



STATE INNOVATION EXCHANGE



RESTORING A FAIR WORKWEEK

STATE POLICIES TO COMBAT ABUSIVE SCHEDULING PRACTICES
CENTER FOR POPULAR DEMOCRACY AND THE STATE INNOVATION EXCHANGE

January 2020

THE WORK HOURS CRISIS

Today a majority of working Americans – over 80 million people – clock into a job with an hourly wage.¹ As millions of families benefit from higher minimum wages, these victories are undermined by unstable work hours. Many hourly workers are expected to be available 24/7 to work part-time jobs with no guaranteed hours, and experience huge fluctuations in weekly income.

In the low-wage service sector, retailers use just-in-time scheduling to reduce labor costs, placing tremendous pressure on frontline managers to calibrate staffing with customer demand. Managers are held accountable for maintaining a particular ratio between the number of hours employees work and either store sales or traffic, and are given a base number of hours to distribute among employees.² It is common for retailers to review staffing ratios daily or even hourly, and adjust workers' schedules to ensure that the ratio is rebalanced the next day.³

Just-in-time scheduling forces workers to bear the cost of fluctuations in customer demand. Most workers receive their work schedules with little notice. Last-minute changes to schedules leave parents scrambling for childcare or missing income needed to cover basic expenses. Unstable schedules also undermine all aspects of working families' lives – volatile incomes make it impossible to budget; family relationships are strained; and last-minute schedule changes interfere with everything from college classes to doctors' appointments.



HOW UNPREDICTABLE SCHEDULES HURT WORKERS AND EXACERBATE RACIAL INEQUALITY

New survey data from **30,000 employees at 120 of the country's largest retail and food service companies confirms that underemployment and unstable and unpredictable schedules are endemic.** For example, half of the workers surveyed regularly work “clopenings,” consecutive closing and opening shifts leaving inadequate time to commute, eat and sleep before returning to work early the next morning.⁴ Abusive corporate practices undermine working families, foster racial inequities and drive workers into poverty.



¹ <https://www.bls.gov/opub/reports/minimum-wage/2018/home.htm>

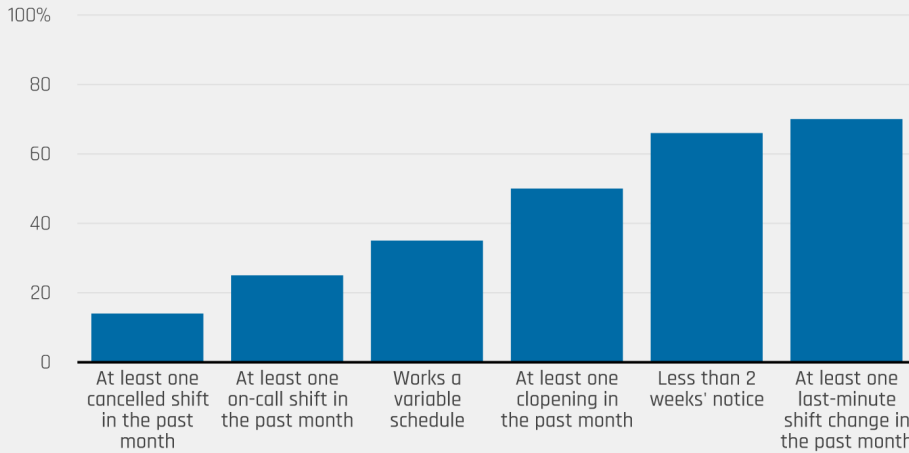
² Susan Lambert (2008). “Passing the buck: Labor flexibility practices that transfer risk onto hourly workers.” *Human Relations* vol. 61(9), pp. 1210-1213.

³ *Id.*, Susan Lambert (2014). “The Limits of Voluntary Employer Action for Improving Low-Level Jobs,” in *Working and Living in the Shadow of Economic Fragility*, Marion G. Crain & Michael Sherraden, eds. Oxford University Press, p. 123.

⁴ <https://shift.berkeley.edu/its-about-time-how-work-schedule-instability-matters-for-workers-families-and-racial-inequality/>

Low-wage workers have high rates of low-quality schedules

Percentage of U.S. food and retail workers that experience each type of scheduling problem



Note: Clopening shifts are back-to-back opening and closing shifts.

Source: Daniel Schneider and Kristen Harknett. 2019. "It's About Time: How Work Schedule Instability Matters for Workers, Families, and Racial Inequality." Shift Project. IRLE. UC Berkeley.

Equitable Growth

UNPREDICTABLE HOURS ARE THE NORM

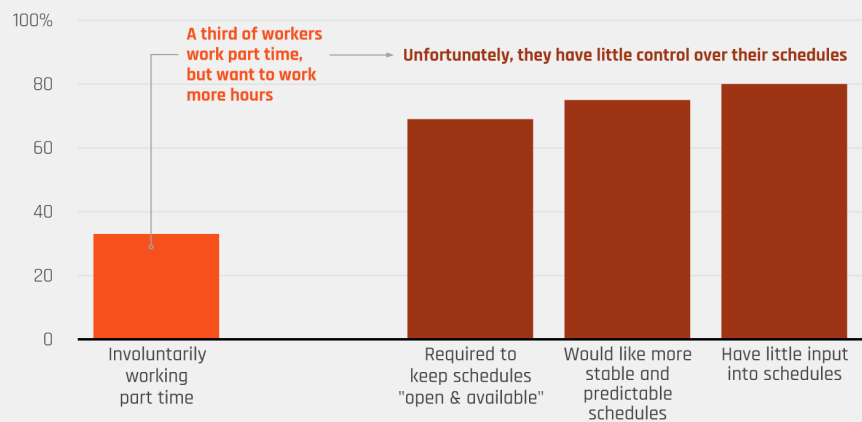
- 65% of hourly workers receive their schedules with less than two weeks' notice. One in three receive their schedule less than one week in advance.⁵
- 71% of hourly workers report at least one change to the timing of one of their shifts in the past month.⁶

UNDEREMPLOYMENT IS WIDESPREAD AND PART-TIME JOBS OFFER NO FLEXIBILITY

- 34% of hourly workers receive less than 35 hours of work a week, despite wanting to work more hours.⁷
- 80% of hourly workers have little or no input into their schedules.⁸

Low-wage workers have little control over their low-quality schedules

Percentage of U.S. food and retail workers that experience each indicator of limited worker control



Source: Daniel Schneider and Kristen Harknett. 2019. "It's About Time: How Work Schedule Instability Matters for Workers, Families, and Racial Inequality." Shift Project. IRLE. UC Berkeley.

