

## Communication from Public

**Name:** National Women's Law Center

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**Council File No:** 19-0229

**Comments for Public Posting:** On behalf of the National Women’s Law Center (NWLC), we write to express our support for the Los Angeles Fair Work Week Ordinance and the strong recommendations outlined by the Bureau of Contract Administration (BCA)—and to suggest modifications that can further strengthen the proposed policy. Please view the attached document for our detailed comments. Thank you for your consideration.



Los Angeles Council President Herb Wesson  
200 North Spring Street, Room 430  
Los Angeles, CA 90012

October 28, 2019

RE: Fair Workweek Policy; Council File 19-0229

Dear Council President Wesson and Members of the Los Angeles City Council:

On behalf of the National Women's Law Center (NWLC), we write to express our support for the Fair Work Week Ordinance and the strong recommendations outlined by the Bureau of Contract Administration (BCA)—and to suggest modifications that can further strengthen the proposed policy. Based in Washington, D.C., NWLC has worked for more than 45 years to remove barriers based on gender, to open opportunities for women and girls, and to help women and their families lead economically secure, healthy, and fulfilled lives. NWLC is part of a national policy group helping to lead the movement to secure fair scheduling practices for working people, because unstable and unpredictable work schedules disproportionately impact women, especially women of color, and are particularly detrimental to women with caregiving responsibilities.

Over 70,000 retail workers in Los Angeles deserve access to good quality jobs and scheduling stability that affords them a high quality of life and positive work-life balance. We wish to thank the Los Angeles City Council sponsors of the policy, BCA, and the City Attorney's office for their diligence in developing a Fair Work Week policy and enforcement strategies to achieve these goals.

Today, employers in L.A.'s retail sector—the second-largest industry in L.A. County<sup>1</sup>—often use “just-in-time” scheduling practices. These practices, enabled by modern workforce management systems, frequently use algorithms to base workers' schedules on perceived consumer demand and maximize flexibility for the employer at the expense of the employee.<sup>2</sup> As a result, retail employees often have little notice of their work schedules, experience last-minute shift cancellations that deprive them of vital income, and are assigned to “on-call” shifts that leave them in limbo, not knowing whether they will be required to report to work. Many employers also spread hours among large numbers of part-time staff rather than offering stable full-time positions with benefits and opportunities for advancement; some require employees to have completely open availability even to qualify for full-time hours.

Research from the UCLA Labor Center shows, among other findings, that 8 in 10 retail workers in Los Angeles do not have a set weekly schedule, while 77 percent of workers receive their schedules no more than one week in advance.<sup>3</sup> More than half work part-time, and close to 6 in 10 of these part-time retail workers want to work more hours.<sup>4</sup> Women and people of color make up most of the retail workforce in

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<sup>1</sup> UCLA LABOR CTR. & LAANE, HOUR CRISIS: UNSTABLE SCHEDULES IN THE LOS ANGELES RETAIL SECTOR 21 (Mar. 2018), <https://www.labor.ucla.edu/publication/hourcrisisreport/>.

<sup>2</sup> See generally, e.g., NANCY C. CAUTHEN, DEMOS, SCHEDULING HOURLY WORKERS: HOW LAST MINUTE, JUST-IN-TIME SCHEDULING PRACTICES ARE BAD FOR WORKERS, FAMILIES AND BUSINESS (Mar. 2011), [http://www.demos.org/sites/default/files/publicationsScheduling\\_Hourly\\_Workers\\_Demos.pdf](http://www.demos.org/sites/default/files/publicationsScheduling_Hourly_Workers_Demos.pdf); NAT'L WOMEN'S LAW CTR. (NWLC), COLLATERAL DAMAGE: SCHEDULING CHALLENGES FOR WORKERS IN LOW-WAGE JOBS AND THEIR CONSEQUENCES (Apr. 2017), <https://nwlc-ciw49tixqw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Collateral-Damage.pdf>; Daniel Schneider & Kristen Harknett, *Consequences of Routine Work-Schedule Instability for Worker Health and Well-Being*, 84 Am. Soc. Rev. 82 (Feb. 2019).

<sup>3</sup> UCLA LABOR CTR. & LAANE, *supra* note 1, at 5.

<sup>4</sup> *Id.* at 6.

