

MEMORANDUM

To: CRUEDA Committee
From: Patricia Lee
Date: August 19, 2016
Subject: Secure Scheduling Ordinance – C.B. 118765

On September 7, 2016, the Civil Rights, Utilities, Economic Development and Arts (CRUEDA) committee will discuss the proposed Secure Scheduling ordinance, C.B. 118765, and any proposed amendments.

The CRUEDA committee will consider and potentially vote on C.B 118765 at the September 13, 2016 meeting. This will allow a vote by the full Council on September 19, 2016 the last Council meeting before Council begins consideration of the City's budget. This memo is divided into three parts:

- A. Background
- B. Summary of the Proposed ordinance, and
- C. Proposed amendments.

A. BACKGROUND

Councilmembers Herbold and González chose a different process for this legislative proposal. Instead of beginning with legislation developed by the Council or Executive and inviting the public to comment on it, they began with the public discussion. Working with the Mayor's Office, the Office of Labor Standards (OLS), businesses, workers and organizations representing both interests, they discussed and considered many ideas on how to balance a business' response to changing staffing needs with the impact those staffing changes have on workers.

The Mayor's Office and Council staff met with businesses and worker advocates at 17 stakeholder meetings during the past eight months. During this time, the CRUEDA committee held 10 committee meetings to hear from these stakeholders, academic researchers, and the San Francisco Office of Labor Standards Enforcement. Council members, the Executive and their staffs have met individually with numerous business owners, workers and worker advocates. Initial policy ideas were exchanged and considered.

C.B. 118765 was introduced on August 15, 2016, and on August 16, 2016 the CRUEDA committee held a public hearing on the legislation.

Why there is a need for this ordinance? SMC 14.22.012 p. 12

Many part-time workers choose to work part-time and many employees want to maintain the flexibility to change their work schedule. This ordinance seeks to balance the work schedule needs of both employers and employees.

As a result of extensive outreach, the Council and Executive decided to promulgate the secure scheduling ordinance to:

...establish predictable work schedules that advance race and social equity, promote greater economic security, further the health, safety and welfare of employees, create opportunity for employee input into scheduling practices, and create a mechanism for employees to obtain access to additional hours of work before the employer hires additional employees. SMC 14.22.012 p. 12

The American economy has shifted from a primarily manufacturing industrial economy to a service economy. Many service industries calculate labor costs on an hourly basis, not a fixed per employee cost. It is also a reality that staffing needs fluctuate depending on customer demand.

Researchers, such as Professor Susan Lambert of the University of Chicago, have observed that a business's labor costs are different if their employee is on a fixed salary or hourly salary. If an employee is on a fixed salary, an employer's costs would not go down if their employee is not as busy some days or hours. However, if an employee is paid per hour, whether it is profitable for an employer to have the employee work depends on how much business is being generated during that hour.

Employers have a legitimate reason to reduce their labor costs; however, when those decisions result in unwanted scheduling changes employees bear the cost either (a) in reduced hours and income or (b) in additional unscheduled hours that may conflict with other responsibilities in their life.

As many part-time hourly workers are women, people of color and recent immigrants, the impacts of unpredictable scheduling falls more heavily on that segment of the population. In a study of Seattle scheduling practices commissioned by the City of Seattle, African American and Latino employees were disproportionately more likely be sent home early, receive short notice of their work hours, work "cloppenings and work on-call." ¹ "Cloppenings" refers to working both a closing and opening shift for a business.

In 2014 San Francisco enacted legislation commonly known as the Retail Workers Bill of Rights, [http://library.amlegal.com/nxt/gateway.dll/California/police/article33fhoursandretentionprotectionsfo?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$anc=JD Article33F](http://library.amlegal.com/nxt/gateway.dll/California/police/article33fhoursandretentionprotectionsfo?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD Article33F) and [http://library.amlegal.com/nxt/gateway.dll/California/police/article33gpredictableschedulingandfairtr?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$anc=JD Article33G](http://library.amlegal.com/nxt/gateway.dll/California/police/article33gpredictableschedulingandfairtr?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD Article33G). Scheduling legislation is being considered in 7 other jurisdictions including Oregon, California, New York, North Carolina, Connecticut, Washington D.C. and Illinois.