Equitable Growth

⁵ <https://equitablegrowth.org/working-papers/hard-times-routine-schedule-unpredictability-and-material-hardship-among-service-sector-workers/>

⁶ *Id.*

⁷ *Id.*

⁸ <https://shift.berkeley.edu/its-about-time-how-work-schedule-instability-matters-for-workers-families-and-racial-inequality/>

ERRATIC SCHEDULES STRAIN FAMILIES AND HARM CHILDREN'S PSYCHOLOGICAL DEVELOPMENT

- On-call shifts and last-minute schedule changes force parents to rely on a complex patchwork of friends and family to provide childcare. These scheduling practices increase the risk that parents must leave children to care for themselves and for young siblings rather than missing needed income.⁹
- Parents who work unstable and unpredictable schedules are more likely to report that their children feel worthless, anxious, guilty, unhappy or worried – and report more behavioral problems.¹⁰

Parents with just-in-time schedules struggle to find childcare

Number of days per year in which young children of U.S. food and retail workers receive childcare from a sibling younger than 10 years of age or lack childcare (for any period of time)

Parents without on-call or last-minute schedule changes*



Parents who work on-call and experience last-minute schedule changes



Number of days

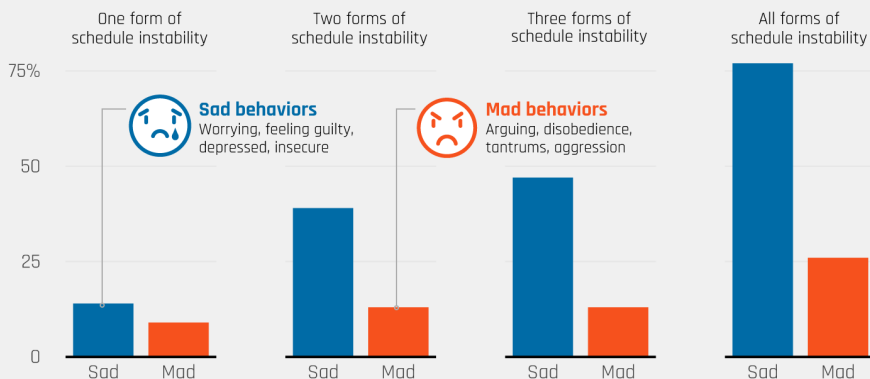
* These parents may experience other scheduling practices that impact childcare, such as receiving their schedule less than a week in advance.

Source: Daniel Schneider, Kristen Harknett, and Sigrid Luhr, "Who Cares if Parents have Unpredictable Work Schedules?: The Association between Just-in-Time Work Schedules and Child Care Arrangements." [Washington, D.C.: Washington Center for Equitable Growth, 2019].



As parents' schedule instability increases, child behavioral problems increase

Increased level of U.S. children's sad and mad behaviors associated with exposure to parents' level of schedule instability relative to children whose parents have stable schedules



Note: Forms of parental schedule instability include on-call, cancelled, and clopening shifts, and last-minute schedule changes. Sad and mad child behaviors were measured using scales for internalizing and externalizing behaviors constructed from the Child Behavior Check-List Brief Problem Monitor.

Source: Daniel Schneider and Kristen Harknett, "Parental Exposure to Routine Work Schedule Uncertainty and Child Behavior" [Washington, D.C.: Washington Center for Equitable Growth, 2019].

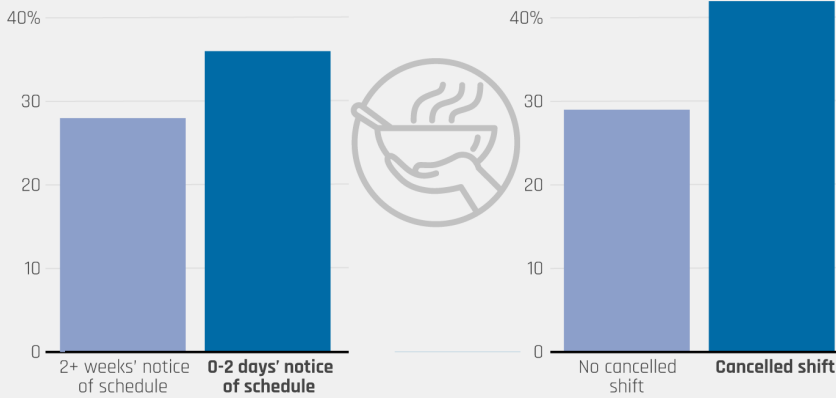


⁹ *Id.*

¹⁰ *Id.*

Shorter notice and cancelled shifts are associated with hunger hardship

Probability of experiencing hunger hardship by type of schedule among U.S. food and retail workers. Hardship includes relying on free food and meals or going without eating due to financial need.



Source: Daniel Schneider and Kristen Harknett, "Hard Times: Routine Schedule Unpredictability and Material Hardship among Service Sector Workers" (Washington, D.C.: Washington Center for Equitable Growth, 2019).



HOURS INSTABILITY DRIVES INCOME VOLATILITY AND POVERTY

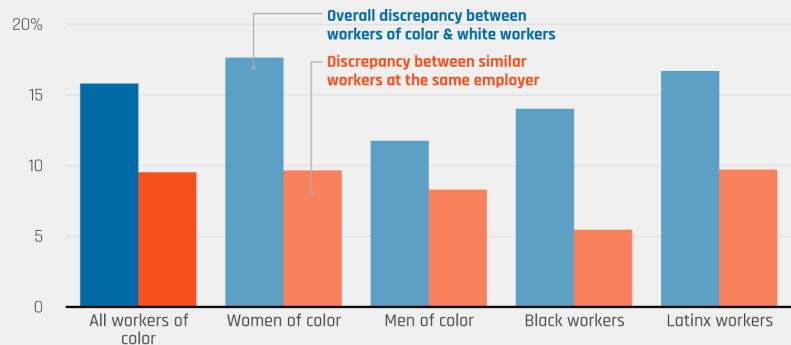
- The average hourly worker reports fluctuations in weekly work hours of 33% – up to 10 hours of weekly pay.¹¹ Such volatile incomes make it impossible to budget, save, or stay on top of bills.¹²
- Hourly workers with canceled shifts and last-minute schedules suffer from hunger and housing instability at much higher rates than workers who receive the same hourly wage but with more predictable schedules.¹³

ABUSIVE CORPORATE SCHEDULING PRACTICES CREATE RACIAL INEQUALITY

- Exposure to schedule instability is 16% higher among workers of color compared with white workers. This gap is largest, though, for women of color, at 18%.¹⁴
- Workers of color are 30% more likely to experience a shift cancellation than white workers.¹⁵
- Racial disparities in schedule instability persist between workers of color and similarly qualified white co-workers at the same company.¹⁶
- The data suggest that some company managers – who are disproportionately white – exercise their scheduling discretion in favor of employees who share their race and ethnicity.¹⁷

Workers of color have worse schedules than their white co-workers

Discrepancy in levels of exposure to unstable and unpredictable scheduling practices between workers of color and white workers at U.S. food and retail companies



Note: In this context, unstable and unpredictable scheduling practices include cancelled, on-call, and clopening shifts, involuntary part-time work, and difficulty getting time off. The level of exposure is measured by counting the number of these practices workers are exposed to. Analyses of gender subgroups compare women of color to white women, and men of color to white men.

Source: Adam Storer, Daniel Schneider, and Kristen Harknett, "What Explains Race/Ethnic Inequality in Job Quality in the Service Sector?" (Washington, D.C.: Washington Center for Equitable Growth, 2019).



