May 21, 2015

Making The Right Call On 'On-Call' Shifts

Law360, New York (May 21, 2015, 11:42 AM ET) --


Lindsay A. Ayers

Shift scheduling emerged as the latest battleground in U.S. labor relations in April 2015 as a California federal judge and New York State Attorney General Eric Schneiderman put on-call shifts, or call-in shifts, at the forefront of the ongoing public discourse on employee relations. On-call shifts (not to be confused with on-call time, discussed below) require an employee to call in to work prior to the start of a tentatively scheduled shift to find out whether he or she needs to report for work. Call-in lead times vary from one employer to the next, but employees are typically required to call the employer between a few days to a few hours before the scheduled shift.

The use of on-call shifts has become more popular as employers have increasingly embraced “just-in-time” scheduling systems that enable companies to adjust employee schedules to match anticipated labor needs. Just-in-time scheduling systems examine a number of variables in real time, such as weather, time of day, customer traffic earlier in the day or major sporting events, to predict customer demand at some later time. These predictions are then deployed to set employee schedules and inform employees whether they are needed to report for their scheduled shifts. As labor costs have risen in recent years, just-in-time scheduling has gained popularity with many companies, particularly those in the food and retail industries, because it allows them to avoid paying for excess labor during slow periods. But employers may soon see these efficiencies evaporate in light of the evolving legal landscape relating to shift scheduling.

Reporting Time Pay vs. On-Call Time

Any analysis of the legal status of on-call shifts must begin with distinguishing two related, but very distinct, concepts currently addressed in federal and state laws across the nation, namely reporting time pay and on-call time.

Reporting time pay, or show-up pay, is owed to an employee when the employee physically presents him or herself at the workplace for his/her scheduled shift but are sent home before commencing any work (e.g., due to a lack of available work). Federal law does not require employers to pay any reporting time pay for sending an employee home. However, eight states, including California and New York, and the District of Columbia currently have laws requiring employers to provide some form of compensation to workers who report to work but are instead sent home.

On-call time, or standby time, is defined by the U.S. Department of Labor as time during which the employee is not necessarily required to work, but is required to remain on the employer's premises or nearby that he or she cannot use the time effectively for his or her own purposes. Both federal and state laws require employers to compensate employees for standby shifts under certain circumstances. To determine whether an employee should have been paid for a standby shift, a court will typically look at factors such as whether the employee could engage in personal matters during the standby shift, any geographical restrictions imposed on the employee, the frequency of calls and the time limit for responding to calls.

Are On-Call Shifts Legal?

The short answer is yes — for now. Currently, federal and state laws do not directly address on-call shifts. But on-call shifts (and just-in-time scheduling generally) have recently come under attack in California, New York and elsewhere through class actions, state investigations and new legislation.

On April 9, 2015, the California federal judge presiding in Casas v. Victoria's Secret Stores LLC, a class action against the lingerie retailer, granted a rare interlocutory appeal to the putative class of store clerks seeking compensation for on-call shifts. The decision gives Victoria's Secret clerks the right to immediately appeal U.S. District Judge George H. Wu's Dec. 18, 2014, ruling dismissing the clerks' claim that they are entitled to compensation under California's reporting time pay law for on-call shifts for which they were not required to appear at work.

In his December ruling, Judge Wu reasoned that the phrase "required to report to work and does report to work" in the reporting time pay law meant that reporting time pay is restricted to instances where an employee physically presents him or herself at the place of work but is sent home without working. In granting the interlocutory appeal, however, Judge Wu stated that the question of on-call shifts presented a novel question of law on which "reasonable minds could go both ways." The question of whether California's reporting time pay law provides compensation for on-call shifts will be considered by the Ninth Circuit in the coming months.

Perhaps emboldened by this development in the California lawsuit against Victoria’s Secret, Schneiderman sent letters the next day, on April 10, 2015, to 13 major employers — including L. Brands (Victoria’s Secret’s parent company), Gap Inc., and Target Corp. — requesting information about their on-call shift practices.

Schneiderman’s letter bemoaned the challenges that “unpredictable work schedules” present for employees, while ignoring the unpredictability also faced by retail employers. For instance, the Hay Group, a management consulting firm, found that the median employee turnover rate for part-time retail employees was an astonishing 74.9 percent in 2013. Like California, New York’s reporting time pay law has, until now, been applied exclusively to instances where an employee actually reports to work — but the New York state attorney general’s letter should be heeded as a signal that his office will pursue an expansive interpretation of what it means to “report” to work.

New Legislative Initiatives Regarding On-Call Shifts

In December 2014, San Francisco became the first jurisdiction in the U.S. to enact legislation requiring employers to provide two weeks’ advanced notice of work schedules to employees, and to pay employees if the employer makes changes to an employee’s work schedule with less than a week’s notice. The city ordinance, "The San Francisco Retail Workers Bill of Rights," requires employers to pay a penalty of one extra hour of pay to an employee for each shift that is changed with less than one week’s notice. If less than 24 hours notice is provided, the penalty rises to four hours of extra pay. The ordinance applies to “formula retail” establishments, which are defined to include retail stores, restaurants and fast food businesses, hotels and banks with 11 or more stores nationwide, and at least 20 employees in San Francisco.

Legislation was introduced at the state level in California in the form of the Fair Schedule and Pay Equity Act in February, with almost identical advanced notice and penalty pay rules as those currently in effect in San Francisco. The Fair Schedule and Pay Equity Act is currently pending before the California Legislature; if it becomes law, the act would apply to food and general retail employers with 500 or more California-based employees.

On Jan. 7, 2015, New York introduced parallel bills in the state assembly and senate that would have discouraged the use of on-call shifts by requiring that employers compensate employees with an extra four hours of pay for each day on which the employee was required to contact the employer within less than 24 hours before a shift to determine whether the employee must report for the shift. The bill has since been withdrawn, and a subsequent bill introduced on Jan. 21, 2015 would give employees a protected right to request flexible work scheduling, without requiring that the employer accept the proposed flexible work schedule.

Similar “fair shift scheduling” legislation has also been introduced in Connecticut, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota and Oregon in recent months, although the specific requirements of the proposed legislation in these states vary widely.

Guidance for Employers

Despite the apparent good intentions, legislation passed in San Francisco and proposed in California, New York and elsewhere is at-odds with the challenges already facing employers that depend on just-in-time scheduling and similar systems to control rising labor costs. Requiring that employers provide employees with their work schedule a full two weeks in advance or pay penalties to the employees whose shifts have been adjusted makes it much more expensive for employers to respond to employee-driven scheduling changes, such as when an employee calls in sick or quits. It also eviscerates the ability of employers to implement just-in-time and other efficient scheduling systems, resulting in increased labor costs due to inefficient scheduling. These challenges are more acute in jurisdictions like California that have enacted paid sick time laws, because the combination of these laws dramatically increases the cost of making adjustments to employee schedules.

Employers who operate in any of the states mentioned above, and particularly those in the food and retail industries, must closely monitor these bills and ensure that they are ready to make changes to their policies in order to comply with any changes in the law. Given the lack of uniformity in the proposals currently pending in state legislatures across the country, the need to monitor — and react swiftly — to these developments is especially important for regional and national employers who may have to adopt scheduling systems varying from state to state.

—By Lindsay A. Ayers and David Szwarcsztejn, Carothers DiSante & Freudenberger LLP

Lindsay Ayers is a partner and David Szwarcsztejn is an attorney in Carothers DiSante & Freudenberger's Orange County, California, office.