Los Angeles<sup>5</sup>—and new national research confirms that people of color, especially women of color, are more likely to experience cancelled shifts, on-call shifts, clopenings, and involuntary part-time work than their white counterparts, even within the same company.<sup>6</sup>

National studies also make clear that unpredictable and inadequate work hours have detrimental impacts on working people, their families, and their communities. Volatile work schedules, and the volatile incomes that result, undercut workers' efforts to budget for expenses and increase economic hardship, including hunger and housing insecurity.<sup>7</sup> Unpredictable schedules can also prevent workers from holding down a second job, or from taking classes that could help them advance in their careers. The stress that such work schedules produce can harm both workers and their families, undermining wellbeing for children and adults alike by disrupting routines and straining relationships.<sup>8</sup> And these same workplace conditions can make maintaining stable, high-quality child care nearly impossible.<sup>9</sup>

Scheduling practices that fail to take working people's needs into account result in higher rates of turnover and absenteeism, and lower employee engagement.<sup>10</sup> In contrast, schedules that work for individuals and their families lead to more productive and committed employees and lower workforce turnover.<sup>11</sup> Improving scheduling practices can therefore reduce long-term labor costs and increase profitability: for example, when Gap Inc. piloted strategies to make work schedules more stable and predictable for employees, the stores that implemented them saw higher productivity as well as a 7 percent increase in sales.<sup>12</sup>

We support the recommendations of the Bureau of Contract Administration, and ask that City Council pass a policy to ensure that retail workers in the city:

- Will receive a good faith estimate of their work schedule upon hiring or upon request;
- Will receive at least two weeks' notice of their schedules;
- Are not forced to work "clopening" shifts (i.e. shifts with a break of less than 10 hours between closing and opening) or to remain "on-call" for shifts;
- Will not be retaliated against for requesting a change in their shift or declining unscheduled hours;

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<sup>5</sup> *Id.* at 16.

<sup>6</sup> See DANIEL SCHNEIDER & KRISTEN HARKNETT, SHIFT PROJECT, IT'S ABOUT TIME: HOW WORK SCHEDULE INSTABILITY MATTERS FOR WORKERS, FAMILIES, AND RACIAL INEQUALITY 1 (Oct. 2019), <https://shift.berkeley.edu/files/2019/10/Its-About-Time-How-Work-Schedule-Instability-Matters-for-Workers-Families-and-Racial-Inequality.pdf> [hereinafter SCHNEIDER & HARKNETT, IT'S ABOUT TIME]. See also Adam Storer, Daniel Schneider & Kristen Harknett, *What Explains Race/Ethnic Inequality in Job Quality in the Service Sector?* (Oct. 2019), <https://equitablegrowth.org/working-papers/what-explains-race-ethnic-inequality-in-job-quality-in-the-service-sector/>.

<sup>7</sup> See ASPEN INST., RESPONSES TO AND REPERCUSSIONS FROM INCOME VOLATILITY IN LOW-AND MODERATE-INCOME HOUSEHOLDS: RESULTS FROM A NATIONAL SURVEY (Dec. 2017), <http://www.aspenepic.org/responses-repercussions-income-volatility-low-moderate-income-households-results-national-survey/>; Daniel Schneider & Kristen Harknett, *Hard Times: Routine Schedule Unpredictability and Material Hardship among Service Sector Workers* (Oct. 2019), <https://equitablegrowth.org/working-papers/hard-times-routine-schedule-unpredictability-and-material-hardship-among-service-sector-workers/> (finding six in ten hourly retail and food service workers experience at least one material hardship—such as hunger, trouble paying bills or securing housing, or foregoing needed medical treatment—over the prior year).

<sup>8</sup> See generally SCHNEIDER & HARKNETT, IT'S ABOUT TIME, *supra* note 6, at 6-8.

<sup>9</sup> See JULIE VOGTMAN & KAREN SCHULMAN, NWLC, SET UP TO FAIL: WHEN LOW-WAGE WORK JEOPARDIZES PARENTS' AND CHILDREN'S SUCCESS 4 (Jan. 2016), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/01/FINAL-Set-Up-To-Fail-When-Low-Wage-Work-Jeopardizes-Parents%E2%80%99-and-Children%E2%80%99s-Success.pdf>.

