

Using Law to Combat Unpredictable Scheduling Practices for Women in U.S. Workplaces

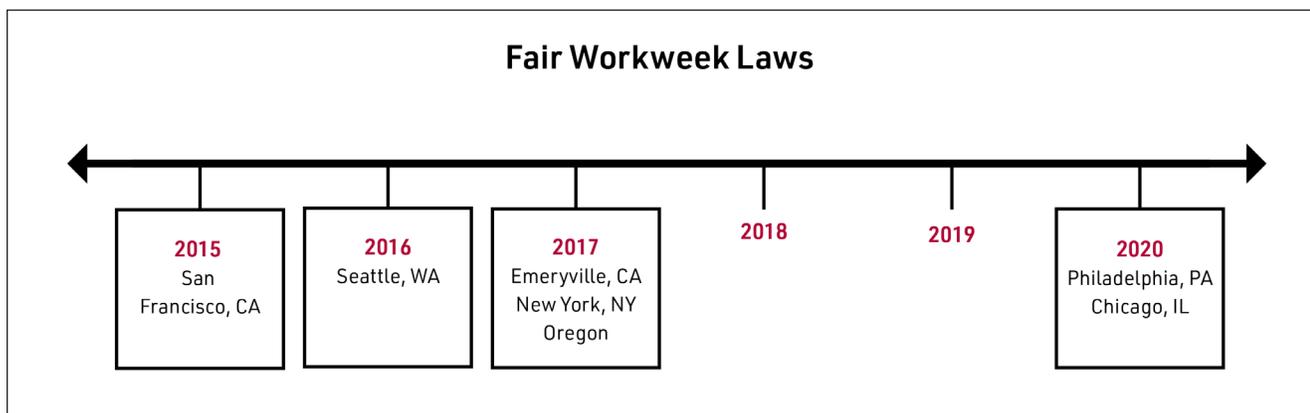
October 2021

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Introduction

The COVID-19 pandemic has both revealed and exacerbated gender and racial inequities in the U.S. workforce. Women in hourly and low-paying jobs — especially Black and Latinx women — who work in industries with unpredictable scheduling practices have disproportionately faced low pay, insufficient benefits, job insecurity, and discrimination in the workplace.^{1, 2, 3, 4} Unpredictable scheduling practices, which is most common in the food service, retail, grocery, and health services industries, subject workers to irregular and inconsistent work hours and provides them with little to no control over their schedules. These practices have been shown to cause negative health outcomes, including increased stress, increased work-family conflict, food and housing insecurity, and negative effects on mental and emotional wellbeing.^{2, 4}

Further, the systemic issues that have existed long before the ongoing pandemic — including an inadequate care infrastructure and insufficient legal protections — now exacerbate the burden on women to choose between work and family.^{1, 5} Every day women are forced to make an impossible decision. Do they work to maintain a semblance of financial security in jobs with irregular and inconsistent shifts or do they attend to the health and caregiving needs of themselves and their loved ones during the ongoing pandemic? Law can serve as a layer of protection between employers and workers, and successful legal interventions addressing workplace scheduling have been shown to improve workers' health and lives. This brief summarizes key findings and recommendations based on our report that describes a pilot assessment of laws regulating workplace scheduling across the United States and a rapid assessment of evidence evaluating the direct effects of those laws.



Seven jurisdictions have passed fair workweek laws. Jurisdictions are listed by the year the law took effect.

Current Legal Landscape

There is no federal law regulating workplace scheduling for workers in the United States. In the absence of federal protection, a handful of state and local governments have enacted laws that aim to improve schedule predictability and stability.

Since 2014, one state and six cities have passed comprehensive fair workweek laws which specifically target unpredictable scheduling practices and regulate several aspects of worker scheduling, as seen in the figure above. Fair workweek laws can include all, or a combination of, the following legal protections: advance scheduling notice, good faith estimates, a stable schedule requirement, predictability pay, the right to rest between shifts, greater access to hours, the right to request flexible scheduling, and anti-retaliation provisions. Although fair workweek laws provide the most comprehensive set of protections to workers, they usually have limited applicability, applying only to certain workers within specified industries (most commonly, workers in the food service and retail industries). Importantly, this limited applicability means these laws generally exclude small businesses and only apply to employers with a large workforce. To see how applicability is limited in a sample of jurisdictions, see the table below.

