restaurant; cafeteria, grill buffet, or buffet; or snack and nonalcoholic beverage bar, as defined under the 2012 and 2017 North American Industry Classification System ("NAICS") 722, or other classification or subsequent edition of the NAICS pursuant to rules promulgated by the Agency.*

(8) *Hospitality Establishment. A hotel or motel as defined under NAICS 721110, or other classification or subsequent edition of the NAICS pursuant to rules promulgated by the Agency.*

(9) *On-Call Shift (or On-Call Hours). Any time that an employer requires an employee to be available to work, and to contact the employer or the employer's designee or wait to be contacted by the employer or its designee, to determine whether the employee must report to work at that time.*

(10) *Predictability Pay. A payment calculated by reference to the employee's regular rate of pay as that term is defined under 34 Pa. Code § 231.43, and paid to an employee as compensation for changes made by the employer to an employee's Work Schedule, in addition to any wages earned for work performed by that employee. The Agency shall determine an appropriate regular rate of pay for any Tipped Employee, and provide for such rate by regulation.*

(11) *Retail Establishment. The fixed point-of-sale location of a retail business as defined under NAICS 441 through 454, or other classification or subsequent edition of the NAICS pursuant to rules promulgated by the Agency.*

(12) *Shift. The consecutive hours an employer requires an employee to work or to be on-call to work, provided that breaks totaling two hours or less shall not be considered an interruption of consecutive hours,*

(13) *Successor. Any person to whom an employer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys in bulk and not in the ordinary course of the employer's business, a major part of the property, whether real or personal, tangible or intangible, of the employer's business. For purposes of this definition, "person" means an individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, corporation, business trust, partnership, limited liability partnership, company, joint stock, company, limited liability company, association, joint venture, or any other legal or commercial entity.*

(14) *Ticketed event. A sporting, entertainment, civic, charitable or other event that requires a ticket*

for admission. The ticket may be electronic, physical or a name on a list held by the event organizer.

(15) *Tipped Employee.* An employee who customarily and regularly receives more than \$50 a month in tips from the same employment.

(16) *Work Schedule.* All of an employee's regular and on-call shifts, including specific start and end times for each shift, during a Work Week.

(17) *Written Communication.* Communication by print or electronic means, including email, text messages, use of scheduling applications, or other forms of communication that can be saved in their original format.

(18) *Posted Work Schedule.* The written Work Schedule that an Employer must provide to employees under § 9-4602(3) and post under § 9-4602(4) no later than 14 days before the first day of any new schedule.

§ 9-4602. *Advance Notice of Work Schedules.*

(1) Upon hiring an employee, a Covered Employer shall provide such employee with a written, good faith estimate of the employee's work schedule. The employer shall revise the good faith estimate when there is a significant change, as further defined by regulation, to the employee's work schedule due to changes in the employee's availability or to the employer's business needs. The good faith estimate is not a contractual offer binding the employer, but an estimate made without a good faith basis is a violation of this Section. The employer is encouraged to engage in an interactive process to discuss such employee requests, but may grant or deny the request for any reason that is not unlawful. The good faith estimate shall contain:

(a) The average number of work hours the employee can expect to work each week over a typical 90-day period;

(b) Whether the employee can expect to work any on-call shifts;

(c) A subset of days and a subset of times or shifts that the employee can typically expect to work, or days of the week and times or shifts on which the employee will not be scheduled to work.

(2) At the time of hire and during employment, the employee has the right to make work schedule requests. The requests protected under this Section include but are not limited to:
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(a) Requests not to be scheduled for work shifts during certain days or times or at certain locations;

(b) Requests not to work on-call shifts;

(c) Requests for certain hours, days, or locations of work;

(d) Requests for more or fewer work hours.

(3) On or before the commencement of employment, a Covered Employer shall provide the employee with a written Work Schedule that runs through the last date of the currently posted schedule. Thereafter, an

employer shall provide written notice of work hours as set forth in Section 9-4602(4). Nothing in this Section 9-4602(3) shall be construed to prohibit an Employer from providing greater advance notice of Employee's Work Schedules and/or changes in schedules than that required by this Section.

(4) Written notice of the Work Schedule shall be provided in a conspicuous and accessible location where employee notices are customarily posted. If the employer posts the notice in electronic format, all employees in the workplace must have access to it on-site. The Posted Work Schedule shall include the employees' shifts at that worksite, whether or not they are scheduled to work or be on-call that week, and shall be posted no later than 10 days before the first day of any new schedule from January 1, 2020 to December 31, 2020, and shall be posted no later than 14 days before the first day of any new schedule beginning January 1, 2021.

(5) A Covered Employer shall provide notice of any proposed changes to the Work Schedule as promptly as possible and prior to the change taking effect. The Covered Employer must revise the written Work Schedule to reflect any changes within 24 hours of making the change.

