

Office of the Managing Director
Mayor's Office of Labor
REGULATIONS REGARDING CHAPTER 9-4600 OF THE PHILADELPHIA CODE:
FAIR WORKWEEK EMPLOYMENT STANDARDS

The following regulations regarding Chapter 9-4600 of The Philadelphia Code ("Fair Workweek Employment Standards") are hereby adopted:

1.0 Scope. These Regulations, promulgated by the Managing Director's Office pursuant to its authority under Section 8-407 of the Home Rule Charter, set forth additional definitions and directions pertaining to the Fair Workweek Employment Standards Ordinance (the "Ordinance"), Chapter 9-4600 of The Philadelphia Code.

1.1 Delay in Implementation. Implementation of Chapter 9-4600 of The Philadelphia Code shall begin on April 1, 2020. To be in compliance as of April 1, 2020, Covered Employers will need to provide their first Posted Work Schedule at least ten (10) days in advance of this date.

a. Good Faith Estimates shall be required by July 1, 2020, for any Employees hired prior to April 1, 2020.

2.1 Definitions. In addition to the definitions provided in § 9-4601, the following terms have the following meanings for the purposes of Chapter 9-4600.

2.2 Agency. The Office of Benefits and Wage Compliance, within the Mayor's Office of Labor.

2.3 Employee. As defined in § 9-4601(5), and further defined as an Employee of a Covered Employer who:

a. Is entitled to overtime pay under state and federal law;

b. Performs work involving the direct provision of retail, food or hospitality services to the public, including floor managers who directly oversee such services; Employees engaged in completing sales, such as a delivery driver; persons involved in security at a retail, food, or hospitality location, whose work involves at least occasional customer contact; persons involved in maintenance at a retail, food, or hospitality location whose work involves at least occasional responses to customer requests, and pharmacy and/or medical staff at a retail, food, or hospitality location; but excluding administrative and professional hourly Employees such as those in human resources, payroll, and receptionist positions, and the trades; but not excluding hotel, restaurant or other retail front desk or front-of-house Employees who greet or provide service to customers.

2.4 Co-Employers. More than one entity may be the "Employer" of an Employee, if Employment by one Employer is not completely disassociated from Employment by the other Employer. For example, an Employee may be employed by both the franchisee of a Chain entity, as well as by the Chain entity itself. Determining whether a co-employment exists will depend upon all of the facts in a particular case. A co-employment will generally be found where:

a. The Employee performs work that simultaneously benefits two or more Employers, or works for two or more Employers at different times during the workweek, such as pursuant to an arrangement

between the Employers, or one franchisee/Employer and the central office of the Chain entity, to interchange Employees among retail locations; or

- b. One Employer acts directly or indirectly in the interest of the other Employer or Employers in relation to the Employee; or
- c. Where the Employers are not completely disassociated with respect to the employment of a particular Employee and may be deemed to share control of the Employee, directly or indirectly, by reason of the fact that one Employer controls, is controlled by, or is under common control with the other Employer.
- d. Where the length of time a temporary employee employed by a temporary or staffing agency works at the location of a Covered Employer is at least 16 hours over a two-week period.

If the facts establish that an Employee is co-employed by two or more Employers, all of the co-Employers are responsible, both individually and jointly, for compliance with all of the provisions of the Ordinance with respect to the entire employment for the particular Work Week and pay period.

2.5 New Location. An establishment that (i) has been operated by a Covered Employer for less than 30 days; and (ii) had not previously been operated by such Covered Employer for at least 180 days prior to opening.

3.0 Good Faith Estimates: For purposes of section 9-4602, “Good faith” means a sincere intention to deal fairly with others. The good faith estimate is a reasonable, fact-based prediction; Employers may base it on forecasts, prior hours worked by a similarly-situated Employee(s), or other information. The good faith estimate shall include:

- a. The average number of work hours the Employee can expect to work each week over a typical 90-day period. The typical 90-day period is not simply an average taken from all hours worked in a year.
- b. A subset of days the Employee can expect to work, or a subset of days that the Employee will not be expected to work. The subset shall not include all days of the week;
 - i. An Employer may provide an alternating weekly Schedule, for a maximum of two weekly estimates so long as both average numbers of hours are for at least 32 hours per week. Each week may provide for different days the Employee can expect to work or not expect to work. If a Good Faith Estimate with multiple workweeks has been presented to the Employee (for example an A-Week and a B- Week), the Employer does not need to schedule the Employee to strictly alternate between weeks. However, when posting the Posted Work Schedule, the Employer shall note which specific week the Employee is being scheduled for.
- c. A subset of times or Shifts the Employee can expect to work, including start and end times. The subset of hours or Shifts shall be defined as not more than 50% greater than the average number of expected hours. The Employer shall not state the estimate as all work Shifts for which the Employer staffs its workplace.