¹¹ <https://equitablegrowth.org/working-papers/hard-times-routine-schedule-unpredictability-and-material-hardship-among-service-sector-workers/>

¹² <http://www.aspenepic.org/responses-repercussions-income-volatility-low-moderate-income-households-results-national-survey/>; <http://www.aspenepic.org/issue-brief-income-volatility-destabilizes-families-philanthropy-can-make-difference/>

¹³ <https://equitablegrowth.org/working-papers/hard-times-routine-schedule-unpredictability-and-material-hardship-among-service-sector-workers/>

¹⁴ <https://shift.berkeley.edu/its-about-time-how-work-schedule-instability-matters-for-workers-families-and-racial-inequality/>

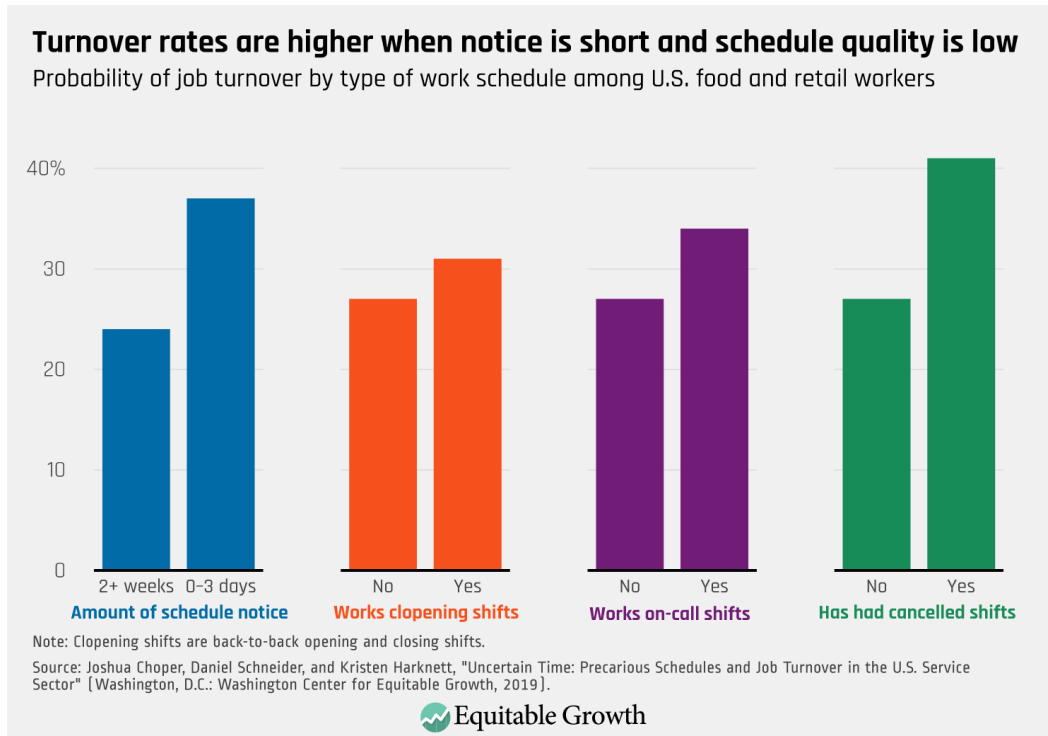
¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

INSTABILITY DRIVES WORKERS OUT OF JOBS

- Turnover is high in the retail and food service sectors: 28% of hourly workers surveyed were no longer in their jobs six months later.¹⁸
- Erratic work schedules play a significant role in turnover. Shift cancellations increase the likelihood of turnover by 50%, and hourly workers who receive their schedules with less than 72 hours' notice are 62% more likely to have left their jobs in six months than workers who receive at least two weeks' advance notice.¹⁹

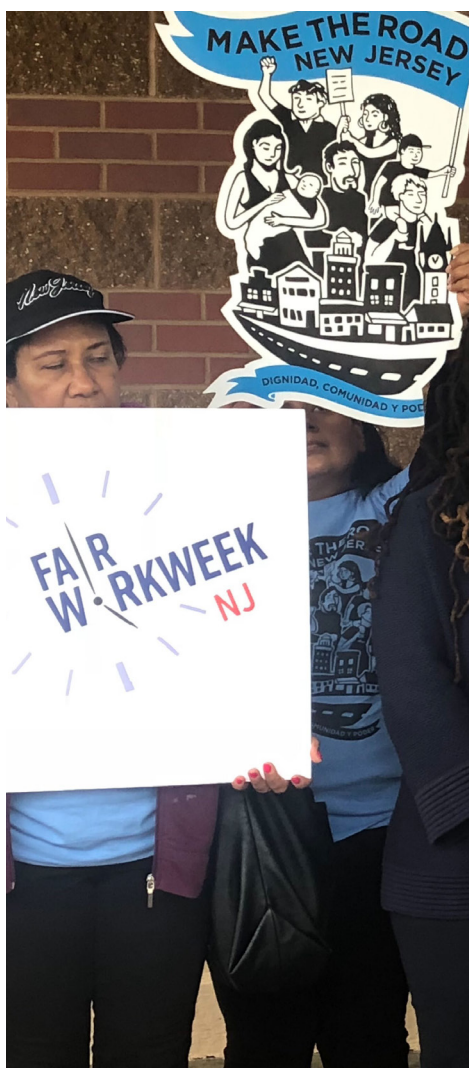


¹⁸ <https://shift.berkeley.edu/its-about-time-how-work-schedule-instability-matters-for-workers-families-and-racial-inequality/>

¹⁹ *Id.*

RESTORING A FAIR WORKWEEK

We all need a workweek we can count on – one that allows all of us to care for our families, stay healthy, and get ahead. That’s why working people across the country are coming together to restore a Fair Workweek in our workplaces and communities.



HOW STATES CAN ADDRESS THE HOURS CRISIS: PASS FAIR WORKWEEK LEGISLATION

States and cities are now passing new work hours protections that ensure that hourly workers at large service-sector chains have a greater voice in their workweek, predictable schedules and the opportunity to work full time. Since 2014, comprehensive Fair Workweek legislation has been adopted in **Oregon** (2017 OR SB 828,²⁰ enacted as 2017 OR Chapter 691²¹) and in cities such as Chicago, Emeryville, New York City, Philadelphia, San Francisco, San José and Seattle. **Over 2.2 million workers across the country** have benefited from these laws.²² Legislators are also pursuing Fair Workweek legislation in a number of states, including **Connecticut**,²³ **Massachusetts** (2019 MA SB 1102,²⁴ 2019 MA SB 1110,²⁵ 2019 MA HB 3809²⁶), **Michigan** (2019 MI HB 5023²⁷), **New Jersey**,²⁸ **Pennsylvania** (2019 PA HB 1436)²⁹, **Washington** (2019 WA SB 5717³⁰, 2019 WA HB 1491³¹) and **Wisconsin** (2019 WI AB 265³²).

Fair Workweek policies tend to apply to large companies in the food, retail and hospitality industries, such as chains and franchises. These service industries are where the just-in-time scheduling practices that hurt working families are most common. Some laws extend protections to healthcare, warehouse, janitorial and temporary workers who increasingly face unpredictable hours. Because large companies already use workforce management technology that can automate compliance with Fair Workweek standards, applying the standards to big businesses ensures feasible implementation.

Key components of Fair Workweek legislation include predictable schedules, the right to request, healthy rest, access to hours and enforcement.

