



the work and family legal center

**TESTIMONY ON “ON CALL” SCHEDULING
NEW YORK STATE DEPARTMENT OF LABOR
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Submitted by Sherry Leiwant, Co-Founder
A BETTER BALANCE**

A Better Balance (ABB) is a national legal advocacy organization based in New York City dedicated to using the law to promote equality and expand choices for women and men at all income levels so that they may care for their families without risking their economic security. We have drafted legislation in New York and around the country to insure that workers have paid sick days and paid family leave, have fought discrimination by drafting policies that strengthen laws on gender, pregnancy and caregiver discrimination and we have worked for many years on policies that would give workers more control over their schedules in order to meet their family demands. Our testimony is informed by the experiences of individuals who call our free legal helpline and by many years working around the country on policy solutions to the increasing problem of workers, particularly low wage workers, having no control over their hours of work and being subject to policies that assume that their availability for work will be unlimited.

We applaud the Governor and the Department of Labor for their attention to the problems that workers face with respect to the lack of control of their schedules and their willingness to explore solutions to this problem. We appreciate the opportunity to testify today.

I. The National Context: The Rise of Economic Uncertainty for Working Families

Many workers today struggle in jobs with stagnant, low-wages and few benefits. However, in recent years there has been an increasing trend toward requiring workers to be available to work without any guaranteed hours and with schedules that fluctuate dramatically from week to week with little notice. Arranging for childcare, getting another job to make rent, or pursuing additional education is impossible with these



unpredictable, unstable schedules. These emerging scheduling trends are fostering pervasive economic insecurity and employment instability for a growing number of workers and making it all but impossible for workers to be able to care for their families.

Today a majority of Americans are getting paid by the hour—that's 75 million people or three in five Americans.¹ Among these hourly workers, over 26 million are part-time. These trends toward hourly and part-time work are only increasing: job growth today is fueled by the dramatic expansion of these low-wage, no-benefit jobs in industries like retail, restaurants, and healthcare, which rely on large part-time workforces and now employ over one-quarter of all workers. In a recent national survey of early career adults², 75 percent of hourly workers reported that the number of hours they worked per week fluctuated dramatically day-to-day. For part-time workers, fluctuation in weekly work hours was extreme: 87 percent. These fluctuations are often impossible to predict: 41 percent of all hourly workers reported that they know their work schedule a week or less in advance of the upcoming workweek.

These trends of hourly and part-time work are rapidly emerging in an environment with few labor policy protections and weakened worker bargaining power. While unionization rates are at a historically low point, workforce management technologies have grown exponentially in their sophistication, resulting in a new phenomenon of micro-scheduling. Technologies, distributed by companies such as Kronos and Dayforce, enable employers to adjust workers' schedules to match the real-time ebb and flow of commerce and to monitor workers' productivity, forcing the lowest paid workers to work harder and to absorb substantial fluctuations in hours and earnings. Software algorithms are

¹ Bureau of Labor Statistics, U.S. Department of Labor (2012). *Labor Force Statistics from the Current Population Survey, Characteristics of Minimum Wage Workers: 2012*. Washington: Bureau of Labor Statistics. Retrieved from <http://www.bls.gov/cps/minwage2012.htm>

² Lambert, S. J., Fugiel, P.J. & Henly, J.R. (2014). *Precairous work schedules among early career employees in the US: a national snapshot* Chicago: Employment Instability, Family Well-being, and Social Policy Network, University of Chicago. Retrieved from http://ssascholars.uchicago.edu/work-scheduling-study/files/lambert.fugiel.henly_.precairous_work_schedules.august2014.pdf



programmed to reduce labor costs, without consideration of the chaos generated in the lives of workers.

To even enter this world of precarious work, employees need to be constantly available, and must forfeit other productive opportunities on the chance their employer might call upon them to work. Families are harmed; arranging for stable childcare or setting up healthy family routines is made even more difficult with ever-changing workweeks. Women in retail in particular are pushed involuntarily into low-quality part-time positions and penalized for their caregiving responsibilities that mean they cannot meet scheduling expectations for “open availability.”

Hourly workers have almost no say in their schedules and do not have the right to request the most basic accommodations. Workers are routinely expected to be on-call without compensation and if they are unable to report to work they are punished with diminished hours. Employees can show up to a full shift – and pay transportation costs and arrange childcare for the day -- and then be sent home upon arrival because of slack business. In that scenario, employees actually lose money by going to work. But another trend has emerged in recent years – rather than calling workers in and sending them home, many employers, especially in retail, are requiring large numbers of their workers to be “on call” or available to come in when the employer calls them, or, alternatively, requiring that the worker call in to see if they are needed with no guarantee of actual work. This is an impossible situation for families and extremely harmful to women workers, many of whom have caregiving obligations. Achieving family-sustaining schedules needs to be a core priority for addressing inequality in our state and in our country.