- d. The average number of hours that the Employee will be expected to work. This number shall not be a range of hours; and
- e. Whether the Employee can expect to work any On-Call Shifts.

3.1 Lack of good faith. The Agency may infer a lack of good faith in the Good Faith Estimate from an Employer’s inability to identify a factual basis for the estimate.

3.2 Changes to the Good Faith Estimate.

a. An Employer must revise the Good Faith Estimate if a significant change (described in ¶ 3.3 a-c hereof) to an Employee’s Work Schedule for purposes of §9-4602(1) occurs. Revisions to the good faith estimate shall be provided to the Employee as promptly as possible.

b. An Employer may provide an Employee with a seasonal or term-limited Good Faith Estimate.

(i) All the rules applicable to a Good Faith Estimate shall apply. The seasonal or term-limited estimate shall contain a clear end date. At the expiration of the termed or seasonal Good Faith Estimate the Employer may provide a new Good Faith Estimate to the Employee. If the Employer does not provide a new Good Faith Estimate upon the expiration of a seasonal or term-limited Good Faith Estimate, it shall be presumed the Good Faith Estimate that was most recently presented to the Employee prior to the seasonal or term-limited Good Faith Estimate is once again active.

Good Faith Estimate Example #1

In this example, the Employer will present the Employee with a Schedule based on a subset of hours. Average Number of Hours: 25

Subset of Hours

Day	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Start	8 AM	N/A	11 AM	11AM	N/A	8AM	N/A
End	6P M		9 PM	9PM		1PM	
Scheduling Window	10 hours		10 hours	10 hours		5 hours	

On-Call Shifts required? Yes No

In this example, the Good Faith Estimate is in compliance. The Employer has provided the following in accordance with the ordinance and regulations:

- Average number of hours the Employee can expect to work each week over a typical 90-day period. The average is provided as a number and not a range of hours.

- The subset of days the Employee can expect to work
- The subset of hours that the Employee can expect to be scheduled on those days.
- The scheduling window is a total of 35 hours, which is within 50% of the average number of hours the Employee will work. *
- Whether or not the Employee can expect to work any On-Call Shifts.

* Note:

To determine the total number of hours an Employer can use for the subset of hours in a good faith estimate the Employer must determine how many hours are 50% greater than the “Average Number of Hours.

As in this example the Average Number of Hours is 25. $25 \times 50\% = 12.5$ hours. The subset of hours can at the most cover 37.5 hours a week ($25 + 12.5$). In this example, the subset of hours covers 35 hours ($10 + 10 + 10 + 5$) and therefore complies.

Based on the days and subset of hours identified in the Good Faith Estimate, the Employer has flexibility on the specific hours scheduled in the two-week posted schedule.

For example, this GFE identifies 8 AM – 1 PM on Saturday. If the Employee is then scheduled 8 AM – noon one week; 9 AM – 1 PM the next week; and 8 AM – 1PM the following week, the Schedule is in compliance with the GFE.

Conversely, if the Employee was scheduled from 10 AM – 3PM on a Saturday, that would not be in compliance and would count as an incidence of significant change from the Good Faith Estimate. Per Regulation 3.3 c., if the Employee was scheduled 10 AM – 3 PM three workweeks out of six consecutive workweeks, that would trigger a significant change from the Good Faith Estimate.

Good Faith Estimate Example #2

In this example, the Employer presents the Employee with a Good Faith Estimate based on a subset of hours. Here the GFE includes estimates for more than one week.