A number of jurisdictions have adopted certain parts of the legislation. For example, New Hampshire recently passed a law providing employees with a right to request a flexible work

¹ *Scheduling in Seattle: Current State of Practice and Prospects for Intervention*, Vigdor Measurement & Evaluation, LLC 2016.

arrangement and right to request 14 days advance notice of work schedules. Vermont also has a law providing employees with a right to request a flexible working arrangement.

B. PROPOSED ORDINANCE: SUMMARY OF C.B. 118765

Who would be covered by this ordinance?

1. Employers SMC 14.22.010 p. 7

The ordinance covers retail and food service establishments with 500+ employees worldwide and full-service restaurants with 500 + employees and 40 or more locations worldwide. The definition of employer is the same as the definition in the City's minimum wage ordinance and include chains, franchises, and integrated enterprises.

Retail and food services have a significant number of part-time employees and research by national experts, such as Professor Susan Lambert of the University of Chicago, and Lonnie Golden at Penn State, have documented scheduling variabilities in those industries. The thresholds of coverage are the same as minimum wage. Larger employers often have a human resource department and other resources that make it easier for them to absorb new regulatory requirements.

While all employees are counted to determine the size of an employer, only those employees who are in a fixed store location and work 50% of their time in the city of Seattle are covered by the ordinance requirements.

2. Employees SMC 14.22.010 p.7

The ordinance covers hourly full-time, part-time, and temporary (i.e. non-exempt) employees.

Collective Bargaining Agreement Waiver SMC 14.22.145 p. 44, 45

The requirements of the ordinance do not apply to employees covered by a collective bargaining agreement (CBA), to the extent that such requirements are expressly waived in the CBA in clear and unambiguous terms and employees have ratified an alternative structure for secure scheduling that meets the ordinance's public policy goals.

What does the bill require of employers?

There are five major concepts in C.B. 118765:

1. **Good Faith Estimate.** Employers must provide a good faith estimate of an employee's hours and employees have a right to request input into their work schedule
2. **Right to Rest.** Employees have a right to rest between scheduled work hours
3. **Advance Notice.** Employers must provide each employee with written notice of work schedules at least 14 calendar days in advance of scheduled work.
4. **Additional compensation for work schedule changes.** Employees are entitled to compensation for work schedule changes, in some circumstances and employees are required to seek coverage for scheduled hours they cannot work in some circumstances

5. **Access to Hours.** Employers must provide existing employees access to additional hours before employers new employees are hired, with a recognition of diversity and youth hiring programs.

In addition, the bill has a number of other provisions described in section 6.

1. **Good Faith Estimate. Employers must provide a good faith estimate of an employee's hours and employees have a right to request input into their work schedule. SMC 14.22.025 p. 14 and SMC 14.22.020 p. 15**

Many employers have a conversation at time of hire, and during the employment relationship, about the hours they can offer and the employee's hours of availability. The Vigdor study found that employees who were given a "good faith estimate" of the hours they would be working experienced less scheduling hardship later on. The good faith estimate helped clarify expectations and create a pattern of communication between employers and employees.

This ordinance encourages that pattern of communication by requiring employers to provide, at time of hire, a written estimate of the hours the employee can expect to work each week and whether they will be required to work on-call shifts. This estimate would be included with the other employment information required at time of hire, such as rate of pay, and provided in English or the employee's primary language. This estimate must be updated at least once a year and whenever there is a significant change due to the employee's availability or employer's business needs.

The good faith estimate is not a contractual offer and the employer is not bound by it. However, the employer is required to have an interactive conversation with the employee to discuss any significant change from the estimate and if applicable, as discussed below to state a bona fide business reason for their decision.

Similarly, the ordinance provides that employees have a right to request input into their work schedule at time of hire, and during their employment relationship. Employee's input into their own work schedule is also a practice currently used by many Seattle employers and leads to better communication and clarity of expectations between employers and employees.

Employees may advise employers of any limits or preferences they have on the hours or locations they are available to work. If an employee's request is not for a "major life event" the employer shall be required to consider and respond to the request but may grant or deny the request for any lawful reason.