The majority of U.S. jurisdictions have yet to enact a comprehensive fair workweek law, though some have enacted narrowly tailored protections that regulate a discrete aspect of worker scheduling. Typically, these standalone protections have been passed at the state level and apply to most or all workers within the jurisdiction. Common standalone provisions include: day of rest laws, reporting pay laws, split shift laws, and right to request flexible scheduling laws.

Just as state and local laws started to gain momentum, private companies and lobbying groups have fought against their enactment, filing unsuccessful lawsuits challenging their validity

INDUSTRIES COVERED AND SIZE OF EMPLOYERS		
JURISDICTION	INDUSTRIES COVERED	EMPLOYERS COVERED
Seattle	Retail	500+ employees worldwide
	Food service	
New York City	Retail	20+ employees
	Fast food	30+ restaurants nationally
Chicago	Retail	100+ employees worldwide (250+ employees worldwide if nonprofit) AND 50+ employees must be covered employees
	Restaurants	
	Hotels	
	Building services	
	Healthcare	
	Manufacturing	
Philadelphia	Retail	250+ employees worldwide AND 30+ locations worldwide
	Food service	
	Hospitality	
Oregon	Retail	500+ employees worldwide
	Food service	
	Hospitality	

and advocating for preemptive laws that prohibit localities from enacting predictable scheduling regulations.^{6, 7, 8} From 2015 to 2017, at least nine states — Alabama, Arkansas, Georgia, Iowa, Indiana, Kansas, Michigan, Ohio, and Tennessee — have passed preemptive laws that prohibit local jurisdictions from passing fair workweek laws or standalone protections that regulate workplace scheduling.⁸

Evidence

The research team identified three published studies as part of a rapid evidence assessment in August 2021. These studies evaluated the impact of fair workweek laws — two that focus on Seattle and one on Oregon.^{9, 10, 11} This research has shown that fair workweek laws can be successful in addressing schedule instability, worker health, and worker happiness — including increased sleep quality and reductions in material hardship.¹¹ However, this research has also identified some challenges regarding the current iterations of these laws which can be improved through policy change. Together, these studies pointed to five common themes:

- Fair workweek laws have the potential to improve stable scheduling and workers' lives.
- Both the implementation and enforcement of fair workweek laws are key to their success and where successfully implemented, these laws have had demonstrable positive effects. Workers saw improvements in schedule predictability and stability, as well as increases in happiness and sleep quality and reductions in material hardship.
- Oftentimes, managers are tasked with implementing the law, which can be complex and difficult to understand. The lack of training and education initiatives results in managers failing to comply with these laws fully or consistently.
- Broad and numerous exceptions to fair workweek provisions (particularly to predictability pay requirements), combined with employers exploiting those exceptions, can weaken the reach and positive effect of these laws.
- More research is needed to evaluate the effect of the COVID-19 pandemic on these laws, particularly since some provisions were delayed or suspended in response to the pandemic.

Policy Recommendations

Based on our pilot assessment of laws regulating workplace scheduling and our review of the current evidence, we determined that more research and comparative evaluations could lead to a deeper understanding of these laws, their impacts, and their potential to improve population health. We outline several recommendations for researchers, advocates, and policymakers; however, we caution that these recommendations are not meant to be exhaustive.

Use Law to Achieve Greater Workplace Protection for Workers

Continue federal, state, and local advocacy efforts. Federal law can create widespread protection for workers across the United States. The federal government also has the authority to supersede and reverse state preemption of local authority. As states continue to enact laws that prevent and limit local governments from protecting workers through preemption, the time for federal action is now. However, federal legislation is slow-moving, and the current proposed workplace scheduling has seen little movement since 2015. We urge advocates and policymakers to focus on enacting, improving, and expanding state and local legislation regulating workplace scheduling.