Alternating Weekly Schedule

A-Week, Average Number of Hours:

36 Subset of Days and Hours:

A-Week

Day	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Start	8 AM	N/A	11 AM	11 AM	8 AM	8 AM	N/A
End	6 PM		9 PM	9 PM	6 PM	6 PM	
Scheduling Window	10 hours		10 hours	10 hours	10 hours	10 hours	

On-Call Shifts required? Yes No

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B-Week, Average Number of Hours:

32 Subset of Days and Hours:

B-Week

Day	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Start	2 PM	2 PM	N/A	2 PM	12 PM	N/A	N/A
End	2 AM	2 AM		12 AM	12 AM		
Scheduling Window	12 hours	12 hours		10 hours	12 hours		

On-Call Shifts required? Yes No

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In this example, the Good Faith Estimate is in compliance. The Employer has provided the following in accordance with the ordinance and regulations:

- Average number of hours the Employee can expect to work each week over a typical 90-day period. For both A-Weeks and B-Weeks the average is provided as a number and not a range of hours.
- The subset of days the Employee can expect to work on an A-Week and on a B-Week.
- The subset of hours that the Employee can expect to be scheduled on those days.
- The Average Number of Hours for both the A-week and B-week is at least 32 hours per week.
- The scheduling windows for A-Weeks and B-Weeks are within 50% of the average number of hours the Employee will work. (For A-Weeks, 50 is within 50% of 36; for B-Weeks, 46 is within 50% of 32.)*
- Whether or not the Employee can expect to work any On-Call Shifts.

*Note:

To determine the total number of hours an Employer can use for the subset of hours in a good faith estimate the Employer must determine how many hours are 50% greater than the “Average Number of Hours.

As in week A’s example the Average Number of Hours are 36. $36 * 50\% = 18$ hours. The subset of hours can at the most cover 54 hours a week ($36 + 18$). In this example the subset of hours above covers 50 hours ($10 + 10 + 10 + 10$) and therefore complies.

As in week B’s example the Average Number of Hours are 32. $32 * 50\% = 16$ hours. The subset of hours can at the most cover 48 hours a week ($32 + 16$). In this example the subset of hours above covers 46 hours ($12 + 12 + 10 + 12$) and therefore complies.

As indicated in Section 3.0 (b)(i), a Good Faith Estimate which includes estimates for more than one week is in compliance with the ordinance and regulations so long as the average number of hours is at least 32-hour per week. However, Employers should be aware that this is a more complicated GFE model. A GFE shall allow for no more than two possible workweeks.

If a GFE with multiple workweeks has been presented to the Employee, when posting the Posted Work Schedule, the Employer shall choose one specific workweek (in this example, the A-Week or the B-Week) as the Schedule the Employee will follow for a particular week.

For every Employee presented with a GFE that includes estimates for multiple workweeks, the Employer shall include a notation identifying which specific workweek the Employee is being scheduled for on the Posted Work Schedule.

Good Faith Estimate Example #3

In this example, the Employer will present the Employee with a Schedule based on a subset of hours the Employee will *not* be scheduled.

Average Number of

Hours: 32 Subset of Hours

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
May be Scheduled for Shift?	Yes / No	Yes / No	Yes / No	Yes / No	Yes / No	Yes / No	Yes / No
5 AM	No	No			No	No	No
6 AM	No	No			No	No	No
7 AM	No	No			No	No	No
8 AM	No	No			No	No	No
9 AM	No	No			No	No	No
10 AM		No			No	No	No
11 AM		No			No	No	No
12 PM		No			No	No	No
1 PM		No			No	No	No
2 PM		No			No	No	No
3 PM		No	No		No	No	No
4 PM		No	No				No
5 PM		No	No	No			No
6 PM		No	No	No			No
7 PM		No	No	No			No
8 PM		No	No	No			No
9 PM		No	No	No			No
10 PM	No	No	No	No		No	No
11 PM	No	No	No	No		No	No
12 PM	No	No	No	No	No	No	No
Scheduling Window	12 hours	None	10 hours	12 hours	8 hours	6 hours	None

On-Call Shifts required? Yes No

In this example, the Good Faith Estimate is in compliance. The Employer has provided the following in accordance with the ordinance and regulations:

- Average number of hours the Employee can expect to work each week over a typical 90-day period. The average is provided as a number and not a range of hours.

- The subset of days the Employee can expect *not to work*
- The subset of hours that the Employee can expect *not to be* scheduled on days they do work.
- The scheduling window is a total of 48 hours, which is within 50% of the average number of hours the Employee will work. *
- Whether or not the Employee can expect to work any On-Call Shifts.

* Note:

To determine the total number of hours an Employer can use for the subset of hours in a good faith estimate the Employer must determine how many hours are 50% greater than the “Average Number of Hours.

As in this example the Average Number of Hours are 32, $32 * 50\% = 16$ hours. The subset of hours can at the most cover 48 hours a week (32+16). In this example the subset of hours above covers 48 hours (12 + 10 + 12 + 8 + 6) and therefore complies.