If the employee's request is for a major life event, defined as changes in the employee's transportation or housing, own serious health condition, responsibilities as a caregiver, education or training program or other job responsibilities, the employer does not have to grant the request, but must provide a bona fide business reason for denying the request. A bona fide business reason is defined as a significant and identifiable burden of additional costs or ability to meet organizational demands.

**2. Right to Rest. Employees have a right to rest between scheduled work hours
SMC 14.22. 035 p. 15, 16**

The term “clopening” refers to working both a closing and opening shift. Depending on the businesses hours, this can result in employees having very little time between work shifts. The Vigdor study found 75% of the surveyed employees worked a “clopening” in the past two weeks, 31% of which were required by the employer.

The ordinance requires employers to not schedule or require employees to work with less than 10 hours between scheduled hours. This is to provide employees sufficient time to rest between work hours, similar to the health and safety reasons underlining the limit of an 8 hour day. However, in recognition that some employees want to work their hours in a concentrated period of time, either because those are desirable shifts or they want to free up the rest of their time for caregiving responsibilities or school, the ordinance does not prohibit clopenings.

If an employee requests or consents to work hours less than 10 hours apart they may. However, similar to the concept of overtime pay for hours beyond an 8 hour day, an employee will receive time and a half for the hours that are less than 10 hours apart.

This ordinance provision does not apply to split shifts.

3. Advance Notice. Employers must provide each employee with written notice of work schedules at least 14 calendar days in advance of scheduled work. SMC 14.22.040 p.16, 17

Lack of certainty about hours of employment can present significant challenges for employees, especially those who are trying to balance other responsibilities such as family caregiving. The Vigdor study found that 25% of the survey respondents received 3 days or less notice of their upcoming work schedule. This mirrors findings in national studies. In fact, nearly half of the surveyed employees in the Vigdor study would rather have one week’s advance notice of their schedule than a 20% pay premium.

4. Additional compensation for work schedule changes. Employees are entitled to compensation for work schedule changes in some circumstances and employees are required to seek coverage for scheduled hours they cannot work in some circumstances. SMC 14.22.

For the 14 day advance notice to be meaningful, employers and employees have to be able to rely on it. However, both employers and employees need the flexibility to make changes. The ordinance seeks to balance predictability and flexibility and is organized first with a discussion of what the notification process is if an employer or employee wants to change an employee’s schedule hours, and then when those changes must be compensated.

- a. **Notification.** Employers and employees are required to provide timely notice, or as soon as practicable, of changes they would like to make to an employees scheduled hours established in the 14-day advance written notice.

The employee has a right to decline an employer's request to work non-scheduled hours if the request differs from the scheduled hours established in the 14-day advance written notice.

Whether an employer can ask or require an employee to find replacement coverage depends on the reason the employee can not work their scheduled hours as follows:

- The employer cannot ask or require an employee to find replacement coverage if work schedule change is due to a reason covered by another local, state or federal law (e.g. Paid Sick and Safe Time).
- The employer can ask but not require an employee to find replacement coverage if work schedule change is due to emergency or major life event that prevents an employee from working the scheduled hours
- The employer can ask and require an employee to find replacement coverage if work schedule change is not for the above reasons

b. **Compensation.** SMC 14.22.050 p. 18-20

Changes to the 14 day advance notice written work schedule must be compensated in the following circumstances:

Additions require one hour of pay, in addition to the wages earned if the employer:

- i. Adds hours that are not on the 14-day advance notice written work schedule, or
- ii. Changes the date, start or end time of a work shift with no loss of hours.

Subtractions require the employer to pay the employee 0.5x pay for the length of the scheduled work shift, or for the remainder of the work shift if the employer:

- i. Subtracts hours from a work shift before or after the employee reports for duty, or
- ii. Changes the date or start or end time of work shift with a loss of hours;
- iii. Cancels a work shift; or
- iv. Schedules an employee for an on-call shift for which the employee does not need to report to work.