²⁰ <https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/SB828>

²¹ https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2017orlaw0691.pdf

²² In 2018, the Economic Policy Institute found that more than 1.8 million workers have been benefited from Fair Workweek laws: <https://www.epi.org/publication/fair-workweek-laws-help-more-than-1-8-million-workers/>. In 2019, Philadelphia passed Fair Workweek legislation that will benefit 130,000 workers: <https://www.inquirer.com/news/fair-workweek-philadelphia-bill-vote-20181206.html/>. Chicago also passed legislation that will benefit 300,000 workers.

²³ Connecticut legislators will reintroduce Fair Workweek legislation in the upcoming weeks. The legislation will build upon 2019 CT SB 764 and HB 6924. https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=SB-764

²⁴ <https://malegislature.gov/Bills/191/S1102>

²⁵ <https://malegislature.gov/Bills/191/S1110>

²⁶ <https://malegislature.gov/Bills/191/H3809>

²⁷ [http://www.legislature.mi.gov/\(S\(iyz5kyyfzqgk4z3sfux5ztym\)\)/mileg.aspx?page=GetObject&objectname=2019-HB-5023](http://www.legislature.mi.gov/(S(iyz5kyyfzqgk4z3sfux5ztym))/mileg.aspx?page=GetObject&objectname=2019-HB-5023)

²⁸ New Jersey legislators will introduce Fair Workweek legislation in the upcoming weeks.

²⁹ <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2019&sind=0&body=H&type=B&bn=1436>

³⁰ <https://app.leg.wa.gov/billsummary?BillNumber=5717&Year=2019&Initiative=false>

³¹ <https://app.leg.wa.gov/billsummary?BillNumber=1491&Year=2019&Initiative=False>

³² <https://docs.legis.wisconsin.gov/2019/proposals/reg/asm/bill/AB265>

ENSURING PREDICTABLE SCHEDULES

To combat erratic workweeks, states are pursuing Fair Workweek reforms that include:

Policy Provision	Standard It Creates	Rationale
Good Faith Estimate of Work Schedule	Requires a nonbinding but fact-based estimate of average weekly hours and days and times of shifts.	Allows employees to evaluate at the time of hire whether a job will match their needs.
Advance Notice of Schedules	Requires employers to provide employees with 14 days' notice of their work schedules and post the schedule in the workplace. The schedule must be updated within 24 hours of when the change was made.	Setting a schedule in advance is an easy and commonsense practice that many employers already follow. It allows people enough time to plan for medical appointments, childcare and family time.
Predictability Pay	An employer must pay half of the scheduled but unworked hours when the employer cancels or shortens a shift, and one hour of pay for other employer-initiated changes to the posted work schedule. Does not apply to shift swaps or employee requests (e.g., to leave early or take time off).	Predictability pay compensates employees for their flexibility when accommodating their employer's changes and creates an incentive for employers to create predictable work schedules. Employees deserve minimum compensation when hours they were counting on are canceled.
Consent to Last-Minute Additions	Allows employees to decline any hours not included in their original posted schedule, without retaliation. Employees can accept additional hours by consenting in writing.	This provision protects employees from last-minute added hours that might interfere with other responsibilities such as childcare or going to school. Many part-time employees want extra shifts, and technology makes it easy for employers to identify volunteers rather than forcing these shifts on unwilling workers.



POLICY SPOTLIGHT: PREDICTABILITY PAY

Predictability pay should be required for all employer-initiated schedule changes made after the 14-day notice period. A model policy provides that:

- (1) For each employer-initiated change to the posted work schedule, a Covered Employer shall pay an employee predictability pay at the following rates:
 - a. One hour of predictability pay when the Covered Employer adds hours of work or changes the date, time or location of a work shift with no loss of hours.
 - b. One-half times the employee's regular rate of pay per hour for any scheduled hours the employee does not work when the Covered Employer cancels or subtracts hours from a regular or on-call shift.
- (2) A Covered Employer is not required to pay predictability pay when:
 - a. An employee requests a shift change in writing, including but not limited to 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 existing employer policy regarding required conditions for employees to exchange shifts.

LEGISLATIVE EXAMPLE – OREGON (2017 OR CHAPTER 691 SECTION 7)³³

(2) An employer shall provide the following compensation to an employee for each employer-requested change that occurs to the employee's written work schedule without the advance notice required in section 5 of this 2017 Act:

(a) One hour of pay at the employee's regular rate of pay, in addition to wages earned, when the employer:

(A) Adds more than 30 minutes of work to the employee's work shift;

(B) Changes the date or start or end time of the employee's work shift with no loss of hours; or

(C) Schedules the employee for an additional work shift or on-call shift.

(b) One-half times the employee's regular rate of pay per hour for each scheduled hour that the employee does not work when the employer:

(A) Subtracts hours from the employee's work shift before or after the employee reports for duty;

(B) Changes the date or start or end time of the employee's work shift, resulting in a loss of work shift hours;

(C) Cancels the employee's work shift; or

(D) Does not ask the employee to perform work when the employee is scheduled for an on-call shift.

Limit exceptions to predictability pay. Some Fair Workweek policies list a variety of circumstances in which employers may change work schedules without compensating workers with predictability pay. These exceptions introduce complexity, making it harder for workers to understand when they are entitled to compensation. Such worker confusion is a serious problem in an enforcement system that relies heavily on worker complaints. Many managers also misunderstand the exceptions and end up violating the law, while scarce enforcement resources are spent investigating whether various fact patterns trigger exceptions.

³³ https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2017orlaw0691.pdf

One particularly concerning exception is the “voluntary standby list,” which allows employers to add hours without predictability pay when workers “agree” to added shifts. This policy undermines the efficacy of Fair Workweek reforms, forcing workers to choose between predictability (relying on the posted schedule) and adequate incomes (picking up last-minute shifts), while disadvantaging working parents who have less flexibility to accept shifts without notice.

LEGISLATIVE EXAMPLE - NEW YORK CITY (2017 INT. 1396A)³⁴

A fast food employer is not required to provide a fast food employee with the amounts set forth in such subdivisions in the event that:

1. *The employer’s operations cannot begin or continue due to:*
 - (a) *Threats to the employees or the employer’s property;*
 - (b) *The failure of a public utility or the shutdown of public transportation;*
 - (c) *A fire, flood or other natural disaster;*
 - (d) *A state of emergency declared by the president of the United States, governor of the state of New York, or mayor of the city; or*
 - (e) *Severe weather conditions that pose a threat to employee safety, although where a fast food employer adds shifts to an employee’s schedule to cover for or replace another employee who cannot safely travel to work, such employer shall provide the replacing or covering employee with the amounts set forth in subdivision a of this section;*
2. *The employee requested in writing a change in schedule;*
3. *Two employees voluntarily traded shifts with one another, subject to any existing employer policy regarding required conditions for employees to exchange shifts; or*
4. *The employer is required to pay the employee overtime pay for a changed shift.*

Having an unpredictable schedule doesn't allow me to plan my budget, my time, and my life. I'm pinching pennies and having the hours I deserve and the predictability would allow me the freedom to relax.