(6) An employee may decline to work any hours or additional shifts not included in the Posted Work Schedule. If the employee voluntarily consents to work such hours, such consent must be recorded by written communication. A written communication of an employee's desire to work shifts made available pursuant to § 9-4605 shall constitute written consent.

§ 9-4603. Compensation for Changed Work Schedules.

(1) For each employer-initiated change to the Posted Work Schedule that occurs after the advance notice required in section 9-4602(3), a Covered Employer shall pay an employee Predictability Pay at the following rates, in addition to the employee's regular pay for hours actually worked by the employee:

(a) One hour of Predictability Pay at the employee's regular rate of pay, when the Covered Employer adds time to a work shift or changes the date or time or location of a work shift, with no loss of hours.

(b) Predictability Pay calculated as no less than one-half times the employee's regular rate of pay per hour, for any scheduled hours the employee does not work for the following reasons:

(i) Hours are subtracted from a regular or on-call shift; or

(ii) A regular or on-call shift is cancelled.

(2) A Covered Employer is not required to pay Predictability Pay under this § 9-4603 or obtain written consent pursuant to subsection 9-4602(6), whenever:

(a) An employee requests a shift change by written communication, including but not limited to voluntary additions or subtractions of hours that are initiated by the employee, the use of sick leave, vacation leave, or other leave policies offered by the employer;

(b) A schedule change is the result of a mutually agreed-upon shift trade or coverage arrangement between employees, subject to any employer policy regarding required conditions for employees to exchange shifts;

(c) *The Covered Employer's operations cannot begin or continue due to:*

(.i) *Threats to the employees or the employer's property;*

(.ii) *The failure of a public utility or the shutdown of public transportation;*

(.iii) *A fire, flood or other natural disaster;*

(.iv) *A state of emergency declared by the President of the United States, Governor of the state of Pennsylvania, or Mayor of the city; or*

(.v) *Severe weather conditions that disrupt transportation or pose a threat to employee safety.*

(d) *An employee begins or ends work no more than twenty minutes before or after the scheduled start or end time of the shift;*

(e) *An employee volunteers to work additional hours in response to a mass written communication from the employer about the availability of additional hours, provided that the mass communication is only used for additional hours that are the result of another employee being unable to work scheduled hours, and the communication makes clear that accepting such hours is voluntary and the employee has the right to decline such hours;*

(f) *Employee hours are subtracted due to termination of employment;*

(g) *Changes are made to the Posted Work Schedule within 24 hours after the advance notice required in § 9-4602(3);*

(h) *The covered employer subtracts hours from an employee's work schedule for disciplinary reasons pursuant to a multi-day suspension, provided the employer documents in writing the incident leading to the disciplinary action;*

(i) *A ticketed event is cancelled, scheduled, rescheduled, postponed, delayed, increases in expected attendance by 20% or more, or increases in duration, due to circumstances that are outside the employer's control and that occur after the employer provides the Posted Work Schedule with the advance notice required by section 9-4602(4). Additional hours due to a change in a ticketed event's duration that fall within this exemption will also be fully exempt from section 9-4602(6).*

(j) *A hotel banquet event is scheduled, due to circumstances that are outside the employer's control, after the employer provides the Posted Work Schedule with the advance notice required by section 9-4602(4).*

§ 9-4604. *Right to Rest Between Work Shifts.*

(1) *An employee may decline, without penalty, any work hours that are scheduled or otherwise occur: (a) less than 9 hours after the end of the previous day's shift, or (b) during the 9 hours following the end of a shift that spanned two days. An employee may consent to work such shifts; however, consent must be*

provided by written communication, either for each such shift or for multiple shifts, and may be revoked by written communication at any time during employment.

(2) A Covered Employer shall compensate the employee for each instance that the employee works a shift described in subsection 9-4604(1), in the amount of \$40 for each such shift.

§ 9-4605. Offer of Work to Existing Employees.

(1) Before hiring new employees from an external applicant pool or subcontractors, including hiring through the use of temporary services or staffing agencies, a Covered Employer shall, subject to the terms and conditions of this Section, offer work shifts to existing employees.

(2) The employer shall provide written notice of available work shifts for at least 72 hours, unless a shorter period is necessary in order for the work to be timely performed.

(a) The notice shall be in English and in the primary language(s) of the employees at the particular workplace, as further defined by regulation, posted in a conspicuous location at the workplace that is readily accessible and visible to all employees. The notice shall also be provided electronically to each employee if the Covered Employer customarily communicates scheduling information in such manner with employees.

(b) The notice shall include a description of the position and its required qualifications, the schedule of available shifts, the length of time the employer anticipates requiring coverage of the additional hours, the process by which employees may notify the employer of their desire to work the offered shifts.

(c) The employer may provide the notice concurrently at the location where the shifts described in the notice will be worked, locations other than the location where the work is to be performed, and to external candidates.

