

SENATE BILL REPORT

SB 5717

As Reported by Senate Committee On:
Labor & Commerce, February 21, 2019

Title: An act relating to secure scheduling.

Brief Description: Concerning employer and employee scheduling.

Sponsors: Senators Saldaña, Das, Hasegawa, Nguyen, Keiser, Lias, Conway, Hunt, Randall and Wilson, C..

Brief History:

Committee Activity: Labor & Commerce: 2/15/19, 2/21/19 [DPS-WM, DNP].

Brief Summary of First Substitute Bill

- Creates a comprehensive program for certain employees regarding their work schedules.
- Covers employers in food services, hospitality, or retail with 250 or more employees worldwide, except full service restaurants must have 40 or more locations worldwide.
- Covers chains and franchises with 250 or more employees in the aggregate, except for those employing less than 25 employees across locations operated by that franchisee.
- Provides exclusions for nonprofit service organizations, temporary service contractor, and roadside assistance services.
- Provides covered employees with 14 days' notice of work schedules, compensates employees for schedule changes, grants employee requests for schedule changes under certain conditions, and other protections.
- Provides a ten-hour rest period for employees working closing an store opening the next day.
- Exempts volunteers who offer to work in response a mass or in-person communication.
- Requires existing employees to be offered additional hours before an employer may hire new employees.
- Provides for administrative remedies and a civil cause of action.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

SENATE COMMITTEE ON LABOR & COMMERCE

Majority Report: That Substitute Senate Bill No. 5717 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Keiser, Chair; Conway, Vice Chair; Saldaña and Wellman.

Minority Report: Do not pass.

Signed by Senators King, Ranking Member; Braun and Walsh.

Staff: Richard Rodger (786-7461)

Background: State law does not address when and how workers are scheduled. A number of jurisdictions, including the cities of Seattle and San Francisco and the state of Oregon, have enacted scheduling laws.

The Minimum Wage Act (MWA) covers most employees in the state. The MWA include exemptions for some executive, administrative, and professional employees.

To be eligible for unemployment insurance, a claimant who quits work must quit only under good cause quit circumstances listed in statute.

Summary of Bill (First Substitute): The scheduling provisions apply to employees who are covered under the state's MWA, work at a fixed point of sale location, and work for specified employers. Covered employers are food service, hospitality, and retail establishments with 250 or more employees worldwide. Covered full service restaurants must also have 40 or more locations worldwide. Establishments include franchises associated with a franchisor or network of franchises employing 250 or more employees in the aggregate, with an exemption for a franchise with less than 25 FTE's across locations operated by that franchisee. Excludes from the definition of employer: nonprofit service organizations, temporary employment agencies, and roadside assistance services "

Covered employers are required to meet the following provisions:

1. Good Faith Estimate of Work Schedule. Employers must provide employees, at the time of hire, a good faith estimate of their work schedule, expected median hours per week, and if on-call shifts are expected. An employer must revise the estimate annually and when there is a significant change to the employee's work schedule.
2. Work Schedule Input. Employees may identify any limitations or changes in availability, and may request schedule and location preferences. Employers must engage in an interactive process regarding requests not to work certain shifts, or at certain locations, or preferences for hours or locations of work. If the request is due to a major life event, the employer must grant the request, unless the employer has a bona fide business reason for denial. A major life event includes changes in transportation or housing, a serious health condition, responsibilities as a caregiver, enrollment in career-related education or training, or other job. An employer may require verifying information, as long as it does not exceed privacy or verification requirements otherwise in law.