-Alexis, worker in Emeryville, CA

#FairWorkWeek

A VOICE IN WORK HOURS: THE RIGHT TO REQUEST

An important aspect of Fair Workweek legislation is to protect workers' right to make scheduling requests without fear of retaliation. The most significant obstacle to ensuring worker input into schedules is managers' demand for “open availability” – willingness to be scheduled at any time. In one study, **94% of retail managers reported that they prefer to hire workers with maximum availability and 79% reported that they give more hours to sales associates with greater availability.**³⁵ Employees also indicated that they faced repercussions (reduced hours or undesirable shifts) when they limited their availability.³⁶

³⁴ <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2900942&GUID=F6382D3F-7D70-4324-A083-65BD4E355E55>

³⁵ Susan Lambert, Anna Haley-Lock, and Julia Henly, “Schedule flexibility in hourly work: unanticipated consequences and promising directions,” *Community, Work & Family* vol. 15(3) (2012), p. 305.

³⁶ *Id.*

Explicit or implicit open availability requirements have significant implications for workers' ability to manage obligations outside of work while also securing enough hours to earn an adequate income. These unstated policies also increase gender disparities and occupational segregation, as working people with caregiving responsibilities – disproportionately women – are less able to meet the demand for open availability.³⁷

To ensure that workers can make scheduling requests without experiencing retaliation, states are pursuing Fair Workweek reforms that include:

Policy Provision	Standard It Creates	Rationale
Right to Request a Flexible Working Arrangement	Employees can request specific scheduling accommodations, such as limiting their availability. Employers cannot retaliate against workers for seeking input into their work hours. In some jurisdictions, employers must respond to requests and grant them when compatible with business needs.	We all have obligations outside of work, including care for family members, schooling and second jobs. Employees shouldn't face negative consequences for asking their employer to accommodate their other commitments.

POLICY SPOTLIGHT: RIGHT TO REQUEST

At the time of hire and during employment, the employee has the right to make work schedule requests. The employer shall not retaliate against an employee for making such requests, nor make opportunities for promotion, full-time employment or training contingent upon an employee's waiver of the right to make work schedule requests or upon the employee's desired number of weekly work hours. The requests protected under this section include but are not limited to:

- a. Requests not to be scheduled for work shifts during certain days or times or at certain locations
- b. Requests for certain hours, days or locations of work
- c. Requests for more or fewer work hours
- d. Requests to be scheduled consistently for a specified or minimum number of weekly work hours

The employer shall engage in an interactive process to discuss such employee requests, but may grant or deny the request for any bona fide business reason that is not unlawful.

LEGISLATIVE EXAMPLE - MASSACHUSETTS (2019 MA SB 1110)³⁸

Section 148F. Advance Notice of Work Schedules.

(b) 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:

- (1) Requests not to be scheduled for work shifts during certain days or times or at certain locations,*
- (2) Requests not to work on-call shifts,*
- (3) Requests for certain hours, days, or locations of work,*
- (4) Requests for more or fewer work hours.*

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.

³⁷ https://populardemocracy.org/sites/default/files/Job%20Quality%20and%20Economic%20Opportunity%20Report%20FINAL%2011-29-17%20%281%29_0.pdf

³⁸ <https://malegislature.gov/Bills/191/S1110>

HEALTHY REST

Workers need adequate time between shifts to commute, sleep, eat and get ready for work. Many must also care for family members or complete other household chores. Schedules that do not allow workers adequate nightly rest periods pose a public health problem by eroding workers' health and endangering their coworkers and fellow commuters.³⁹

Policy Provision	Standard It Creates	Rationale
Right to Rest between Shifts	Guarantees employees adequate rest by allowing workers to decline to work with less than 11 hours' rest between shifts, and earn overtime for hours worked with less than 11 hours' rest.	Employees need enough time to eat, commute and sleep between shifts. These basic work-hour standards are healthier for families and better for business because employees will be alert on the job.

POLICY SPOTLIGHT: RIGHT TO REST

A model policy provides that:

- (1) An employee may decline, without penalty, any work hours that are scheduled or otherwise occur: (a) less than 11 hours after the end of the previous day's shift, or (b) during the 11 hours following the end of a shift that spanned two days. An employee may consent to work such shifts; however, consent must be provided in writing, either for each such shift or for multiple shifts, and may be revoked by the employee in writing at any time during employment.
- (2) The employer shall compensate the employee for each instance that the employee works a shift described in Section 1 at one and one-half times the employee's scheduled rate of pay for the hours worked that are less than 11 hours apart.

LEGISLATIVE EXAMPLE - CONNECTICUT (2019 CT SB 764)⁴⁰

(d)(1) An employee may decline to work a shift that begins less than eleven hours after the end of the employee's previous day's shift or during the eleven-hour period following the end of the employee's shift that spanned two days.

(2) If an employee consents to work a shift described in subdivision 92(1) of this subsection, such consent shall be in writing.

(3) An employee who works a shift described in subdivision (1) of this subsection shall be compensated at one and one-half times the employee's regular rate of pay for any hours worked during such shift.

(e) Nothing in this section shall prohibit an employer from adopting policies related to employee scheduling that are more beneficial to an employee than those required by this section.

³⁹ Center for Popular Democracy & Human Impact Partners, "Scheduling Away Our Health," July 2016, pp. 7-8; see also Daniel Schneider & Kristen Harknett, "Consequences of Routine Work-Schedule Instability for Worker Health and Well-Being," *American Sociological Review* 1-33 (2018) (finding that workers who experience clopenings are significantly more likely to report psychological distress, poor sleep and unhappiness).

⁴⁰ <https://www.cga.ct.gov/2019/TOB/s/pdf/2019SB-00764-R02-SB.PDF>

ACCESS TO WORK HOURS

Employers seeking to reduce labor costs intentionally spread work among many part-time employees so that they can ‘flex up’ during peak business hours.⁴¹ This practice also helps them save money, as part-time workers are often denied benefits and paid less per hour than their full-time counterparts. Because underemployment is an intentional employer strategy to maximize managers’ flexibility in scheduling labor hours, part-time workers experience more variability in the amount and timing of work hours compared to full-time workers.⁴² The resulting income volatility is just as significant a threat to families’ economic security as low wages. Families with volatile incomes are far more likely to rely on payday loans, defer medical care, miss a housing payment or experience food insecurity than families with more stable income.⁴³

Policy Provision	Standard It Creates	Rationale
Promoting Opportunities for Full-Time Work	<p>Requires employers to offer extra shifts to current part-time employees before hiring additional staff.</p> <p>The employer has discretion to distribute the shifts to qualified workers. The employer is never required to offer overtime.</p>	<p>Instead of offering full-time work, many employers spread hours among many part-time staff and hire new employees but offer them few or no hours.</p> <p>Underemployment is bad not just for workers but also for the economy. Adequate hours are critical for hourly workers to ensure a decent paycheck. If employers have additional work, they should offer those hours to their current workforce to provide family-sustaining employment instead of hiring people they don’t need.</p>



POLICY SPOTLIGHT: ACCESS TO HOURS

Most Fair Workweek laws require the employer to post an opportunity for additional hours for a prescribed amount of time before hiring additional employees. Procedural approaches have fostered loopholes that have undermined compliance in other cities; for example, some employers have hired new employees at locations outside the city limits and then transferred them into the stores subject to the Fair Workweek law in order to subvert “access to hours” protections. Other employers have required employees to work hours other than those advertised at the time of hiring or have arranged start and end times of shifts in a way that makes it impossible for most employees to bid on the shift.

