

# Management Alert



## SF “Retail Workers’ Bill of Rights” Enacted — Likely Employer Impact

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We previously [blogged](#) about pending legislation in San Francisco titled the “Retail Workers’ Bill of Rights,” a comprehensive set of policies introduced as two separate pieces of legislation ([here](#) and [here](#)) by San Francisco Supervisors [Eric Mar](#) and [David Chiu](#). After undergoing several amendments, the legislation was passed by the San Francisco Board of Supervisors on November 25, 2014. San Francisco Mayor Ed Lee had until December 5, 2014 to veto the legislation, but declined to do so, meaning that the effective date of the ordinances is January 4, 2015. They become operative 180 days after the effective date, so ironically, the “Retail Workers’ Bill of Rights” will become operative just in time for Independence Day 2015.

Below we summarize the legislation, outline the scope of applicability, and discuss anticipated compliance issues facing San Francisco employers.

### Summary of the Legislation

#### Board of Supervisors File No. 140880: Hours and Retention Protections for Formula Retail Employees

This ordinance applies to “Formula Retail Establishments” with 20 or more employees in San Francisco, and requires the following:

- **Offering Additional Hours of Work to Current Part-time Employees:** Formula Retail employers *and* certain janitorial or security services contractors or subcontractors of a Formula Retail employer (“Property Services Contractors”) must first offer current part-time employees additional hours, in writing, before hiring new employees or utilizing subcontractors or temporary workers of a services/staffing agency.

The offer of additional hours applies when the available work is the same or similar work that a current part-time employee is performing and is qualified to do. The Formula Retail employer is only required to offer the additional hours needed for a part-time employee to reach 35 hours of work per week.

- **Retention Of Employees for 90 Days upon Sale or Other Transfer of a Formula Retail Establishment:** If a Formula Retail Establishment changes ownership, the new Formula Retail employer (“Successor Employer”) must retain for 90 days those employees of the old Formula Retail employer (“Incumbent Employer”) who worked for at least six months prior to the sale (other than supervisory, managerial, or confidential employees). The Incumbent and Successor Employers must also maintain a retention list, post certain notices, and—in the case of the Successor Employer—make employment offers to workers on the retention list based on seniority, unless there is good cause to terminate.

## Board of Supervisors File No. 141024: Fair Scheduling and Treatment of Formula Retail Employees

This ordinance also applies to “Formula Retail Establishments” with 20 or more employees in San Francisco and requires Formula Retail employers **and** “Property Services Contractors” to provide the following to their San Francisco employees:

- **Initial Estimate of Minimum Hours:** Prior to the start of employment, the Formula Retail employer must provide a “good faith” estimate—in writing—of the employee’s expected minimum number of scheduled shifts per month, and the days and hours of those shifts. The employer is not bound by the estimate, and it does not constitute a contractual offer.
- **Two Weeks’ Notice of Schedules:** Requires a “biweekly schedule.”
- **Notice of Schedule Changes:** Advance notice must be provided of any changes made by the Formula Retail employer to the employees’ biweekly schedule (not including employee requested sick leave, time off, shift trades, or additional shifts).
- **Predictability Pay:** For each previously scheduled shift the Formula Retail employer moves or cancels, and for each previously unscheduled shift for which an employee is required to come to work, a Formula Retail employer must offer the following compensation in addition to the employee’s regular pay for working the shift: (a) one hour of pay for each shift change made with less than seven days’ notice but more than 24 hours’ notice, and (b) between two and four hours of pay, depending on the duration of the shift, for each shift change made with less than 24 hours’ notice.
- **On-Call Shift Pay:** Each on-call shift for which an employee is required to be available but is not actually called in to work (unless the employer cancels the on-call shift or moves it with at least 24 hours’ notice to the employee), the Formula Retail employer must provide between two and four hours of pay, depending on the duration of the on-call shift.

The advance notice requirement, predictability pay, and on-call shift pay requirements do not apply under certain specified circumstances listed in the ordinance, including when there are threats to employees, public utilities fail, or certain acts beyond the employer’s control. Examples provided in the ordinance include when other employees are unable to work and the employer did not receive advance notice, or where the employer requires overtime.

- **Equal Treatment:** Formula Retail Establishments must provide equal treatment to part-time employees regarding (1) starting hourly wage, (2) access to (prorated) employer provided paid and unpaid time off, and (3) eligibility for promotions, subject to certain qualifications.

Both ordinances require employers to give employees notice of certain rights and require that records demonstrating compliance with the ordinance be kept for at least three years. Also, both ordinances contain anti-retaliation provisions.

## Who Is an Employer? The Scope of “Formula Retail Establishments”

The ordinances apply to employers who operate “Formula Retail Establishments.” As outlined below, this includes businesses some may not consider to be “retail” as that term is commonly used.

The ordinances define a “Formula Retail Establishment” as a business located in San Francisco that engages in retail sales or services regulated as “Formula Retail Uses” under the San Francisco Planning Code with one change: the ordinances only apply to establishments with 20 or more retail sales locations worldwide.

So - this begs the question...what is a “Formula Retail Use,” as defined by the San Francisco Planning Code? Under Planning Code Section 303.1, which was amended on November 26, 2014, a “Formula Retail Use” is a type of “retail sales or service activity or retail sales or service establishment” which, along with eleven or more other retail sales establishments located worldwide, maintains two or more of the following features:

- **A standardized array of merchandise:** 50% or more of in-stock merchandise from one distributor that bears uniform markings.

