

---

---

## **OLR Bill Analysis**

### **sHB 5353**

#### ***AN ACT CONCERNING A FAIR WORK WEEK SCHEDULE.***

#### **SUMMARY**

This bill generally requires employers with at least 500 employees within the U.S. or globally to pay certain types of employees (i.e., those employed in retail, food service, and hospitality establishments) half of their regular pay rate for any scheduled hours that the employer cancels or reduces (1) after the employee reports to work for the scheduled hours or (2) less than seven days in advance. The bill specifically applies to (1) restaurants where food is prepared, served, and consumed on the premises if the employer has at least 30 restaurant locations in the U.S. or globally and (2) a franchisee if the network of franchises in the U.S. or globally employs at least 500 employees total. The bill applies to employees who are paid hourly and not exempt from minimum wage or overtime rules.

The bill provides exceptions to this requirement under certain circumstances, such as an employee's written request for leave pursuant to the employer's leave policy; mutually agreed upon shift swapping by employees; power outages; or a declared state of emergency.

It also allows an employee to decline to work any hours not included in the posted work schedule. An employee may voluntarily consent to working these hours, but the consent must be recorded in writing.

The bill requires that an employer and new employee take certain steps to establish a work schedule, including the employer (1) obtaining the employee's requested schedule and (2) providing an initial schedule estimate.

Additionally, it authorizes (1) relief to employees or former employees for violations of the bill and (2) \$200 civil penalties to be paid

to the labor commissioner for each employee affected by a violation. The bill authorizes any person aggrieved by a violation of the bill to bring a civil action in Superior Court seeking relief for violations including, among other things, compensatory damages and other relief to make the employee or former employee whole. It also authorizes the labor commissioner, the attorney general, or any entity with a member who is aggrieved by a violation to bring a civil action.

Finally, the bill includes whistleblower provisions that allow a person with knowledge of an alleged violation to bring civil action in court on behalf of the state. It authorizes a whistleblower to seek remedies and penalties equivalent to those allowed under the bill.

EFFECTIVE DATE: October 1, 2022

#### **EMPLOYEE DEFINITION**

Under the bill an employee is a person paid by the hour who is not exempt from minimum wage and overtime pay rules and is employed in a:

1. “retail establishment,” which is a fixed point of sale location for establishments as defined in the 2022 North American Industry Classification System (NAICS) sections 4410 to 4599 (e.g., auto dealers, grocery stores, department stores, pharmacies, hardware stores, home furnishing stores, and office supply stores);
2. “food service establishment,” which is a fixed point of service location for food services contractors, caterers, mobile food services, bars, full- and limited-service restaurants, cafeterias, grill buffets and buffets, and snack and nonalcoholic beverage bars (NAICS § 722); or
2. “hospitality establishment,” which is a hotel, motel, or casino hotel (NAICS §§ 721110 and 721120).

The bill allows the Labor Commissioner to add other classifications or use subsequent NAICS editions by adopting regulations.

The bill specifies that an alleged employer bears the burden of proof that an individual is, under applicable law, an independent contractor rather than the employer's employee.

## **REQUIRED WORK SCHEDULE PROCESS**

### ***Employee Schedule Request and Employer Schedule Estimate (§ 1(b))***

Upon hiring an employee, the bill requires an employer to obtain a written statement from the employee of his or her desired weekly work hours, including available days and times. The employer must notify the employee that this written statement may be modified in writing by the employee at any time during employment.

At the time of hire, an employer must give each employee a written estimate of the employee's work schedule. The employer must revise the estimate when there is a significant change to the employee's work schedule due to changes in the employee's availability or employer's business needs. Under the bill, the estimate is not considered a contractual offer binding the employer, and an estimate made without a basis in good faith will be a violation of this requirement.

The employee's work schedule estimate that the employer is required to provide must include the:

1. average, minimum, and maximum number of work hours the employee can expect to work each week;
2. minimum length of shifts that the employee can expect to work; and
3. number of days, amount of time, and number of shifts that the employee can expect to work, plus the days of the week and times or shifts the employee will not be scheduled to work.

Under the bill, an employer does not violate the schedule request and schedule estimate provisions when an employee's average weekly work hours significantly exceed the number provided in the written estimate if the employer makes every effort to schedule the employee for the

employee's desired number of weekly work hours. (The bill doesn't define "significantly exceed" in this context.)

