

Businesses Take Another Look at On-Call Scheduling Practices

On-call scheduling is coming under heavy fire around the country. Many hourly workers don't like it: They've stormed social media to criticize the last-minute cancellations of their work shifts and the lost income, resentment and chaos those changes cause.

New York's attorney general doesn't like it, either: Eric Schneiderman fired a warning shot at retailers last summer, claiming the practice was illegal. Workers weren't being paid for canceled shifts, he said, though state law required them to receive at least four hours of pay when they report to work but are sent home. Several major retailers, including Abercrombie & Fitch and Victoria's Secret, backed down, promising to cease the practice. Others followed suit.

And even some federal legislators don't like it: The Schedules That Work Act brought before Congress last summer aimed to penalize businesses that engage in unpredictable scheduling.

Despite the heightened scrutiny, no state bars the practice. But its days may be numbered as businesses explore alternatives. During these times of flux, HR professionals can help steer their companies to more efficient staffing models when possible and encourage the use of predictive analytics to reduce or eliminate the need for on-call staffing.

"You want to get to the point where your call-ins are the exception, not the rule," said Nathan Oleson, a labor and employment attorney who is a partner in Akin Gump Strauss Hauer & Feld's Washington, D.C., office. Decreased use of on-call scheduling means fewer unhappy employees and less likelihood of complaints and litigation, he said. "Ask your operations people: Are there better tools we can use at the front end to predict staffing needs to give people more notice?"

There likely are. Businesses are tapping "big data" analytics to dig deep into their metrics. They can review sales over various time periods, even drilling down to hour-by-hour revenue as well as seeing peak revenue days, weeks and seasons, or factoring in the impact of a snowfall or road construction. The data can be predictive as well, enabling managers to anticipate when they'll need the most coverage. Scheduling software has become more sophisticated over the past decade, Oleson said, but it may still be cost-prohibitive for some businesses.

Tapping Tech's Powers

The expanding availability of data analytics allows managers to schedule in real time and trim on-call shifts, even if they cannot completely eliminate them, said Hope Eastman, co-chair of the employment law group at Paley Rothman in Bethesda, Md. Eastman, who is licensed to practice in

California and advises California companies, has seen employers she advises tweak their policies to make schedules more predictable.

“Have as few employees on call as possible,” she said. “You might need someone to cover for workers who don’t show up or who quit abruptly or with very little notice.” But otherwise, use the practice judiciously. One option for minimizing the need for on-call workers is to put a very small number of employees on the on-call schedule for a week at a time every four to six weeks but otherwise give them predictable hours, Eastman said.

HR can also confer with workers to better understand their scheduling preferences. Asking staffers to define what they consider to be acceptable notice might offer some surprising answers. If workers say that 48 hours’ notice isn’t an inconvenience, management might be able to alter scheduling practices to eliminate shorter notice. Ideally, Eastman said, on-call scheduling should be the exception, not the norm.

Review Your Policies

On-call scheduling is a relatively recent phenomenon. The practice mushroomed in tandem with cellphone ownership. A recent [Pew Research Center report](#) found that smartphone ownership is highest among people ages 18-29, which is also the bulk of the on-call workforce. If your company policy defining what constitutes “reporting for work” predates mobile phones, a review is in order.

“You’re going to have to confront it at some point,” said Dan Pyne, co-chair of the employment law department at Hopkins & Carley in San Jose. Being proactive is wiser than attempting to defend an outdated policy in court. “Instead of arguing about whether the [existing company] policy is legal, ask instead, ‘does it serve our interests,’ or does it go much further than you really need? A lot of times, you can solve a lot of the problems by revising the policy to reflect the current needs of the business.”

He’s been urging his clients to reconsider the restrictions they impose on employees and, when possible, to rewrite them, making them as narrow as possible while still accommodating business needs. He cites the case of a client that runs large residential units. Company policy required an employee to report to the site to respond to a tenant complaint within 15 minutes of receiving a tenant’s call. Yet nearly every call the on-duty manager received was quickly and easily handled remotely. The manager contacted the appropriate service person, such as a plumber or electrician, and almost never had to report to the site.

Pyne persuaded his client to change its policy. Now the on-call manager must respond by phone or e-mail within 30 minutes and refer the problem to the appropriate service person. "People can do that remotely, and it's a minimal intrusion, so your risk of liability goes way down," he said.

Close-Up on California

He and other labor and employment attorneys who advise Golden State businesses are watching a California lawsuit filed in 2014 by a Victoria's Secret clerk seeking compensation for "call-in" scheduling practices she claims are unfair business practices. A federal judge granted an interim appeal in that case, *Casas v. Victoria's Secret Stores*, on what he called "a novel question of law": Does the requirement to "report for work" in order to be paid apply even when workers don't physically show up at the workplace? The opinion, which is expected this year, could affect employers' willingness to use on-call scheduling practices.

Lawmakers need not wait for a decision in that case; they have the freedom to enact laws that spell out exactly what constitutes "reporting for work" and impose penalties on businesses for noncompliance. San Francisco did exactly that in 2014, when the city's Board of Supervisors unanimously passed the [Retail Workers Bill of Rights](#), which requires large retailers, banks, hotels, restaurants and stores to schedule workers two weeks in advance and pay them if that schedule is altered on short or no notice. The law took effect in July 2015.

Oleson said other municipalities are unlikely to follow San Francisco's lead because the ordinance's terms are complex and challenging to implement. An effort to expand San Francisco's legislation to the entire state—[The Fair Scheduling Act of 2015](#)—didn't make it out of the state Assembly.

Confer with Colleagues

HR professionals with employees in New York or San Francisco have likely already spoken with their company's counsel and one another about the challenges of on-call scheduling. If you're facing similar dilemmas, reach out to colleagues who have already grappled with these issues. Have they altered their scheduling process to eliminate or reduce-on call practices? What technology are they using to help them manage schedules and staffing?

Ultimately, time, technology, litigation and legislation will resolve the problems surrounding on-call shifts. "You have a business world that has evolved dramatically but is constrained by laws that really have not evolved since they were written," Pyne said. "We are struggling to reconcile those two forces right now."

By June D. Bell - 2016