3. Rest Between Work Shifts. Employers may not require employees to work shifts separated by less than ten hours. An employee who requests or agrees to work such hours is entitled to one and a half times the regular rate of pay for hours separated by fewer than ten hours.
4. Advance Notice of Work Schedule. Employers must provide the work schedule to employees at least 14 days before the first day of the schedule. An employer must post the work schedule in English and the primary languages of all the employees at the workplace and transmit it to each employee. An employer who fails to timely post the work schedule must compensate each employee \$100 for each day the schedule is not posted.
5. Work Schedule Changes. Employees may decline any schedule changes made by the employer after the advance notice. If the employee requests a change in the schedule after the advance notice, the employer may ask or require the employee to find a replacement as follows:
 - if another law prohibits asking the employee or protects the absence from employer interference, the employer may not ask or require the employee to find a replacement;
 - if the reason is an emergency or major life event, an employer may ask but not require the employee to find a replacement; and
 - for other reasons, the employer may require the employee to find a replacement.
6. Compensation for Work Schedule Changes. For employer requested changes after the advance notice, the employee is entitled to additional compensation as follows:
 - one hour of regular pay for adding hours or changing the date or start or end time of a work shift with no loss of hours, or changing the location. The hour of premium pay does not include any requirement for overtime pay that would not ordinarily be paid to the employee.
 - one-half the regular pay for any scheduled hours not worked, including on-call hours not worked. Exceptions include mutually agreed shift swaps or coverage, employee-requested changes, voluntary responses to a mass communication or to an in-person group communication for employees who are currently working, and when operations close because of a natural disaster.
7. Under Scheduling. An employer may not engage in a pattern or practice of systemic under scheduling in which the total hours actually worked are significantly greater than the hours in the work schedule. Employers must periodically provide aggregate data on discrepancies between hours scheduled and hours worked to the Department of Labor and Industries (L&I).
8. Access to Hours for Existing Employees. Before hiring external employees, including temporary employees, employers must offer additional hours to current employees as follows:
 - employers must post notice of the available hours for five days, must offer the hours to qualified existing employees, and details of the notice are specified;

- employees are not qualified if overtime pay would be required or if other laws would bar the employee from working;
- the employer must give the employee offered hours at least five days to accept the offer;
- the priorities for offering shifts to employees are specified;
- if no employee responds to the notice of additional hours or accepts offered hours within the timeframe specified; or
- all employees decline hours, the employer may hire externally.

An employer who fails to offer additional hours as required must compensate each employee \$100 for each occurrence. An employer who fails to award hours to a qualified employee must compensate the employee \$1,000.

L&I and private enforcement provisions and job protections include:

1. Administrative Enforcement. L&I must investigate complaints and may order payment to the employee of unpaid compensation plus interest, statutory damages of twice the unpaid compensation, and payment to L&I for the costs of the investigation and enforcement. A prevailing employee is entitled to attorneys' fees and costs.
2. Civil Penalties. L&I may also order payment of a civil penalty of not less than the greater of \$1,000 per violation or 10 percent of unpaid wages, up to \$20,000 per aggrieved party. Penalties may be waived if the employer pays the full remedy due to employee within ten days of the final order.
3. Whistleblower Enforcement. An employee may seek civil penalties through a civil action on behalf of the director of L&I and other employees, if the director, after notice, decides not to investigate the alleged violation. The process for a whistleblower action is specified. An employee may designate an organization to represent them in the whistleblower proceedings. Penalties are distributed as follows: 70 percent to the director for enforcement and education of employers and employees; and 30 percent to the aggrieved employees. Twenty percent of the director's share of penalties must be allocated to community-based enforcement partnerships.
4. Private Cause of Action. An employee or class of employees may bring a civil action for remedies similar to those available in an administrative action.
5. Retaliation. Retaliation for filing a complaint or taking other action under the provisions is prohibited. Prohibited discrimination includes demoting, reducing hours, and actions or threats relating to perceived immigration status or work authorization. An adverse action against an employee within 90 days of the employee's exercise of rights is presumed retaliatory. If an employer is found to have retaliated, the director or court must order an additional payment to the employee up to \$5,000.

Miscellaneous provisions include:

1. Unemployment. If an employer knowingly fails to comply with the requirements or makes a significant change in the employee's work schedule due to changes in the

employer's needs, an employee has good cause to quit for purposes of unemployment insurance.

2. Recordkeeping. Employers must maintain specified records documenting compliance for three years. A failure to retain adequate records creates a presumption, rebuttable by clear and convincing evidence, that the employer violated the provisions.
3. Rulemaking and Technical Assistance. L&I must adopt implementing rules and provide technical assistance to employers.