<sup>10</sup> A BETTER BALANCE, FACT SHEET: THE BUSINESS CASE FOR WORKPLACE FLEXIBILITY 2-4 (Nov. 2010), [http://www.abetterbalance.org/web/images/stories/Documents/fairness/factsheets/bc-2010-A\\_Better\\_Balance.pdf](http://www.abetterbalance.org/web/images/stories/Documents/fairness/factsheets/bc-2010-A_Better_Balance.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> JOAN C. WILLIAMS ET AL., CTR. FOR WORKLIFE LAW, STABLE SCHEDULING INCREASES PRODUCTIVITY AND SALES: THE STABLE SCHEDULING STUDY (Mar. 2018), <https://worklifelaw.org/publications/Stable-Scheduling-Study-Report.pdf>.

- Will receive additional compensation for last minute changes to their schedules; and
- Will be offered additional hours at their place of employment before employers hire additional part-time workers or use subcontracted labor.

We also believe that the ordinance should include robust record-keeping and enforcement provisions.

In finalizing the Fair Work Week policy, the City Council can and should look to the experience of the growing number of jurisdictions that have implemented similar policies in recent years.<sup>13</sup> Specifically, drawing on lessons learned from these jurisdictions, we recommend that the Los Angeles policy 1) expand the information included in the good faith estimate; 2) ensure that workers are compensated for violations of advance notice protections; 3) incorporate a flexible, outcome-focused access to hours requirement; and 4) limit exceptions to predictability pay.

### **1. Bolster predictability through good faith estimates**

Too often, workers accept a new retail job because they are assured that they'll receive the number of hours they need to make ends meet; yet after an initial training period their hours drop precipitously. The good faith estimate (GFE) policy was designed to mitigate this challenge by providing workers with reliable information at the time of hire.

NWLC strongly supports the BCA's inclusion of a GFE in its implementation recommendations. However, in order to ensure that the GFE provides meaningful predictability to workers, NWLC urges the City Council to:

- *Ensure that GFEs have sufficient specificity to give workers meaningful information.* In addition to specifying the “median number of hours an Employee can expect to work” and whether they can expect to work on-call, as BCA recommends, fair workweek laws in San Francisco, Chicago, Philadelphia, and New York City also require information about the days and times workers can expect to work or to have off. Philadelphia and New York City also require information about the location of the worksite. We recommend these elements be included in Los Angeles' GFE policy.
- *Establish clear presumptions for variances from the GFE that suggest it was not provided in good faith.* Although the BCA states that estimates that are not made in good faith may violate the law, cities like Philadelphia have adopted specific standards that have made it easier for enforcement authorities to determine whether an employer has acted in bad faith.
- *Ensure that workers receive revised GFEs when there is a significant change to employees' work schedules due to changes in employee availability or the employers' bona fide business needs.* At present, the BCA's recommendations, if implemented, would not require employers to provide employees with revised GFEs after an employee is hired, which reduces predictability for an employee once she is on the job.
- *Require that workers receive compensation when their employer has violated their right to a GFE.* Merely requiring employers to update an inaccurate GFE does not address the harm incurred by workers who accepted a job based on misinformation. A penalty for an inaccurate GFE would also promote compliance.

### **2. Provide workers with compensation for violations of advance notice rights**

BCA recommends a requirement that employers post a schedule in the workplace that contains the shifts to be worked by all workers at the worksite, with specific times and locations. This schedule must be posted 14 days before the first shift on the schedule, allowing employees to plan child care options, doctor's visits, and other obligations. Reports from cities with fair workweek laws indicate that this posting

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<sup>13</sup> See NWLC, STATE AND LOCAL LAWS ADVANCING FAIR WORK SCHEDULES (Oct. 2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/10/Fair-Schedules-Factsheet.pdf>.

requirement is easily implemented by employers and has been well broadcast to and easily understood by workers.

Employees should be compensated for each day the schedule is not posted with the required notice to ensure that employers do not avoid the obligation to compensate employees for last-minute changes (predictability pay) by simply violating the posting requirement. Direct compensation to employees, in addition to penalties recovered by the agency, have proven critical to compliance in cities that have adopted fair workweek laws.

### **3. Adopt flexible, outcome-focused Access to Hours requirements**

All municipal fair workweek policies include an “Access to Hours” provision requiring employers to give existing workers the opportunity to work additional hours before hiring new staff (subject to overtime limitations). The city of San José also adopted this policy via ballot initiative in 2016. These policies all require the employer to post an opportunity for additional hours for a prescribed amount of time before hiring. If no existing employee desires or is available for the offered hours, or is qualified to perform the work, the employer can hire externally. The employer has discretion to distribute hours among interested workers (e.g., by seniority, first-come-first-served, by rotation) provided the distribution system is neither discriminatory nor designed to avoid the coverage mandates of the Affordable Care Act.