To address these concerns, model policies have adopted “access to hours” requirements to ensure that existing employees are scheduled for the desired number of weekly work hours identified by the employer.⁴⁴

⁴¹ Susan Lambert (2008) “Passing the buck: Labor flexibility practices that transfer risk onto hourly workers.” *Human Relations* vol. 61(9), p. 1207.

⁴² Susan J. Lambert, Peter J. Fugiel, and Julia R. Henly (2014) “Precarious Schedules among Early Career Workers in the US Labor Market: A National Snapshot,” University of Chicago.

⁴³ See Stephen Roll et al., Responses to and Repercussions from Income Volatility in Low- and Moderate-Income Households: Results from a National Survey, Expanding Prosperity Impact Collaborative (Dec. 2017).

⁴⁴ In the coming weeks, New Jersey legislators will introduce legislation that contains a streamlined “make every effort” standard. This language is intended to incorporate lessons from jurisdictions that have passed and enforced Fair Workweek laws.

LEGISLATIVE EXAMPLE - MASSACHUSETTS (2019 MA SB 1110)⁴⁵

Section 148I. Offer of Work to Existing Employees.

(a) *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 offer work shifts to existing employees.*

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

[...]

(c) *A Covered Employer shall distribute hours ... 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:*

(1) *A Covered Employer shall distribute hours to employees whose regular workplace is the location where the hours described in the notice will be worked; or, if no such employee accepts the hours within the time defined in this section, to employees whose regular workplace is a covered location other than the location where such hours will be worked; or, if no such employee accepts the hours described in the notice within the time defined in this section, to temporary or seasonal workers who have been continuously assigned for at least four weeks to the location where the hours described in the notice will be worked.*

(2) *The 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.*

ENFORCEMENT

Policy Provision	Standard It Creates	Rationale
Whistleblower Enforcement	Empowers the state or local labor standards agency, and directly impacted workers, to enforce all provisions of the law. Authorizes employees to collect damages, as well as penalties on behalf of the city/state.	A law on the books won't protect workers unless it can be enforced. Tough penalties for violations will encourage employers to obey the law and employees will be compensated when their rights are violated.
Retaliation Protections	Establishes a presumption of retaliation where adverse action is taken against an employee within 90 days of a complaint being filed. The presumption also protects seasonal employees. Adverse action includes actions or threats related to perceived immigration status or work authorization.	Strong retaliation protections are critical in an enforcement system that relies heavily on worker complaints.

⁴⁵ <https://malegislature.gov/Bills/191/S1110>

POLICY SPOTLIGHT: WHISTLEBLOWER ENFORCEMENT

Our state agencies have talented, hardworking staff, but not enough resources to prosecute every company that violates Fair Workweek laws. That's why lawsuits by victims of Fair Workweek violations are an important tool to hold bad actors accountable. But now powerful corporations are burying forced arbitration provisions deep in the fine print of contracts, which denies workers their constitutional right to go before a judge and a jury.⁴⁶ The Supreme Court has also ruled that workers have no right to join with their coworkers to fight Fair Workweek violations. This decision makes it almost impossible to hold employers accountable for violating the law.

States can protect workers' rights and hold corporate wrongdoers accountable by deputizing whistleblowers to bring cases on behalf of the state. By passing a law to allow public enforcement suits for Fair Workweek violations, states can:

- Expose companywide violations through whistleblower suits on behalf of all affected consumers or workers.
- Collect millions in civil penalties from scofflaws to invest in increased enforcement capacity.
- Preserve access to courts. Courts have ruled that the right to bring a collective public enforcement action can't be waived in arbitration.⁴⁷

LEGISLATIVE EXAMPLE - WASHINGTON (2019 WA HB 1491)⁴⁸

Sec. 16. Whistleblower Enforcement.

(1) *The civil penalties specified in section 14(2)(b) of this act may be recovered through a civil action brought by any employee allegedly harmed by a violation of this chapter, whether or not that person has received full or partial relief from the harm, on behalf of the director and other current and former employees, pursuant to the following procedures:*

(a) *The employee must give written notice to the director of the specific provisions of this chapter alleged to have been violated, including the facts and theories to support the alleged violation. The employee may also designate an organization, including a union or a nonprofit, to represent it in proceedings under this section, subject to rules adopted by the director.*

(b) *The director must notify the employee or representative organization that he or she does not intend to investigate the alleged violation within forty-five calendar days of the postmark date of the employee's notice. Upon receipt of the director's notice, or if no notice is provided within forty-five calendar days, of the postmark date of the notice, the aggrieved employee may commence a civil action under this subsection.*

(c) *If the director intends to investigate the alleged violation, he or she must notify the employee or representative of his or her decision within forty-five calendar days of the postmark date of the employee's notice. Within one hundred twenty calendar days of that decision, the director may investigate the alleged violation and issue any appropriate citation. If the director, during the course of the investigation, determines that additional time is necessary to complete the investigation, the director may extend the time by not more than sixty additional calendar days and must issue a notice of the extension. If the director determines that no citation will be issued, the director must notify the employee of that decision within five business days. Upon receipt of that notice or if no citation is issued by the director within the time limits prescribed by this subsection, or if the director fails to provide timely or any notification, the employee may commence a civil action under this subsection.*

⁴⁶ <https://populardemocracy.org/blog/cpd-and-epi-release-new-report-forced-arbitration-and-workers-rights>

⁴⁷ *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2015).

⁴⁸ <https://app.leg.wa.gov/billsummary?BillNumber=1491&Year=2019&Initiative=False>

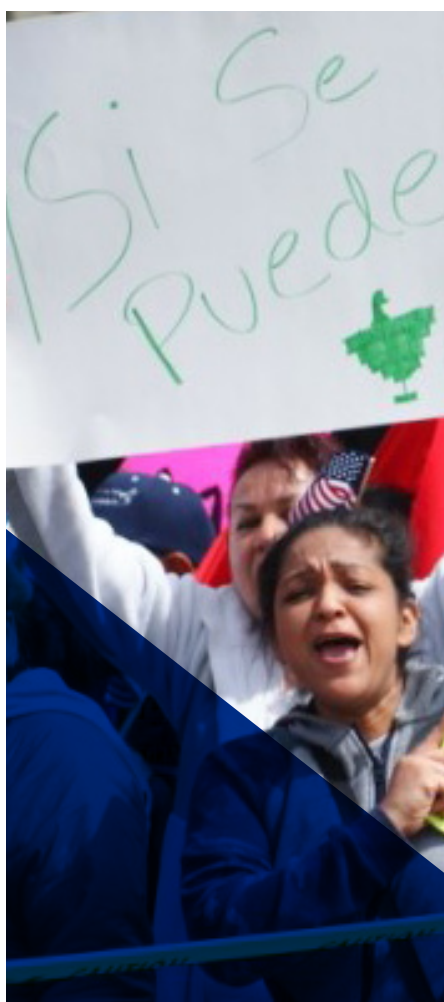
- (2) No action may be brought under this section if the director, on the same facts and theories, cites a person within the time frames set forth in subsection (1) of this section for a violation of the same section or sections of this chapter under which the employee is attempting to recover a civil penalty, or files a proceeding to assess penalties or enforce other remedies.
- (3) Any employee who prevails in any action under this section shall be entitled to an award of reasonable attorneys' fees and costs.
- (4) Civil penalties recovered by aggrieved employees under this section shall be distributed as follows: Seventy percent to the director for enforcement of this chapter, and for education of employers and employees about their rights and responsibilities under this chapter, to be continuously appropriated to supplement and not supplant the funding to the director for those purposes; and thirty percent to the aggrieved employees. Twenty percent of the director's share of penalties recovered under this section shall be allocated to community-based enforcement partnerships.
- (5) The right to bring an action under this section shall not be impaired by any private agreement.
- (6) No employer or his or her agent or any other person shall retaliate in any manner, or threaten to retaliate, against an employee because the employee has, or is believed to have, participated in or cooperated with an action under this section. Any person so retaliated against may bring an action for compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of wages or benefits, reinstatement, costs, reasonable attorneys' fees, and other appropriate relief. There shall be a rebuttable presumption that any adverse action taken against an employee within ninety days after the employee has filed an action under this chapter is retaliatory.