Federal, state, and local policymakers and advocates should consider the successes and challenges of existing fair workweek laws. In addition to passing comprehensive fair workweek laws or standalone protections, advocates and policymakers should consider focusing on the following provisions when championing and drafting new legislation or amending existing laws and ordinances at the state and local level:

- **Expand applicability.** Broader applicability to all employees would provide more employees with legal protection. By including other low wage industries with prevalent unpredictable scheduling practices (such as Chicago), fair workweek laws can have a greater impact on workers and, in turn, better serve the disproportionate number of Black and Latinx women employed by these industries. Standalone laws passed at the state level, such as reporting pay laws and split-shift laws, often apply to most or all workers. However, most fair workweek laws only apply to workers in the service industry. Newly enacted or amended laws should expand applicability to more industries, as well as to employees who work for smaller employers. Going a step further, new laws could expand applicability to all hourly workers — similar to some state standalone protections, as well as other labor and workplace laws (such as federal overtime requirements).
- **Eliminate excess exceptions and legal loopholes.** Excess exceptions can create loopholes for employers to circumvent workplace protections intended for their employees. This is especially glaring in the enforcement of predictability pay requirements. In fact, existing fair workweek laws contain numerous exceptions that ultimately prevent workers from being compensated for the addition, reduction, or change in hours for a shift. These exceptions undermine the effectiveness of these laws' ability to ensure workers have stable schedules or are compensated for last-minute changes. Since employers have been found to exploit these exceptions, legislatures should work to close these loopholes so that fair workweek laws can more successfully reduce schedule instability.
- **Improve implementation and enforcement efforts.** Numerous enforcement agencies regulating unpredictable scheduling laws do not have the independent funding or capacity to investigate employer compliance with the law. However, to ensure compliance, enforcement agencies need to conduct proactive investigations of covered employees, rather than relying primarily (or even exclusively) on worker-initiated complaints. Further, policymakers should develop practical and feasible implementation and enforcement mechanisms within the law itself.
- **Increase public awareness and education campaigns.** Policymakers should prioritize public awareness and education campaigns. Since many enforcement agencies primarily, or even exclusively, rely on employee complaints to address allegations of noncompliance, additional trainings must be provided to ensure that employees are aware of their rights. This can be as simple as having “know your rights” posters conspicuously posted in understandable terms and multiple languages, or as extensive as having regular employee trainings. Relatedly, employers — particularly frontline managers tasked with on-the-ground implementation of scheduling provisions — often misunderstand the complexities of fair workweek laws. Agencies tasked with enforcing these laws should provide training and education to employers so that those implementing these provisions fully understand the law.

Research Agenda

More – and more timely – research evaluating the direct effects of laws regulating predictable scheduling is needed

The Seattle and Oregon evaluations demonstrate that fair workweek laws have the potential to improve hourly workers' lives. However, they also highlight some of the challenges presented by current iterations of these fair workweek laws. These studies focus on legal effects within their respective jurisdictions and no comparative research evaluating laws across jurisdictions was identified. Given the wide variation among laws — including differences in pay and notice requirements, enforcement mechanisms, and the numerous exceptions to predictability pay — robust

comparative research and evaluation are necessary to better determine which provisions are most effective in improving health outcomes for workers.

Further, the COVID-19 pandemic has drastically altered workplaces in the U.S., especially for hourly workers in healthcare and service industries. Future research must include evaluation of how the pandemic has affected implementation and enforcement of laws regulating worker scheduling. To build upon this pilot assessment and existing evaluations, future research can utilize legal epidemiology to measure the effects of predictable scheduling laws across jurisdictions and over time. Legal evaluations using these methods can help to identify the most (and least) effective legal provisions for advocates and policymakers.

Conclusion

Overall, laws regulating workplace scheduling are growing in popularity and have gained some traction over the past decade. However, most jurisdictions do not have a comprehensive fair workweek law, resulting in a patchwork of discrete and disparate standalone protections in some jurisdictions, and no protection at all in many others. Further, preemption laws have blocked local jurisdictions from enacting workplace protections in several states. As a result, many hourly workers across the nation lack legal protection from the harms of unpredictable and unstable scheduling practices.

Critically, future research should focus on who benefits from these laws and who gets left behind. We know that women — especially Black and Latinx women — are most burdened by unpredictable scheduling and its harms. We also know that the current landscape of these laws is patchy at best, with many laws applying only to people working for large corporations in certain industries. Thus, future research must evaluate the effect of fair workweek laws on the populations most harmed by unpredictable and unstable scheduling. Such evaluation is vital to ensure that legal interventions are evidence-based and not perpetuating existing inequities.

To read the full report describing our research and findings, please visit phlr.org.

Acknowledgments

This research is made possible thanks to support from the TIME'S UP Foundation and the *Time's Up, Measure Up* initiative. *Time's Up, Measure Up* is generously supported by Pivotal Ventures, an investment and incubation company created by Melinda French Gates.

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