***Employee's First Work Schedule (§ 1 (c))***

No later than the date of an employee's first shift, the employer must provide an employee with his or her work schedule. The schedule must cover the period starting on the date of that first shift and ending on the last day of the seven-day period covered by the employer-posted work schedule as required by the bill (see below). After that, the employer must notify the employee of the employee's work schedule in accordance with the bill's requirements.

Under the bill, "work schedule" means a written notice of an employee's regular and on-call hours, including specific start and end times for each shift during a consecutive seven-day period.

***Posting Work Schedules (§ 1(d))***

At least 14 days before the first day of any work schedule's seven-day period, an employer must post the work schedule in a conspicuous place that is readily accessible and visible to all employees at the workplace. The employer must also transmit the schedule to each employee, which may be by electronic means if that is the regular way this information is communicated to employees. The work schedule must identify all employees currently employed at the worksite, whether or not they are scheduled to work any hours in the work schedule.

***Notice of Work Schedule Changes (§ 1 (e))***

Under the bill, an employer must provide each employee with written notice of any work schedule change as promptly as possible and before the change takes effect.

The bill defines a "work schedule change" as any employer-initiated modification to the employee's work schedule, including: (1) adding or reducing hours; (2) cancelling a work shift or part of a work shift; (3) changing the date, time, or location of a work shift; or (4) scheduling the employee for an on-call work shift for which the employee is

subsequently not needed to report to work.

Within 24 hours after making a change to the work schedule, the employer must revise the posted schedule to reflect the change. An employee may decline to work any hours not included in the posted schedule (presumably, this is meant to say “not included in the posted schedule before it was revised”). If the employee voluntarily consents to work the revised hours, the consent must be recorded in writing.

***Work Schedule Adjustment Requests (§ 1(h))***

The bill permits employees to request adjustments to their work schedule, including requests:

1. not to be scheduled for shifts during certain days or times or at certain locations;
2. for certain hours, days, or work locations;
3. for more or fewer work hours; and
4. to be scheduled consistently for a specified or minimum number of weekly work hours.

The employer must engage in an interactive process to discuss the requests and may grant or deny them for any lawful, bona fide business reason.

***Work Cancellation Pay and Additional Work Hours Pay (§ 1(f))***

The bill generally requires an employer to pay an employee one-half of the employee’s regular pay rate for any of the employee’s scheduled work hours that the employer cancels or reduces (1) after the employee reports to work the scheduled hours or (2) less than seven days before the start of the scheduled work hours. Under the bill, “scheduled work hours” are the hours an employee is scheduled to work under a written notice of the employee’s regular and on-call hours over a consecutive seven-day period.

Also, an employer must generally pay an employee one hour of pay at the employee’s regular rate for each instance that the employer, less

than seven days before the scheduled work, adds one or more hours of work or changes the date, time, or location of a work shift without a reduction of hours. Under the bill, an employee's "regular rate" of pay includes all remuneration for employment paid to the employee, but it does not include, among other things, (1) sums paid as gifts or (2) irrevocable employer contributions to a plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.

Exceptions. Under the bill, an employer does not have to pay an employee for cancelling, reducing, or adding to the employee's scheduled work hours if it was due to:

1. the employee's written request, including requests to use sick, vacation, or other leave provided by the employer;
2. a mutually agreed on shift trade or coverage arrangement between employees, subject to an applicable existing employer policy; or
3. the employer's inability to operate due to (a) a public utility failure or public transportation shutdown; (b) fire, flood, or other natural disaster; or (c) a state of emergency declared by the President or governor.

***Declining Shifts with Less Than 11 Hours Between Shifts (§ 1(g))***

The bill allows an employee to decline to work a shift that begins less than 11 hours after the employee's previous shift ended. But if the employee agrees to work the shift, the bill requires the employer to consent in writing and the employer to pay the employee one and one-half times the employee's regular pay rate for working the shift.

Under the bill, a "shift" is the consecutive hours, excluding breaks of one hour or less, that an employer schedules an employee to work. It includes the hours an employer schedules an employee to be available to work at the employer's request or permission (i.e., "on-call"). So, the bill also requires employers to pay employees time-and-a-half when they are on-call for work less than 11 hours after their previous shift

ended.

***Limit on Hiring New Employees (§ 1(k))***

Under the bill, before hiring a new employee, an employer must make every effort to schedule existing employees for the desired number of weekly work hours that each employee identifies in the written scheduling requests the bill requires. An employer may hire a new employee if existing employees lack the qualifications necessary to perform the duties of the position being filled and cannot obtain them with reasonable training. These conditions apply to an employer that hires from an external applicant pool or through a contractor, including a temporary help service or an employment agency.