In essence, Access to Hours policies create a pre-hiring requirement: before making new hires, employers must first evaluate whether existing employees want to increase their work hours. Following intensive conversation with enforcement agencies in several cities with fair workweek laws around successes and challenges in enforcing Access to Hours, we disagree with BCA’s recommendation to replicate the procedural requirement that “Employers must post a notice of additional shifts/hours for at least three days and provide Employees with at least two days to consider the offer of additional shifts/hours.” Instead, we recommend that the City Council:

- Adopt a flexible, outcome-focused requirement that employers make “every effort” to schedule existing employees for their desired number of hours.<sup>14</sup> Employees’ desired hours must be recorded at the time of hire and may be updated. Employers can choose to use the existing posting process or a more individualized approach to match workers with newly available hours.
- Specify that workers denied hours due to violations of this ordinance are owed compensation. Many enforcement agencies pursue backpay by dividing the total number of hours worked by unlawful new hires among the part-time employees who were already employed at the time of hire. But the consensus from other cities is that employers invest more in compliance, and workers are more likely to participate in enforcement activity, when direct compensation to injured employees (in addition to penalties) is explicit in the ordinance.

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<sup>14</sup> Sample ordinance language for this approach:

- (1) Upon hiring an employee, a Covered Employer shall obtain a written statement of the employee’s desired number of weekly work hours and the days and times the employee is available to work. The employer shall notify the employee that this written statement will be relied on in distributing additional hours and may be modified in writing at any time during employment.
- (2) Before hiring new employees from an external applicant pool or contractors, including hiring through the use of a temporary labor service agency, an employer shall make every effort to schedule existing employees for their desired number of weekly work hours, provided that:
  - a. The employer may hire a new employee if existing employees lack, and cannot obtain with reasonable training, the qualifications necessary to perform the work.
  - b. This section shall not be construed to require any employer to schedule employees to work hours required to be paid at an overtime rate under state or federal law.
- (3) When an employer fails to offer existing employees opportunities to work their desired number of weekly work hours before hiring a new employee, existing employees must be compensated at the employee’s regular hourly rate for hours worked by a newly hired employee that occurred within the existing employee’s written availability.

If the Council prefers to emulate the procedurally prescriptive Access to Hours model of other cities instead of a streamlined “every effort” approach, the policy should address loopholes that have undermined compliance in other cities. These loopholes include:

- When employers are empowered to define the length of the shift and restrict workers to picking up the full shift, some employers have defined the start and end times of the shift in such a way that will make it impossible for most employees to bid on the shift and pick up the additional hours.<sup>15</sup>
- 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. To curb this practice, employers should be required to offer hours to employees at the “home store” and only to workers at other stores if no “home store” employee is interested or qualified.
- Instead of offering additional hours to experienced employees, other employers have filled shifts by requiring newly hired employees to work hours other than those advertised at the time of hiring. The policy must prevent this by specifying that the hours worked by new hires must match the hours advertised in the notice.

#### **4. Limit exceptions to predictability pay**

We strongly recommend requiring predictability pay for nearly all employer-initiated schedule changes. Several cities have accommodated employer concerns about predictability pay by enumerating many circumstances in which predictability pay does not apply. This complexity has made it harder for workers to understand when they are entitled to compensation – a serious problem in an enforcement system that relies heavily on worker complaints.

A longer list of exceptions will also burden BCA by requiring investigators to examine complex fact patterns. Taking the “mass communication” exception as one example, BCA staff would have to determine: (1) whether the reason for the added hours was the unplanned absence of a scheduled employee, (2) whether the communication was made to a large enough group of workers, and (3) whether it made clear that employees could decline. Finally, these exceptions do not benefit employers: the savings associated with avoiding predictability pay are likely outweighed by the cost of tracking and recording when complicated exceptions apply, and increased compliance risk because managers are not properly trained to apply the exceptions.

The policy should adhere as closely as possible to a bright-line rule: employee-initiated changes (requests to leave work early, shift swaps, vacation time) do not trigger predictability pay, but workers are compensated when the employer initiates a schedule change, regardless of the circumstance.<sup>16</sup> Under that principle, NWLC recommends that the City Council decline to enact exceptions for unplanned absences/unanticipated needs and for employees facing discipline, as well as for emergency operational closures unless the circumstances prompting such closures are clearly and narrowly defined.