Based on the days and subset of hours that the Employee will *not be* scheduled to work identified in the Good Faith Estimate, the Employer has flexibility on the specific hours the Employee will be scheduled for.

For example, under this GFE, on a Wednesday the Employee may be scheduled as early as 5 AM, but the Employee’s Shift would end no later than 3 pm. On a Saturday the Employee would be scheduled no earlier than 4PM, but the Employee’s Shift would end no later than 10 PM.

If on a Saturday, the Employee was scheduled earlier than 3 PM or later than 11 PM that would not be in compliance and would count as an incidence of significant change from the Good Faith Estimate. Per Regulation 3.3 c., if on a Saturday the Employee was scheduled earlier than 3 PM or later than 11 PM three workweeks out of six consecutive workweeks, that would trigger a significant change from the Good Faith Estimate.

Also note that this example also shows GFE where every hour the business is open is contemplated. This is contrasted with Example #1 and Example #2 which are less detailed in terms of business hours. Either approach is valid and would be in compliance.

3.3. Significant Change.

Qualifies as Significant Change:

- a. Six (6) workweeks out of twelve (12) consecutive workweeks in which the number of actual hours worked differs by twenty percent or more from the good faith estimate during each of the three weeks, and the differences are not due to documented Employee-initiated changes;
- b. Six (6) workweeks out of twelve (12) consecutive workweeks in which the days of work differ from the good faith estimate at least once per week, and the differences are not due to documented Employee-initiated changes; or
- c. Six (6) workweeks out of twelve (12) consecutive workweeks in which the start or end times of at

least one Shift per week differ from the good faith estimate by at least one hour; or, if Shifts have been identified, start and end times of Shifts differ by at least one hour from the range by which the Shift was identified; and the differences are not due to documented Employee-initiated changes.

Does not qualify as a Significant Change:

- a. Changes to an Employee's Schedule which are due to documented voluntary changes (see section 6.0(b) hereof) do not qualify as an incidence of divergence from the Good Faith Estimate when calculating whether a Significant Change has occurred.
- b. Changes to an Employee's Schedule which occur because the Covered Employer's operations cannot begin or continue (see section 6.0(d) hereof) do not qualify as an incidence of divergence from the Good Faith Estimate when calculating whether a Significant Change has occurred.
- c. Changes to an Employee's Schedule which are due to a documented Hotel Banquet exemption (see section 6.0(e) hereof) do not qualify as an incidence of divergence from the Good Faith Estimate when calculating whether a Significant Change has occurred.
- d. Changes to an Employee's Schedule which are due to a documented Ticketed Event exemption (see section 6.0(f) hereof) do not qualify as an incidence of change from the Good Faith Estimate when calculating whether a Significant Change has occurred.
- e. Changes to an Employee's Schedule are due to the Employee being removed from the Schedule for documented disciplinary reasons identified in a written policy provided by the Covered Employer to its Employees.

3.4. Joint and Several Liability. For any Employee who is co-employed by two or more Employers, including temporary services, staffing agencies, or franchisee-franchisor sharing arrangements, each Employer shall be individually and jointly responsible for providing a good faith estimate at the beginning of each distinct assignment for a Covered Employer. Such Employees shall be considered new Employees upon starting each distinct assignment for a Covered Employer(s).

3.5 Training Period. A Good Faith Estimate shall not be required during an Employee's training period. Training periods shall be based on reasonable business practice. In the event the Agency is called upon to investigate a complaint related to a training period, the Employer shall be prepared to document how the training period in question is based on reasonable business practice.

3.6 New Locations. The provisions of § 9-4602(1) and this ¶ 3.0 shall not apply with respect to Employees working exclusively at a New Location.

4.0. Advance Notice of Work Schedules. Pursuant to §9-4602 (4) the written notice of the Work Schedule shall be provided to all Employees in the workplace, by posting either electronically or in conspicuous physical location; at least ten (10) days before the first day of the new Schedule. (Effective January 1, 2021, the Schedule shall be posted at least 14 days in advance.) The Work Schedule shall be time-stamped with its date and time of posting.

4.1. Names of all Employees. The Posted Work Schedule shall include the names of all Employees who work at that workplace, whether or not they are scheduled to work that week. Thus, an Employee who is on vacation in the listed week, or has no work hours for some other reason, must still be listed on the Schedule, with an indication that no work hours have been assigned. To be in compliance, names shall include a minimum of first initial and full last name. Covered Employers may go beyond the minimum requirement and list full names for their employees.