Exceptions. Requirements for additional compensation do not apply in the following situations:

- i. Mutually agreed upon work shift swaps or coverage among employees, that may be approved by the employer;
- ii. Additional hours that an employee volunteers to work in response to an employer's written mass communication about the availability of additional hours. This exception only applies to additional hours that are the result of another employee being unable to work their scheduled hours. The communication must be clear that accepting such hours is voluntary and employee has the right to decline such hours;

- iii. Additional hours that were included in an “access to hours” offer of work;
- iv. Employee-requested changes that the employee voluntarily makes to the employee’s work schedule and documents in writing
- v. Employee hours that are subtracted due to disciplinary reasons, provided the employer documents in writing the incident leading to discipline
- vi. Operations cannot begin or continue due to threats to employees or property; when due to the recommendation of a public official work cannot begin or continue; when public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or due to natural disaster or other cause not within the employer's control pursuant to rules issued by the Director.

5. Access to Hours. Employers must provide existing employees access to additional hours before employers new employees are hired, with a recognition of diversity and youth hiring programs. SMC 14.22.055 p. 20 - 24

Many employees choose to work part-time and this proposal does not prevent that. However, there are many employees who are working fewer hours than they want or need to in order to be economically self-sufficient. The Vigdor study found that 30% surveyed Seattle employees want to work more hours. The Seattle Restaurant Workers Survey reported 23% of their surveyed employees wanted to work more hours. These findings are consistent with findings in national studies (*e.g.*, Underwork, Work-Hour Insecurity, and a New Approach to Wage and Hour Regulation, Alexander and Haley-Lock 2015).

When new hours become available for a given employer, the ordinance would require employers to offer the hours to existing employees before hiring new employees.

In order to provide existing employees a meaningful chance to apply for available new hours, the ordinance would require that employer to post notice of the new hours for three days. The employer can simultaneously advertise those hours externally. If existing employees apply the employers would be required to offer additional hours to an existing employee(s) who have the skills and experience to perform the work. Employers may but would not be required to distribute hours among all interested employees. Employees have two days to accept an offer.

Employers are only required to offer the hours to qualified candidates. In order to help employees take on different job responsibilities, employers are encouraged to offer employees training opportunities to gain the skills and experience to perform work for which the employer typically has additional needs.

Exceptions:

- i. Expedite the hiring process when existing employers do not want the additional hours.

Employers sometimes need to make hiring decisions quickly. For example, the dishwasher in a restaurant leaves. Employers may expedite their hiring process after posting notice of the hours either by:

- a. receiving written confirmation from all their existing employees that they are not interested in the additional hours; or
 - b. creating and maintaining an access to hours list identifying employees who are interested in additional hours. All employees shall be added to the list at time of hire; however, an employee may opt out or back onto the list at any time. When new hours become available, employers need only receive written confirmation from those employees on the access to hours list that they are not interested in the additional hours before proceeding with an external hiring process.
- ii. Seasonal work.

Some employers need to hire additional employees for a particular busy period (e.g., a retail holiday season). In order to have sufficient employees, the employer may want to hire in September for work that won't begin until November and to have new employees trained before they begin work. The ordinance permits this as long as the additional hours are first offered to existing employees with a prospective start date for the additional hours existing employees will be working during that busy period and the training provided new employees is part of their customary training practices.

- iii. Diversity and Youth Training Programs

The city has a long standing policy goal of assisting those who have traditionally had barriers to accessing jobs including women, people of color, the LGBTQ community, people with a criminal history, and people with disabilities. The access to hours requirements in the ordinance would not apply to hours an employer has designated for diversity or young adult hiring programs affiliated with a government entity or external non-profit organization approved subject to OLS Director's Rules.

6. Other Provisions of the ordinance:

- a. Enforcement & Remedies

The Office of Labor Standards (OLS) will provide education and outreach, investigate and enforce the Secure Scheduling ordinance as one of the City's labor laws. In 2015, the City passed the Wage Theft and Harmonization ordinance to align the enforcement and remedies in the City's Paid Sick and Safe Leave, Wage Theft, Minimum Wage and Fair Chance ordinances. The Fair Chance ordinance, which regulates an employer's use of an

individual's criminal history, does not have a private right of action but otherwise has the same remedies and penalties.