(3) With regard to existing employees, a Covered Employer shall distribute shifts, in accordance with the criteria contained in the notice required by subsection 9-4605(2)(b), to one or more employees who have accepted such shifts and who, to a reasonable employer acting in good faith, are qualified to perform the work, provided that:

(a) A Covered Employer shall distribute shifts to employees whose regular workplace is the location where the shifts described in the notice will be worked; or, if no such employee accepts the shifts within the time defined in this Section, and it is a regular practice of the employer to schedule employees across multiple locations, to employees whose regular workplace is a covered location other than the location where such shifts will be worked. If not a regular practice, offering additional shifts to employees at a different location shall be at the option of the employer.

(b) The Covered Employer's system for distribution of hours shall not discriminate on the basis of race, color, creed, religion, ancestry, national origin, sex, sexual orientation, gender identity, disability, age, marital or familial status, nor on the basis of family caregiving responsibilities or status as a student, and the employer may not distribute hours in a manner intended to avoid application of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18001.

(4) A Covered Employer may hire individuals from an external applicant pool or subcontractors to

perform the work described in, and in accordance with the criteria set forth in, the notice posted pursuant to subsection 9-4605(2)(b) if the employer provides notice of available work shifts as required herein, and:

(a) No employee accepts the offer of available work shifts within 24 hours of the end of the 72 hour posting period; or

(b) The employer receives written confirmation from eligible employees that they are not interested in accepting the available work shifts; or

(c) Existing employees have accepted a subset of the offered work shifts, in which case the existing employees must be awarded that subset of work shifts, and external applicants may be offered the remaining shifts.

(5) This § 9-4605 shall not be construed to require any Covered Employer to offer employees work hours paid at a premium rate under state or federal law, or to prohibit such employer from offering such work hours.

(6) An employer must notify an employee by written communication of its policy for offering and distributing work shifts under this Section, at the time of hire and within 24 hours of any change in the policy, and must post the notice in an accessible location in the workplace. The notice shall state:

- a. Where employees can access written notices of available work shifts;*
- b. The process by which employees may notify the employer of their desire to work the available work shifts;*
- c. The criteria for distribution of work shifts among qualified and interested employees.*

(7) The Agency is authorized to promulgate rules limiting the applicability of this section with regard to trainees who work for a limited time at a particular location.

§ 9-4606. Exercise of Rights Protected; Retaliation Prohibited.

(1) It shall be unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Chapter 9-4600.

(2) No person shall take any adverse action as to an employee that penalizes such employee for, or is reasonably likely to deter such employee from, exercising or attempting to exercise any right protected under this Chapter. Taking an adverse action includes threatening, intimidating, disciplining, discharging, demoting, suspending or harassing an employee; assigning an employee to a lesser position in terms of job classification, job security, or other condition of employment; reducing the hours or pay of an employee or denying the employee additional hours; and discriminating against the employee, including actions or threats related to perceived immigration status or work authorization.

(3) Protections of this Section shall apply to any person who mistakenly but in good faith alleges violations of this Chapter.

(4) It shall be considered a rebuttable presumption of retaliation if the employer or any other person takes an adverse action against an employee within 90 calendar days of the employee's exercise of rights

protected in this Chapter unless due to disciplinary reasons for just cause, provided the employer documents in writing the incident relating to the employee's discipline. In the case of seasonal employment that ended before the close of the 90 calendar day period, the presumption also applies if the employer fails to rehire a former employee at the next opportunity for work in the same position.

§ 9-4607. *Regulations.*

The Agency is authorized to coordinate the implementation, administration, and enforcement of this Chapter, and shall promulgate such regulations or guidelines as it may deem necessary for such purposes.

§ 9-4608. *Notice.*

Each Covered Employer shall post and keep posted, in conspicuous and accessible places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Agency, setting forth the rights and privileges provided under this Chapter, stating that retaliation against employees for exercising such rights is prohibited, and providing such other information as the Agency may require.

§ 9-4609. *Employer Records.*

(1) *Covered Employers shall keep records necessary to demonstrate compliance with this Chapter, including but not limited to good faith estimates of Work Schedules and any modifications thereto, written consent for work shifts as required by this Chapter, offers of work shifts to existing employees and responses to those offers, and payroll records that specify the amount of additional compensation paid to employees under sections 9-4603 and 9-4604 of this Chapter. Employers shall retain such records for a period of two years, and shall allow the Agency access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Chapter. When an issue arises as to a Covered Employer's compliance with this Chapter, if the employer does not maintain or retain adequate records documenting compliance, or does not allow the Agency reasonable access to such records within 30 days of the Agency's request, it shall be presumed that the employer has violated the Chapter, absent clear and convincing evidence otherwise.*

(2) *Upon request by any employee, and in accordance with the rules of the Agency, a Covered Employer must provide such employee with work schedules for all employees at the location in writing for any previous week for the past two years, including the originally posted and modified versions of work schedules.*

§ 9-4610. *Collective Bargaining.*

All of the provisions of this Chapter, or any part thereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unmistakable terms and only so long as the agreement is in effect contractually. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this Chapter.