II. Scheduling Issues in New York

Research in New York has shown that the trends discussed above are equally prevalent among workers in our state. A report that ABB did with New York City Comptroller Scott Stringer based on a survey of over 1,100 responses from residents of all five boroughs in New York City working in a range of industries, from professional services and education, to health care, retail, and construction between June and August 2015

found that among “shift workers” a full 20 percent receive their schedule only a day in advance. (The report recommended that the New York City Council pass a law stopping employers from requiring workers to report for work with less than 72 hours notice, a law that has now been passed.)³ A report by the Community Service Society found that more than one in three employed New Yorkers -- and half of low wage New Yorkers as well as half of all retail workers -- receive their work schedules less than 2 weeks in advance. The report documented the negative effects that short notice of schedule has on workers (when compared with workers who have more reliable schedules) including economic hardships such as increased likelihood to fall behind on their rent, the need to skip meals and job loss.⁴

III. Policy Solutions to the Problems of Abusive and Unfair Schedules

There are few legal rights enabling workers to assert control of their schedules or curb abusive scheduling practices. However, some states have addressed the issue of working time as part of their wage and hour laws creating a minimum standard for workers with respect to their hours and schedules. The laws that exist are a powerful precedent for the concept that workers’ time should be compensated whenever it is controlled by the employer whether actual work is performed or not. Those laws are most commonly “reporting pay” laws requiring a minimum amount of pay for a worker when s/he is required to come to work even if s/he is sent home or given less work than anticipated. As discussed below, New York State has such a law.

More recently, a package of laws addressing scheduling issues has been passed in several places that apply only to specific industries, so far, only retail or fast food. Those laws have been passed in San Francisco, Seattle, Oregon and New York City and there are proposals for similar packages of laws in many other states and localities.

These “Fair Work Week” laws include requirements of advance notice of schedules (in New York City, at least 2 weeks notice and payment to the worker if a schedule is changed within the two week window for fast food workers); restrictions on open

³ https://comptroller.nyc.gov/wp-content/uploads/documents/Families_and_Flexibility.pdf

⁴ <http://www.cssny.org/publications/entry/unpredictable-schedules>

availability or on call scheduling (in New York City, requiring workers to come in with less than 72 hours notice is prohibited in retail); access to hours (a requirement that additional hours of work be offered first to the existing workforce in fast food); and a prohibition on “clopening” – short hours between the end of a shift on one day and the start of a shift on the next (in New York City this applies to fast food workers).

IV. New York State: Expanding the Reporting Pay Requirements in the Wage Order.

In New York, the Department of Labor “wage order” is contained in the New York Codes, Rules, & Regulations (NYCRR) and contains a variety of provisions with respect to wages divided by industry. The Department of Labor’s Miscellaneous Industries and Occupations Wage Order applies to all employers who are not covered by a more specific wage order, and would cover most retail establishments. It would be easy – and legally permissible – to create an on-call pay requirement within the order’s existing “reporting pay” provision. This would greatly help workers throughout the state who are currently subjected to requirements that they be available or “on call” with no guarantee of being called into work and paid for the time they have set aside. Currently, the Miscellaneous Industries and Occupations Wage Order has a provision stating that any “employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage.” Miscellaneous Industries and Occupations Wage Order § 142-2.3. This provision could be expanded to include payments for on-call employees or, in the alternative; a new provision could be added with higher wage rates for call-in pay.⁵ The reason for the Wage Order’s requirement of reporting pay is that workers should be paid for their time when they give up that time for the sake of the employer. This underlying rationale is just as applicable to time that the worker gives up when s/he is “on call” for an employer even if s/he does not physically come to the work

⁵ The only, relatively minor, limitation to such a provision would be for residential employees who live on the premises of their employer. Under a provision of the order, this type of employee “shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment.” Miscellaneous Industries and Occupations Wage Order § 142-3.1(b).

place. Expanding the current “on call” requirements in the wage order to apply to circumstances where a worker is required to be available and must either call in to see if s/he is needed or wait for the employer to call him or her would compensate the worker for time set aside for the employer. It would also likely stop the practice of many retailers of having a large number of workers available “on call” to insure that someone will be available if needed. If the employer needs to pay everyone who is not called in, it will not be economical to require large numbers of workers, the majority of whom will never be called for paying work, to make themselves available. This would help all workers who need their time for other obligations such as family or need to seek additional employment or educational opportunities. It would not solve all problems of erratic and unpredictable schedules, but it would be a start.

We note that the New York City legislation Int. No. 1387-A which was passed last spring and will go into effect at the end of November prohibits an employer from requiring a retail employee to be scheduled for an on call shift, cancel a shift of a retail employee within 72 hours or the shift, require a retail employee to work a shift without his or her written consent within 72 hours of the shift, or require a retail employee to contact the employer to confirm if s/he will be needed within 72 hours of the shift. “On call” shift is defined as “any time period other than an employee’s regular shift when the employer requires the employee to be available to work, regardless of whether the employee actually works and regardless of whether the employer requires the employee to report to a work location.” “Retail employer” is defined as an employer who runs a business with 20 or more employees and is engaged primarily in the sale of consumer goods and a “retail employee” is one who works for a retail employer.

We urge the state to expand its reporting pay requirements to include on call shifts so that workers can fairly be paid for their time. At the same time, we believe that such an expansion should not preempt New York City from actually prohibiting the practice of using on call shifts or requiring availability within 72 hours. Preemption is being used throughout the country to stop more progressive legislation by localities in the area of labor protections. We applaud the Governor and the Department of Labor for exploring



ways to insure that workers throughout New York State will be protected from giving their time to their employers with no economic return. But we are hopeful that cities that want to go even farther with respect to protection of employees' work schedules will be permitted to do so.