The Secure Scheduling ordinance's enforcement and remedies are aligned with the City's other labor laws and include remedies for employees of up to 3x unpaid wages, civil penalties for violations of up to \$500 per aggrieved party for first violations, penalties payable to the aggrieved party of up to \$5,000 for retaliation, a private right of action, the authority of the OLS Director to conduct directed investigations (i.e., investigations without a complaining party).

b. Records

Employers are required to maintain records that demonstrate compliance with the ordinance requirements for three years.

c. Two Year Study SMC 14.22.130 p. 43

Similar to the evaluation of the Minimum Wage ordinance, the City Auditor, in collaboration with OLS, is requested to contract with academic researchers to conduct an evaluation of the impacts of this ordinance for the baseline, one-year and two-year periods following implementation. The results of the evaluation will be used to identify possible areas for revision and to determine whether to extend application, in whole or in part, to employers in different industries and/or with different thresholds for coverage.

d. Implementation Date. SMC 14.22 section 5 p. 51.

The ordinance requirements will be effective July 1, 2017 to give OLS time to do outreach and education to employers and employees on the ordinance requirements.

C. PROPOSED AMENDMENTS

Substantive Amendments

1. Advance notice of work schedule SMC 14.22.040 p. 16 Central Staff

The proposed amendment changes the order and addresses existing employees in Section A. and new employees in Section B. For new and returning employees it changes the requirement to place them on the current or next posted schedule from "shall" to "may" to reflect the expectations that not all employees will want to start employment immediately during the currently posted work schedule and not all employers will have space in the currently posted work schedule to add the employee.

- A. (~~For new employees at time of hire, and for existing employees returning to work after a leave of absence, the employer shall provide the employee with a written work schedule that runs through the last date of the currently posted schedule. Thereafter, the employer shall include these employee(s) in the schedule for existing employees as described in subsection 14.20.040.B.)~~ Subject to the provisions of

subsection 14.22.040.B, the employer shall provide employees with a written work schedule at least 14 calendar days before the first day of the work schedule.

- B. (~~For existing employees, the employer shall provide the employee with a written work schedule at least 14 calendar days before the first day of the work schedule.~~)
For new employees at time of hire, and for existing employees returning to work after a leave of absence, the employer may provide the employee with a written work schedule that runs through the last date of the current or next posted work schedule. Thereafter, the employer shall include these employees in the work schedule as described in subsection 14.20.040.A.

CRUEDA COMMITTEE VOTE:

2. Compensation for Work Schedule Changes SMC 14.22.050 B4 p. 20
CM Bagshaw

The proposed amendment clarifies that an employee's changes to their own schedule may include additions and subtractions, such as an employee volunteering to work additional hours (e.g., restaurant employee may want to continue working after the scheduled end of a shift to continue getting tips during a particularly busy evening).

Employee-requested changes, including additional or subtracted hours, that the employee voluntarily makes to the employee's work schedule and documents in writing;

CRUEDA COMMITTEE VOTE:

3. Access to hours. SMC 14.22.055 E p. 23
CM González

The proposed amendment would add "supported employment" to the hiring programs exempted from the access to hours requirement.

This Section 14.22.055 shall not apply to additional hours of work that the employer has designated for hiring programs, ~~whether~~ including but not limited to diversity, supported employment, hiring programs or young adult hiring programs, affiliated with a government entity or external non-profit organization that has been approved subject to the rules of the Director.

CRUEDA COMMITTEE VOTE:

4. Employer Records. SMC 14.22.065 p. 25
CM Harrell

The ordinance requires the employer to retain written records that document compliance with the ordinance for three years. "Written" is defined in the ordinance as printed or printable communication in physical or electronic format. The proposed amendment would add a requirement that the Office of Labor Standards assist employers in understanding the records requirements in the ordinance.

12. Upon request, before July 1, 2017, the Office of Labor Standards will provide technical assistance to businesses on the records systems they are using to document compliance with the ordinance. The intent is to provide employers and employees the opportunity to create, maintain and retain records using methods or procedures that are effective, efficient and not unreasonably burdensome or impractical.

CRUEDA COMMITTEE VOTE:

5. Study SMC 14.22.130 p.43
CM Herbold

The proposed amendment would separate an evaluation of this ordinance from a future study of potential other industries that should be considered for coverage.