§ 9-4611. *Enforcement and Penalties.*

(1) *An employee or other person may report to the Agency any suspected violation of this Chapter.*

(2) *The Agency is authorized to take such steps as it deems appropriate to resolve complaints and enforce this Chapter, including, but not limited to, establishing a system to receive complaints regarding non-compliance with this Chapter, investigating alleged violations in a timely manner, and resolving complaints through mediation. The Agency may also open an investigation on its own initiative.*

(3) *Any person alleging a violation of this Chapter shall file a complaint with the Agency within two years of the date the person knew or should have known of the alleged violation. The Agency shall maintain confidential the identity of any complainant unless disclosure of such complainant's identity is necessary for resolution of any investigation by the Agency, or otherwise required by law. The Agency shall, to the extent practicable, notify such complainant that the Agency will be disclosing his or her identity prior to such disclosure.*

(4) *Upon receiving a complaint alleging a violation of this Chapter, the Agency shall investigate such complaint and, if appropriate, attempt to resolve it through mediation. The Agency may designate representatives to inspect worksites and access records required to be maintained under Section 9-4609. The Agency shall keep complainants reasonably notified regarding the status of their complaint and any resulting investigation and shall notify complainants of any final decision of the Agency, including any mediation result, with respect to the complaint. Whenever the Agency finds that a violation of this Chapter has occurred, it shall issue to the offending employer a notice of violation.*

(5) *The Agency shall have the power to subpoena records and testimony from any party to a complaint. Such records shall be provided to the Agency within thirty (30) days after receipt of the subpoena.*

(6) *The Agency shall have the power to impose penalties and fines for violation of this Chapter and to provide or obtain appropriate relief. Remedies may include reinstatement and full restitution to the employee for lost wages and benefits, including Predictability Pay required by this Chapter. The Agency shall also fix by regulation an amount of presumed damages to be awarded to an employee for the employer's violations of §§ 9-4602 and 9-4605. It shall be a Class III offense under § 1-109(3) of this Code for a Covered Employer to retaliate against an employee for any activity protected under this Chapter. All other violations of this Chapter shall be Class II offenses under § 1-109(2) of this Code.*

(7) *The Agency, the City Solicitor, any person aggrieved by a violation of this Chapter, or any entity a member of which is aggrieved by a violation of this Chapter, may bring a civil action in a court of competent jurisdiction against an employer violating this Chapter.*

(a) *If during the pendency of a determination by the Agency, prior to the issuance of a final decision, a complainant employee brings a private action under this Ordinance, in a court of competent jurisdiction, seeking relief based upon the same facts and allegations as the complainant employee's complaint under this Chapter, or affirmatively or by consent opts to participate in any such litigation, that complainant employee's complaint to the Agency shall be deemed withdrawn with respect to any respondent employer named as a defendant in such court action. This Section shall be interpreted narrowly so as to leave unaffected any cumulative rights which were not the subject of the complainant employee's complaint.*

(b) *Nothing in this Chapter or its implementing regulations shall be construed to require a complaint to be filed with the Agency before bringing an action in court or before any other governmental agency.*

(c) *Upon prevailing in an action brought pursuant to this Section, an aggrieved person shall recover the full amount of any unpaid compensation, including Predictability Pay, to which he or she would have been entitled under this Chapter, any wages and benefits lost, presumed damages under § 9-4611(6) an Agency regulations, other damages suffered as the result of the employer's violation of this Chapter, and an equal amount, up to a maximum of \$2,000, as liquidated damages. An aggrieved person shall also be entitled to an award of reasonable attorney's fees and costs.*

(d) *Upon prevailing in an action brought pursuant to this Section, an aggrieved person shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation, that is not duplicative of any relief provided to the person in administrative proceedings, including, without limitation, reinstatement in employment, back pay and injunctive relief.*

(8) *The City Solicitor may bring a civil action to enforce this Chapter. The City Solicitor may seek injunctive and other equitable relief, damages on behalf of one or more injured employees, and may seek to impose a fine payable to the City.*

(9) *The limitations period for a civil action brought pursuant to this Section shall be two (2) years from the date the alleged violation occurred.*

(10) *The Agency is authorized to establish a working group consisting of members of the Administration, City Council, and a representative group of affected stakeholder organizations to provide advice regarding implementation of this Chapter, including regulations promulgated under this Chapter, and to assist in the preparation of reports.*

SECTION 2. Effective Date. This Ordinance shall take effect on January 1, 2020.

Explanation:

Italics indicate new matter added.