The bill provides that this requirement does not require an employer to schedule employees to work hours that would require overtime pay under state or federal law.

If an employer fails to offer existing employees the opportunity to work their desired number of weekly hours before hiring a new employee, the employer must pay the existing employees at their regular hourly rate for hours worked by a newly hired employee that occurred within the existing employees' written availability.

***Enforcement and Remedies (§ 1(m) & (n))***

The bill authorizes any person aggrieved by a violation of the bill, or any entity with a member aggrieved by a violation, to bring a civil action to recover damages, civil penalties, and any equitable and injunctive relief as the court deems appropriate. It also authorizes the labor commissioner or the attorney general to pursue civil action for violations.

It authorizes a court to grant employees or former employees the following relief for violations of the bill:

1. compensatory damages and other relief required to make the employee or former employee whole;
2. an order directing compliance with the bill's recordkeeping

requirements; and

3. for each violation of specific provisions, in addition to an order directing compliance, the monetary penalties shown in Table 1.

This relief must be (1) imposed on a per employee and per instance basis for each violation and (2) in addition to, or as an alternative to, any other remedies provided by law.

**Table 1: Work Scheduling Violations and Penalty Amounts**

<i>Violation</i>	<i>Bill Subsection</i>	<i>Amount for Each Violation</i>
Failure to obtain employee schedule request, provide employee with estimate of work schedule, and notify employee that they may modify the schedule request at any time	1(b)	\$200
Failure to provide first work week schedule	1(c)	\$200
Failure to post work schedules 14 days in advance and transmit them to employees	1(d)	\$200
Failure to provide written notice of any work schedule change as promptly as possible and prior to the change taking effect	1(e)	\$200
Failure to provide additional pay for (1) cancelling or reducing scheduled hours or (2) adding hours or changing the date, time, or location of a shift without reducing hours	1(f)	\$300, plus any unpaid compensation
Failure to schedule existing employees for their designed number of weekly hours before hiring new employees, as provided under the bill	1(k)	Greater of \$500 or the employee's actual damages

In addition, the bill requires employers to pay a civil penalty of \$200 to the labor commissioner for each employee affected by a violation of any of the five provisions in the table that the employer knowingly violates.

Any individual who prevails in the civil action must be awarded reasonable attorney's fees and costs.

### ***Whistleblower Provisions (§ 1(o))***



Under the bill, a whistleblower, on behalf of the state, may bring a civil action against an employer who violates any provision of the bill to seek equitable remedies or penalties equivalent to the statutory damages in the bill's enforcement provisions.

The bill defines a "whistleblower" as a person with knowledge of an alleged violation of the bill, regardless of whether the person is aggrieved by the violation, or a representative of an aggrieved person. A whistleblower does not include the state or its representatives.

It allows the state to intervene in an action up to 30 days after the action has begun. After 30 days, the state may intervene with the court's permission.

At least 30 days before the action is filed, the whistleblower must give written notice to the Department of Labor (DOL) commissioner of the specific provisions that the whistleblower alleges an employer violated. The commissioner may prosecute the action in DOL's name or allow the whistleblower to proceed on the state's behalf.

The bill specifies that the proceeds of any judgment entered in favor of a whistleblower must be distributed as follows: (1) 75% to DOL's enforcement division related to the bill and (2) 25% to the first whistleblower who filed the action. The court must award a whistleblower who prevails in an action reasonable attorney's fees and the attorney's fee amount is in addition to the judgment proceeds.

It also specifies (1) that the right to bring an action under the bill cannot be impaired by any private contract and (2) an action under the bill must be tried promptly and without regard to concurrent adjudication of private claims.

***More Favorable Employer Policies (§ 1(j))***

The bill specifies that it does not prohibit an employer from adopting scheduling policies that are more favorable to employees than those the bill requires.

***Regulations and Records Requirement (§ 1(i) & (l))***

The bill allows the labor commissioner to adopt regulations to implement and enforce the bill's provisions, including a process for the commissioner to address complaints. It requires employers, unless they are exempted by the regulations, to keep true and accurate records, for at least three years, of each employee's (1) daily and weekly shifts worked and (2) work schedule and schedule revisions.

**COMMITTEE ACTION**

Labor and Public Employees Committee

Joint Favorable Substitute

Yea 9 Nay 4 (03/22/2022)