14.22.130 Study of application of secure scheduling requirements

- A. The Council shall request the City Auditor, in collaboration with the Agency, to contract with academic researchers who have a proven track record of rigorous analysis of the impacts of labor standards regulations to conduct an evaluation of the impacts of the ordinance introduced as Council Bill 118765 for the baseline, one-year, and two-year periods following implementation. Areas of evaluation shall include, but not be limited to the impacts to businesses, including costs, and the impacts on employees of the requirements of this Chapter 14.22, differences and challenges between limited and full service restaurants in implementing the ordinance, and the interplay of diversity programs and access to hours lists.

- B. The Council shall use the results of the evaluation to identify possible areas for revision to accomplish the goals of Council Bill 118765.
- C. Efforts to identify whether other industries have scheduling practices that should be considered for coverage under SMC 14.22 et. seq. could be conducted under a separate study, by contracting with academic researchers who have a proven track record of rigorous analysis of labor standards regulations ~~and to determine whether to extend application, in whole or in part, to employers in different industries and/or with different thresholds for coverage.~~

CRUEDA COMMITTEE VOTE:

Technical Amendments

6. Definitions. SMC 14.22.010 p. 8

Central Staff

This is a technical amendment that will result in standard terminology throughout the ordinance; the rest of the ordinance uses the term, “work schedule.”

“Interactive process” means a timely, good faith process that includes a discussion between the employer and the employee for the purpose of arriving at a mutually beneficial arrangement for a work schedule that meets the needs of the employee and the employer. The discussion may include the proposal of alternatives by the employee and the employer.

CRUEDA COMMITTEE VOTE:

7. Intent of secure scheduling SMC 14.22.012 p.12

Central Staff

This is a technical amendment that will make this section consistent with the access to hours section.

The intent of this Chapter 14.22 is to establish predictable work schedules that advance race and social equity, promote greater economic security, further the health, safety and welfare of employees, create opportunity for employee input into scheduling practices, and create a mechanism for employees to obtain access to additional hours of work before the employer hires ~~additional employees~~ new employees from an external

applicant pool or subcontractors, including hiring through the use of temporary services or staffing agencies.

CRUEDA COMMITTEE VOTE:

**8. Good faith estimate of work schedule SMC 14.22.025 p.14,15
Central Staff**

This is a technical amendment that will make the language for median hours of work consistent with language for on-call shifts.

- A. For new employees, the employer shall provide the employee with a written good faith estimate of the employee's work schedule at time of hire. The good faith estimate shall include the median number of hours the employee can expect to work each work week, and whether the employee ~~will be expected~~ can expect to work on-call shifts.

CRUEDA COMMITTEE VOTE:

**9. Notice of work schedule changes SMC 14.22.045 p.17
Central Staff**

This is a technical amendment that will clarify the type of coverage and will correct a typo.

3. The employer's ability to ask or require the employee to find a replacement employee for coverage of any hours during which the employee is unable to work a scheduled shift is as follows:
- a. The employer shall not ask or require the employee to find replacement coverage if the employee is unable to work the scheduled hours due to a reason covered by another local, state or federal law that prohibits asking such questions or protects the absence from employer interference, including but not limited to work schedule changes related to use of paid sick and safe time under Chapter 14.16.
 - b. The employer may ask but not require the employee to find replacement coverage if the employee is unable to work scheduled hours due to an emergency or major life event that prevents the employee from working

scheduled hours, unless the major life event is also covered by another local, state or federal law pursuant to subsection 14.22.045.B.3.a. The employer may require a written statement from the employee verifying that the employee is unable to work the scheduled hours due to an emergency or major life event. The employee shall not have to explain the nature of the emergency or major life event.

- c. The employer may ask and require the employee to find replacement coverage if the employee is unable to work the scheduled hours due to a reason other than a reason covered by a local, state or federal law pursuant to subsection 14.22.045.B.3.a or an emergency or major life event pursuant to 14.22.045.B.3.b.

CRUEDA COMMITTEE VOTE:

cc: Kirstan Arestad, Central Staff Executive Director
Dan Eder, Deputy Director