October 28, 2019

Los Angeles City Council
200 North Spring Street
Los Angeles, CA 90012

Dear Councilmembers,

The Valley Industry and Commerce Association (VICA) and the Los Angeles Area Chamber of Commerce (Chamber) are writing in response to the Bureau of Contract Administration (BCA) "Fair Work Week" ordinance implementation recommendations report. We do not oppose an ordinance requiring large retail employers to provide two weeks' scheduling notice.

Our members met with BCA staff and Council staff to reiterate that we want to be collaborative on this issue, and work with the City to implement an ordinance that works for employees and employers. In that spirit, we share the following observations, requests for clarification, and recommendations.

***Priority Amendments***

The proposed ordinance has many components, and feedback from our retail members has highlighted that it will be complicated to comply with. Some of the definitions in the recommendation are extremely vague and open to interpretation, meaning that employers with the best of intentions could inadvertently fail to comply with certain aspects. VICA and the Chamber are extremely concerned that a private right of action would open the door to lawsuits even if the employee has suffered no actual harm. We strongly encourage adequate resources for the BCA to educate, support, and enforce this ordinance. Robust enforcement would remove any need for a private right of action, and ensure that the intent of the ordinance - providing employees with a predictable schedule – is achieved.

As VICA and the Chamber have noted throughout the process, record keeping requirements are one of our greatest concerns. Employees often communicate with their employers in a variety of ways – text message, handwritten note, email, etc. Requiring every written correspondence to be kept on file is complicated and difficult, and this is compounded by the extremely onerous staff recommendation of four-year retention of records. We strongly recommend that staff revisit what written records need to be retained, and also suggest reducing the time period to a much more reasonable one year.

In addition, this implementation recommendation would require employers to keep records from employees they may not provide (e.g., written responses, requests for changes, etc.) – many employees verbally request schedule changes, accept or reject shifts, and yet employers would be held responsible for keeping written records even if the employee may not have provided in writing.

As currently drafted, all employees including managers, administrative staff and support staff are included in the definition of employee that would be covered under this new regulation. We would recommend amending this definition to only include employees that work at least ten hours a week in Los Angeles at a retail establishment, excluding those employees that primarily travel to customer sites.

We would also ask for a self-scheduling exemption for employees who self-select work shifts without employer pre-approval pursuant to a mutually acceptable agreement. Employers must demonstrate that workers who are not employees are bona fide independent contractors. The provisions of this Ordinance will apply to hours scheduled and performed within the City.

***Technical and Other Requested Amendments***

**Implementation Recommendation (IR) 4: Definition of Covered Employer**
The inclusion of temp agencies is problematic, since the purpose of temp agencies would be to provide short-term, last minute staffing coverage. As drafted, this would mean that the temp agency would effectively need to act like a retail establishment covered under the ordinance.

**IR 6: Good Faith Estimate of Number of Hours**
We are concerned that the definition of "good faith estimate of median hours" is problematically vague. Who decides whether the estimate provided is "in good faith"? Separately, is the "good faith estimate" an affirmative defense or an element of the claim?

Ordinances in other cities have required employers to provide a good faith estimate for average hours for a specific time period: for example, the first three months of employment. It is unrealistic for employers to provide an estimate of hours for a longer or indefinite period of time, as operational needs and employees' scheduling requests could fluctuate over a longer period of time.

**IR 7: Requesting Scheduling Preference**
We recommend clarifying what "the time of hire" means - the offer stage, when the offer is accepted, or the first date of work. We would also like to ensure that an offer of employment can be made conditional on a specific schedule. Finally, we are concerned that this section could contradict pending FEHA regulations regarding religious creed (prohibiting inquiries regarding an applicant's availability to work on certain days and times in order to ascertain an applicant's religious creed, disability, or medical condition).

**IR 8: Fourteen Calendar Days' Notice**

We recommend clarifying the requirement to provide access to the electronic schedule at the worksite if there is no physical worksite. We also recommend clarifying that posting requirements do *not* require posting the employee's full name, since that would raise privacy concerns in a large retail establishment.

**IR 9: Requesting Work Schedule Preferences**

We are unclear why the employer would need to provide a decision in writing for any work schedule changes, since the schedule would be posted 14 days in advance. This unnecessary requirement seems administratively burdensome. We also request clarifying the definition of "reasonable" when requesting verifying information.

**IR 10: Right to Decline Work**

If an employer is required to pay predictability pay for any additional shifts, then the prohibition on disciplining an employee for refusing to change, reduce, or increase their hours makes no sense and contradicts the notion of at-will employment. The idea of predictability pay is to compensate employees for being required to work shifts they were not expecting and compensate them for the inconvenience: if an employee has the right to refuse any change, reduction or increase in their hours, then by definition that means they're willing to accept changes, and the whole point of predictability pay is removed. We would recommend removing the right to decline additional hours of work, since employees will receive compensation for the inconvenience with the required predictability pay.

We would also recommend removing the requirement to record consent in writing, as that is administratively burdensome.

**IR 11: Ten-Hour Rest**

Under this proposal, the employee has the right to swap shifts with another employee. We recommend ensuring that the employer does not have to pay the premium if the employees choose to swap their shifts and run afoul of this provision. The ordinance also needs to be clear whether the premium applies to the first or second shift. Finally, the rate of pay should be the hourly rate, not the "regular rate of pay."

**IR 12: On Call Shifts**

We would appreciate clarification on whether the required predictability pay would be half the hourly rate, or half the scheduled shift. We would also question if this applies if the employee is paid on-call at a different rate of pay. Finally, the rate of pay should be the hourly rate, not the "regular rate of pay."

**IR 13: Notice of Additional Hours**

We seek clarification on whether the two days to respond are in addition to the three days notification, i.e., a total of five days. We also urge an exemption for cases of emergency, when waiting five days to hire additional workers would be problematic.

**IR 15: Predictability Pay**

In California, employees are entitled to reporting time pay: "each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours." We recommend that the implementation recommendation is clarified so that predictability pay for reduced or canceled shifts only applies in cases when reporting time pay requirements do not apply.

In addition, requiring that only written requests are subject to the exception is problematic. Employees often only verbally alert employers when they need to leave early or arrive late. The exemption should apply to any employee-initiated change to their schedule. While employers can encourage written documentation, it is completely impractical to presume that employees will provide written requests/explanations and requiring this is administratively burdensome.

In the list of exemptions, we would also recommend expanding the exemption for schedule changes to additions or subtractions up to 30 minutes, a much more realistic amount of time. We recommend amending the seventh bullet point to read "existing laws and or company procedures **or policies.**" In addition, "regular rate of pay" should be replaced with "hourly rate of pay."

**IR 20: Penalties**

We suggest that for the sake of clarity, and not penalizing employers for simple mistakes multiple times, that any penalties apply per scheduling period, rather than per day.

Sincerely,



Stuart Waldman
VICA President

Maria Salinas
Los Angeles Area Chamber of Commerce President & CEO