- **A standardized façade:** the face or front of a building, including awnings, that looks onto a street or an open space.
- **A standardized décor and color scheme:** the style of interior furnishings, which may include but is not limited to, style of furniture, wall coverings or permanent fixtures and the selection of colors used throughout.
- **A uniform apparel:** standardized items of clothing including but not limited to standardized aprons, pants, shirts, smocks or dresses, hats, and pins (other than name tags) as well as standardized colors of clothing.
- **Standardized signage.**
- **A trademark or servicemark:** a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs that identifies and distinguishes the source of the goods from one party from those of others.

A "retail sales or service activity or retail sales or service establishment" includes the following:

- **Amusement Game Arcades**
- **Bars**
- **Drive-up Facilities:** excluding gas stations, service stations, or car washes
- **Eating and Drinking Uses:** uses that offer food or beverage for on- or off-site consumption.
- **Limited-Restaurants:** including bakeries, confectioneries, and delis that provide specialty food, along with uses that: do not provide on-site beer/wine sales for consumption on premises but may provide off-site beer/wine sales for consumption off premises; may or may not have seating; may have processing, manufacturing, or wholesaling of foods/goods on the premises as an accessory use.
- **Liquor Stores:** which require a state license to sell beer, wine, or distilled spirits in open or closed containers for consumption off the premises.
- **Massage Establishments:** fixed place of business where more than one person engages in the practice of massage.
- **Movie Theatres:** not including adult theatres.
- **Restaurants**
- **Sales and Service, Other Retail:** including self-service Laundromats and dry cleaners; florists; art galleries; art supply and framing stores; and retail uses that sell general and specialty groceries, pharmaceuticals, household goods and services, pet supplies and grooming services, apparel and accessories, toiletries, antiques, home furnishings, furniture, appliances, books, greeting cards, office supplies, copy services, music, sporting goods, toys, gifts, and photographic goods and services.
- **Sales and Service, Retail:** commercial use that provides goods and/or services direct to consumer, or to the business community, so long as they also provide goods to the public generally.
- **Service, Financial:** retail use that provides banking services and products to the public, such as banks, savings and loans, and credit unions, that occupy more than 15 of linear frontage or 200 square feet of gross floor area.
- **Service, Fringe Financial:** retail use that provides banking services and products to the public and is owned or operated by a "check casher" or by a "licensee."
- **Service, Limited Financial:** retail use that provides banking services, but occupies 15 feet or less of linear frontage or 200 square feet or less of gross floor area, including Automated teller machines (ATMs), if installed in such a facility or on an exterior wall as a walk-up facility.
- **Service, Personal:** retail use that provides individual grooming services, including salons, cosmetic services, tattoo parlors, and health spas, or instructional services not certified by the State Educational Agency, such as art, dance, exercise, martial arts, and music classes.
- **Take-out Food:** retail uses without seating that provide ready-to-eat prepared food or drinks to a high volume of customers intended to be immediately consumed off-premises, including delis, ice cream stores, and bakeries.

- **Tobacco Paraphernalia Establishment:** retail use where 11% or more of the square footage of occupied floor area, or more than 10 linear feet of display area projected to the floor, whichever is less, is dedicated to the sale, distribution, delivery, furnishing or marketing of Tobacco Paraphernalia from one person to another. “Tobacco Paraphernalia” means paraphernalia, devices, or instruments that are designed or manufactured for the smoking, ingesting, inhaling, or otherwise introducing into the body of tobacco, products prepared from tobacco, or controlled substances. “Tobacco Paraphernalia” does not include lighters, matches, cigarette holders, any device used to store or preserve tobacco, tobacco, cigarettes, cigarette papers, cigars, or any other preparation of tobacco that is permitted by existing law. Medical Cannabis Dispensaries are not “Tobacco Paraphernalia Establishments.”

## What Are the Penalties for Non-Compliance?

The San Francisco Office of Labor Standards Enforcement (“OLSE”) is responsible for implementing and enforcing the ordinances. If the OLSE investigates and determines there has been a violation, it can order compliance, impose administrative fines of differing amounts, and require employers to offer payment of lost wages and reimburse the City’s enforcement costs.

In addition, the San Francisco City Attorney may bring a civil court action against an employer believed to be in violation to recover lost wages, civil penalties, ordered reinstatement or other appropriate legal or injunctive relief. Upon prevailing in such civil action, the ordinances provide that the City shall be awarded its reasonable attorneys’ fees and costs.

## Issues on the Horizon

Various employers and employer groups currently are reviewing and evaluating:

- The legal validity of the law, including potential constitutional challenges;
- The impact of the law’s requirement that covered employers offer existing part-time employees full-time work before employing temporary workers on the large number of temporary workers who currently rely upon seasonal or occasional work at “Formula Retail Establishments”;
- The potentially burdensome nature of the required scheduling and scheduling change notices; and,
- The ambiguous nature and required breadth of provisions such as the “good faith” estimate to be given to all new hires in writing, setting forth the minimum number of scheduled monthly shifts, and the days and hours of those shifts.

As the Retail Workers’ Bill of Rights takes effect and these and other issues unfold, we will update you. Until then, we wish those in the Retail Industry a successful holiday season (in and outside of San Francisco)!

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**Seyfarth Shaw LLP Management Alert | December 10, 2014**

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