EFFECT OF CHANGES MADE BY LABOR & COMMERCE COMMITTEE (First Substitute):

- Raises the employer threshold from 100 to 250 employees.
- Adds franchise exemption at less than 25 FTE's across locations operated by that franchisee.
- Rest time between clopening is reduced from 12 to 10 hours.
- Definition changes:
 - Clarifies the requirements apply to employers that are food services, hospitality, or retail establishments meeting the threshold requirement and not all employers.
 - Makes additional cross-references between the terms "employee" and "employer."
 - Excludes nonprofit service organizations, temporary employment agencies, and roadside assistance services from the definition of "employer."
- Removes the definition of "work shift."
- Changes definitions of "employ" and "parent" to use definitions in the Minimum Wage Act.
- Clarifies that the employer's requirement that an employee provide verifying information regarding scheduling request may not exceed privacy or verification requirements otherwise in law.
- Exempts additional hours that the employee volunteers to work in response to a mass communication, and for employees who are currently working, through an in-person group communication.
- Clarifies that the hour of premium pay, does not include any requirement for overtime pay.
- Removes all provisions related to unemployment insurance.

Appropriation: None.

Fiscal Note: Requested on January 30, 2019.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The industry and workers'

representatives have been very engaged in encouraging and supporting this effort. Individuals need more clarity around their schedules, especially for workers outside of Seattle. It is very challenging to balance work and school schedules, when the schedules change weekly for work and quarterly for schools. Knowing schedules in advance allows us to schedule and plan medical appointments and child care for our children. Openings are very difficult for employees to deal with. Workers need secure, reliable schedules so we can take care of our families and lives and make our lives less of a struggle. Erratic shifts and inconsistent hours make it difficult to plan a budget and are harmful to our health. Allowing employees to discuss their availability for shifts and locations create a better working relationship between the employers and employees. As a small business owner, we find secure scheduling provides stability for our employees.

CON: As a full service worker I do not support this bill. I like the flexibility the current system offers, if the business is slow we can leave and spend time with our families. How can a sports bar plan for such events as Seahawks playoff post season schedules? Penalties for call-offs are ridiculous to pay people to stay home and not work. The bill does not work for full service restaurants, they are not comparable to fast food, coffee, or retail establishments. Secure scheduling is restrictive scheduling, it takes away the power workers have to schedule their own work/life balance and puts it into the hands of government and our employers. We enjoy the perks of having flexible schedules that we can plan for ourselves. These are not rights that are being offered, but obligate the employees to the set schedules. Concerns with the Seattle law included the perils of algorithm software for fast food and coffee chains, as no such software exists for full service restaurants.

Please exclude temporary worker companies as was done in Oregon. This is not what was done in Seattle, as its law less restrictive than what is proposed today. We are required to honor our CBA agreements, which conflicts with this law on notice of schedules and splitting shifts. Posting of notices in all the languages of the employees present at a work site, that may cover 20 to 30 languages. If we offer out additional hours, the law still requires us to pay a penalty to those who accept the hours. Wineries maintain standard business hours, but our customer traffic is not predictable. The bill sets up drastic and punitive enforcement measures that will prevent us from providing our employees with the flexibility they need. These laws across the country have resulted in fewer hours and less money for our employees. The bill is unfair as it only covers large employers and franchisees. Weather is a big factor in our business and it is unpredictable 14 days in advance. Five degrees can double my business or cut my business in half. Full service is not Fred Meyers or Dominos. The term covered employers is used inconsistently with employer. A small franchise with five employees is covered by the bill, as are some agricultural businesses that provide retail services to farmers. This adds a layer of paperwork for both employers and our employees. The bill locks in antiquated work schedules versus the flexible nature of the new businesses and environment. This is much different from Oregon's law.

Persons Testifying: PRO: Senator Rebecca Saldaña, Prime Sponsor; Amy Dayley-Angell, citizen; Peter Charlie, citizen; Sarah Rawlings, citizen; Adam Scripter, citizen; David Rojas, citizen; Karynn Pauly, citizen; Matt Hipp, citizen; Joel Nelson, United for Respect.

CON: Natalie McNair, Tue Blue; Holly Chisa, NW Grocery Association; Steve Gano, Ste Michelle Wine Estates; Carolyn Logue, Washington Food Industry Association; Bruce

Beckett, Washington Retail Association; Simone Baron, citizen; Sean Beavers, citizen; Dee Firlschild, citizen; Julia Gorton, Washington Hospitality Association; Mike McKinnon, Dairy Queen; Valerie Fisk, Dairy Queen; Rick Nelsen, Ricardo's; Bob Battles, AWB.

Persons Signed In To Testify But Not Testifying: No one.