##### **A. Unplanned absences and unanticipated needs**

The BCA would allow employers to offer additional hours of work, without predictability pay, to cover absences when the offer (1) is communicated via written “mass communication” and (2) emphasizes that

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<sup>15</sup> New York City’s rule avoids this problem by requiring the employer to award shift increments, as long as the employer is not left to fill a shift of less than 3 hours, and requiring employers to award a shift to an employee already scheduled for an overlapping shift, then advertising any newly available hours. Similarly, San Francisco requires the distribution of shift increments provided the employer is not left to fill a shift of less than 4 hours.

<sup>16</sup> “Active attestation timeclocks” are available from some workforce management vendors. This product captures in real time any discrepancy between scheduled hours and the time a worker clocks in or out. In the event of a discrepancy that exceeds the “grace period” (typically 15 minutes), the system prompts the employee to note whether the change was manager or self-initiated, and automatically triggers compensation unless the employee confirms that he or she initiated the change.

acceptance is voluntary. The BCA would also permit in-person communications about schedule changes when two or more working employees are present. The requirement to offer the hours to multiple employees at once is designed to minimize the coercive experience of being asked for a favor by the manager that controls a worker's hours and livelihood.

In practice, this complicated exception has proven to undermine compliance. Perhaps due to insufficient training of managers, some employers use mass communications to offer shifts without predictability pay for any reason, beyond unplanned employee absences. Evaluating each circumstance necessary to invoke the exception also consumes undue enforcement capacity and disempowers workers from participating in enforcement, as workers may not be in a position to confirm that a last-minute changed shift was due to a coworker's absence rather than a manager's poor planning. By contrast, 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. The exception that allows employers to extend shifts without predictability pay to meet "unanticipated customer demand" is equally challenging from an enforcement perspective and should be avoided.

#### B. Employees facing discipline

The BCA would also permit an employer to deny predictability pay to an employee where the "employee hours [are] reduced due to the Employee's violation of any existing laws and/or company procedures."

Jurisdictions such as New York City and Emeryville, CA, have elected not to include a disciplinary exception at all—the approach that we recommend. Due to the pressures corporations place on managers to stay within their labor budget, there is a substantial risk of managers fabricating discipline in order to reduce hours without compensation. To prevent exploiting this loophole, the enforcement agency would have to evaluate the disciplinary record, needlessly consuming scarce enforcement resources.

#### C. Emergency operational closures

The BCA recommends an exception for predictability pay for the "[e]mployer's inability to begin or continue operations due to threats to employees or property, the recommendation of a public official, public utilities failure, natural disaster, a weather event, or an event that would cause the Employer to violate a law."

However, we question whether workers should bear the full cost of such closures (in the absence of this exception, workers would receive half-time pay, so they would still lose wages). When a disaster causes a retailer to shut down, the retailer may have insurance to defray costs, but workers typically have little savings to cushion the blow. As climate change increases the likelihood of natural disasters that may cause such closures, the implications of this policy choice may become more serious. If this exception is included, it should be reserved for situations that are both rare and easily verifiable: natural disasters and government-declared states of emergency.

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Enacting a Fair Work Week Ordinance in Los Angeles has the potential to benefit tens of thousands of working people and their families. In the first study of the impact of a fair scheduling ordinance, Duke University researchers who monitored working parents in Emeryville, California found that those covered by the local Fair Workweek policy reported a 35 percent decline in schedule instability after the policy took effect, along with reductions in last-minute schedule changes; overall, working parents covered by the Fair Workweek policy reported significant improvements in family well-being after the ordinance was adopted.<sup>17</sup>

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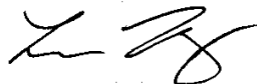
<sup>17</sup> Letter from Anna Gassman-Pines & Elizabeth O. Ananat, Sanford School of Public Policy, Duke University, to Councilmembers Price, Buscaino, & Rodriguez, Econ. Dev. Committee, Los Angeles City Council, [http://clkrep.lacity.org/onlinedocs/2019/19-0229\\_pc\\_6-25-19.pdf](http://clkrep.lacity.org/onlinedocs/2019/19-0229_pc_6-25-19.pdf).

We applaud the City Council for taking steps to protect retail workers from unstable hours, and we appreciate BCA's thoughtful recommendations. We are happy to provide any technical assistance the Council may require in developing this ordinance. Thank you for your consideration.

Sincerely,



Julie Vogtman  
Director of Job Quality & Senior Counsel



Laura Narefsky  
Fellow, Workplace Justice