OPPOSITION TO FAIR WORKWEEK

Opposition to Fair Workweek laws typically arises from large corporations in covered industries. Large employers have primarily argued that just-in-time scheduling benefits workers and that compliance with Fair Workweek laws is too burdensome.

OPPOSITION ARGUMENTS: JUST-IN-TIME SCHEDULING BENEFITS WORKERS

Employer associations may offer data purporting to show that their employees are happy with current scheduling practices. In 2018, the Pennsylvania Restaurant and Lodging Association released a survey of 600 service employees, including many who would not be covered by the ordinance. The survey relied on biased methodology and misrepresentations of the policy. The industry arguments based on the survey, summarized below, failed to sway Philadelphia councilmembers. Independent academic data indicated⁴⁹ that Philadelphia workers largely lacked control over their schedules and wanted more predictable and stable hours.



Industry Claim

Workers like to be busy at work and have the option to go home when business is slow.

Reality

Data shows that 75% of workers would like a more stable and predictable schedule.⁵⁰ Last-minute schedule changes and cancellations, which include being sent home early without pay, make it difficult for workers to predict their income from week to week and increase the risk of hunger and homelessness.⁵¹

Industry Claim

Workers do not want the government to mandate that employers end voluntary clopening shifts.

Reality

Workers who work “clopening shifts” have lower sleep quality and report higher levels of psychological distress.⁵² Data also show that children of parents who work clopenings also experience higher levels of anxiety and behavioral problems.⁵³ Clopening shifts and other just-in-time scheduling practices also worsen racial inequality, as workers of color are more likely than white workers to have to work these exhausting shifts.⁵⁴ Researchers indicate that eliminating clopening shifts would reduce workers’ psychological distress, improve sleep quality and raise self-reported happiness levels.⁵⁵

⁴⁹ <https://shift.berkeley.edu/files/2018/01/Working-in-the-service-sector-in-Philadelphia.pdf>

⁵⁰ <https://shift.berkeley.edu/files/2019/10/Its-About-Time-How-Work-Schedule-Instability-Matters-for-Workers-Families-and-Racial-Inequality.pdf>

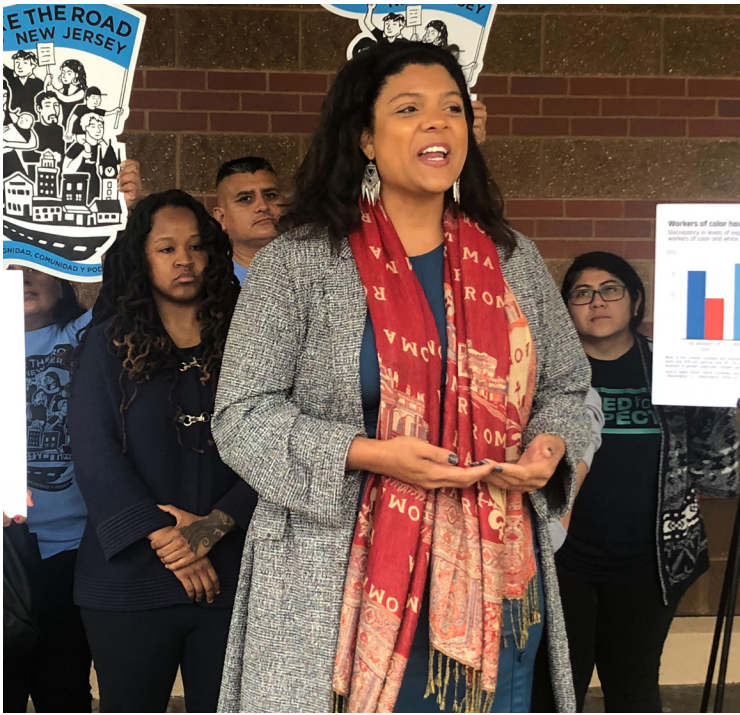
⁵¹ *Id.*

⁵² <https://shift.berkeley.edu/consequences-of-routine-work-schedule-instability-for-worker-health-and-wellbeing/>

⁵³ <https://shift.berkeley.edu/files/2019/10/Its-About-Time-How-Work-Schedule-Instability-Matters-for-Workers-Families-and-Racial-Inequality.pdf>

⁵⁴ *Id.*

⁵⁵ <https://shift.berkeley.edu/consequences-of-routine-work-schedule-instability-for-worker-health-and-wellbeing/>



Industry Claim

Employees are satisfied with how much they work and are not looking for additional work hours.

Reality

Unemployment is pervasive within the service economy, with one-third of workers reporting that they work fewer than 35 hours and would like to be scheduled for more hours at their jobs.⁵⁶ In Philadelphia, where the industry survey was administered, 62% of service sector workers expressed a desire for more hours.⁵⁷ **Among Philadelphia employees who worked fewer than 30 hours a week, 74% would work more hours if they had the opportunity.**⁵⁸

OPPOSITION STRATEGIES TO COMBAT FAIR WORKWEEK LEGISLATION

A. Use Dubious Research to Argue That Compliance is Burdensome

As part of their attacks on Fair Workweek reforms, corporations have also enlisted economists-for-hire to back up their claims that compliance is a drain on business resources. Lon Hatamiya, a researcher who is often hired by big retail companies, presented findings to the Seattle City Council claiming that San Francisco's Fair Workweek law was a failure. Councilmembers critiqued Hatamiya for presenting "assertions" without "a legitimate study to back it up."⁵⁹ Hatamiya admitted he "didn't know the exact number of interviewees or how they were surveyed. There were also no percentages or data on the responses they received." In contrast to Hatamiya's unfounded assertions, peer-reviewed academic research examining San Francisco's restaurant industry showed that improved working conditions in traditionally low-wage industries with challenging hours can lead to more stable work, improving the lives of workers and significantly reducing turnover.⁶⁰ Meanwhile, workforce management technology companies have argued that Fair Workweek can be a win-win for employers and workers and that employers can readily rely on technological platforms to ensure compliance with Fair Workweek laws.⁶¹

B. Water the Policy Down Behind Closed Doors

As it becomes increasingly clear that Fair Workweek policies are urgently needed and effective, corporations have backed away from public opposition to these laws. Today, employers' favored tactic is backroom dealings to weaken legislation and make it harder to enforce. Because proposed compromises may appear reasonable on their face but have serious consequences for workers in practice, knowledge of the dynamics of just-in-time scheduling will be critical to combat efforts to water down reforms.

⁵⁶ <https://shift.berkeley.edu/its-about-time-how-work-schedule-instability-matters-for-workers-families-and-racial-inequality/>
⁵⁷ <https://shift.berkeley.edu/files/2018/01/Working-in-the-service-sector-in-Philadelphia.pdf>

⁵⁸ *Id.*

⁵⁹ <https://www.seattletimes.com/articles/2016/6/29/herbold-sawant-question-industry-report-on-workplace-scheduling>

⁶⁰ https://www.washingtonpost.com/news/wonk/wp/2016/01/12/how-worker-friendly-laws-changed-life-as-a-server-in-san-francisco-restaurants/?utm_term=.0e68e015adcd

⁶¹ <https://www.forbes.com/sites/ashikahmed/2018/06/26/fair-workweek-fair-or-unfair/#46c7cdb0681f>

Industry Demand

Expand Exceptions to Predictability Pay Requirements

Reality

Research shows that the majority of schedule changes stem from improper planning and lack of communication from corporate headquarters. However, employers often attempt to establish broad exceptions in order to deny predictability pay to workers on account of their own poor planning.⁶²

Corporations routinely seek to amend Fair Workweek bills to include long lists of circumstances in which they can change employees' schedules without compensating them for their flexibility. One sought-after exception relates to "mass communications," where employers are permitted to offer additional hours of work, without predictability pay, to cover absences when the offer (1) is communicated in writing to multiple workers and (2) emphasizes that acceptance is voluntary.

These exceptions are not needed. In New York City, which declined to enact this exception and requires compensation when workers change their plans to work in place of an absent coworker, no adverse effects have been reported.

Industry Demand

Shorten the Time Frames When Predictability Pay Is Required

Reality

Last-minute changes are commonplace within the service industry and can have serious economic consequences for workers. Data show that 71% of hourly food service and retail workers have experienced at least one shift change in the past month.⁶³ However, when workers pay for childcare or turn down another job to accept a shift that is later canceled or changed, they are not compensated for their time. To address this issue, the majority of enacted Fair Workweek laws require predictability pay for any changes to the schedule after it is posted, 14 days in advance.

However, employers have pursued policies that would require them to compensate workers only for schedule changes made with less than seven days' notice. Where adopted, this proposal effectively converts the notice-posting requirement to a seven-day policy, as companies can alter the schedule without cost until the predictability pay requirement takes effect.

Industry Demand

Remove Compensation for "Clopening" Shifts

Reality

Corporations have argued that the right to decline these shifts offers sufficient protection to workers and that additional pay for these shifts is not needed. However, the right to decline is necessary but not sufficient in a predominately non-union industry where workers experience pressure to accommodate employer requests. Enforcement agencies report that the compensation requirement has successfully spurred employers to program their scheduling systems to avoid clopenings. Most policies require that workers are compensated at 1.5 times their regular rate for the hours worked with less than 11 hours' rest. A flat rate of \$100, as in New York City's law, is another effective approach.

⁶² <https://worklifelaw.org/publications/Stable-Scheduling-Study-Report.pdf>

⁶³ *Id.*



ADVOCATE SPOTLIGHT: ADIL AHMED, DIRECTOR OF WORKER ORGANIZING AND POLICY FOR MAKE THE ROAD NEW JERSEY

At Make the Road New Jersey, our members working low-wage hourly jobs in the warehouse, retail, hospitality and fast-food industries face unpredictable work hours and fluctuating income. Members have also testified that they have been threatened with termination when their availability doesn't match their employers' demands. These workers were part of the fight to enact an increased minimum wage and paid sick days in New Jersey, but they need predictable and stable workweeks to be able to live on one job and reap the benefits of these laws.

Our proposed Fair Workweek legislation, which will be introduced by Senator Loretta Weinberg, Assemblywoman Britnee Timberlake and Assemblyman Tom Giblin later this year, builds upon the lessons we have learned from other communities and integrates an innovative whistleblower enforcement model to ensure that corporations that use forced arbitration can also be held accountable for Fair Workweek violations.

New Jersey's Fair Workweek campaign is backed by a growing coalition of community members and labor partners, including the Anti-Poverty Network of New Jersey, CIR-SEIU, Make the Road New Jersey, New Jersey Citizen Action, New Jersey Working Families Alliance, New Labor, RWDSU Local 108, RWDSU Local 338, SEIU 32BJ, United for Respect, UNITE HERE Local 54, UNITE HERE Local 100 and Workers United. Our campaign has received significant press coverage, including strong support from local editorial boards,⁶⁴ demonstrating the growing consensus that Fair Workweek protections are an essential component of building an equitable economy where workers can thrive regardless of race or immigration status.

⁶⁴ <https://www.nj.com/opinion/2019/10/schedule-volatility-is-customary-in-food-and-retail-jobs-lets-end-it-editorial.html?fbclid=IwAR2Um7IYeAwluk6ocEq8ZfZqdbQORghBIVJOEgMFf528sf1CDk3T3yPV70>

ADDITIONAL RESOURCES

- Center for Popular Democracy, Schedules That Work Act + Part-Time Workers' Bill of Rights = A Fair Workweek for Hourly Workers
<https://populardemocracy.org/sites/default/files/Worker%20Stories%20Final-web.pdf>
- Cesar Perez and Alix Gould-Wirth, How U.S. Workers' Just-in-Time Schedules Perpetuate Racial and Ethnic Inequality
<https://equitablegrowth.org/how-u-s-workers-just-in-time-schedules-perpetuate-racial-and-ethnic-inequality/>
- Daniel Schneider and Kristen Harknett, It's About Time: How Work Schedule Instability Matters for Workers, Families, and Racial Inequality
<https://shift.berkeley.edu/its-about-time-how-work-schedule-instability-matters-for-workers-families-and-racial-inequality/>
- Economic Policy Institute, 'Fair workweek' laws help more than 1.8 million workers
<https://www.epi.org/publication/fair-workweek-laws-help-more-than-1-8-million-workers/>
- Human Impact Partners and Center for Popular Democracy, Scheduling Away Our Health: How Unpredictable Work Hours Affect Health and Well-Being
https://populardemocracy.org/sites/default/files/Scheduling-Away-Our-Health_rev3.pdf
- National Women's Law Center, State and Local Laws Advancing Fair Work Schedules
<https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/10/Fair-Schedules-Factsheet-v2.pdf>

CONTACT

For questions or policy support, contact the Center for Popular Democracy at info@fairworkweek.org and SiX’s legislative and research teams at helpdesk@stateinnovation.org.



STATE INNOVATION EXCHANGE

About SiX

The State Innovation Exchange (SiX) is a national resource and strategy center that collaborates with state legislators to improve people’s lives through transformative public policy. SiX provides legislators with on-the-ground support; creates tailored policy research, trainings, and communications guidance; and fosters collaboration between legislators—across chambers, across regions, and across state lines—and with grassroots movements.



About CPD

The Center for Popular Democracy (CPD) works to create equity, opportunity, and a dynamic democracy in partnership with high-impact base-building organizations, organizing alliances, and progressive unions. CPD strengthens our collective capacity to envision and win an innovative pro-worker, pro-immigrant, racial and economic justice agenda.