Exception: If an employee who is a victim of domestic violence requests in writing that the Employee's name not be included in the Posted Work Schedule, an employer shall not include that employee's name. The Employer shall however retain records of such schedule for compliance purposes.

4.2. Notice of Change to Work Schedule. The Employer shall provide notice of any Employer-initiated change to the Work Schedule that occurs after the required advance notice of the Work Schedule (including during time when the Schedule is active), as promptly as possible after learning of the need for such change. Notice shall be provided by in-person conversation, telephone call, email, text message, or other accessible electronic or written format. In addition, the posted notice of the work Schedule shall be revised to reflect the change no later than 24 hours after the Employer makes the change.

4.3. Employee's Right to Refuse. An Employee may decline to work any additional hours or Shifts not included in the notice of Work Schedule posted pursuant to §9-4602(4) and ¶ 4.0 hereof. The Employee's voluntary consent to work such additional hours must be provided by Written Communication, including in physical or printable electronic format. The Employee's consent must relate to a specific Shift and cannot be a general or long-term statement of availability.

4.4. Employee-Initiated Changes. Changes to the Work Schedule that are initiated by the Employee after the required advance notice has been given are not subject to the notice requirements of §9-4602(5) and ¶ 4.2 hereof. Such changes include use of sick leave, other compensated or uncompensated time off, Shift trades with other Employees, and voluntary additions or subtractions of hours that are initiated by the Employee.

5.0. Compensation Required for Changed Work Schedules. For additional hours that the Employer does not intend to fill through hiring, the Employer is not required to observe the notice and distribution requirements of § 9-4605 but is required to pay Predictability Pay when an exception is not present.

Example 1. At 11 am, the manager receives a phone call from Maya, who is scheduled to work from 2 pm until 10 pm. Maya says that she won't be able to come in for the Shift. The manager calls Steven, who is not scheduled to work that day, and asks if Steven can fill the Shift. Steven responds that he can work from 5 pm until 10 pm that day. The manager then approaches Tina, who is currently working and whose Shift is scheduled to end at 2 pm, to ask if Tina can stay until Steven comes in at 5 pm. Tina agrees. The manager's activity does not violate section 9- 4605, Offer of Work to Existing Employees. However, since the Manager did not use mass communication, the Employer will be required to pay Predictability Pay to both Steven and Tina.

Example 2. The store manager receives notice from the corporate office of a company-wide, three-day sales event (that will occur in five days) that will require additional staff on the Schedule for those days. The store manager approaches Ben and Luke, two of the store's 25 Employees, and verbally offers them the opportunity to work additional hours during the sale. Ben and Luke accept all of the additional hours. The manager's activity does not violate section 9-4605, Offer of Work to Existing Employees; however, the Employer will be required to pay Predictability Pay.

Example 3. Same as Example 2, except that Ben and Luke decline the additional hours. The manager determines, without further inquiry, that the other 23 Employees at the site are not qualified for the position, so the manager hires temporary workers to work during the sales event. The Employer has violated section 9-4605, Offer of Work to Existing Employees, because the Employer did not provide notice of the available hours to all 25 existing Employee before the Employer decided to hire an external candidate. The manager is prohibited from making the determination of qualifications without first posting the hours to all Employees.

Example 4. The Employer requires all Employees to designate in writing their desired number of weekly work hours and the times and days they are available to work. The Employer explains how Employees can update this information if their preferences change. When additional hours become available, the Employer only offers hours pursuant to the preferences recorded by existing Employees. The Employer then hires contract workers to fill the remaining time slots. The Employer's activity does not violate section 9-4605, Offer of Work to Existing Employees.

5.1 Predictability Pay. For purposes of calculating Predictability Pay, the rate of pay for a Tipped Employee shall be determined as follows:

(a) If the Employee is paid at least \$7.25 / hour by the Employer, the rate of pay shall be the hourly amount paid to the Employee by the Employer.

(b) If the Employee is paid less than \$7.25 / hour by the Employer, the rate of pay shall be the numerical average of (1) the hourly wage for Standard Occupational Classification (SOC) Code 35-3011 "Bartenders," (2) the hourly wage for SOC 35-3031 "Waiters & Waitresses," and (3) the hourly wage for SOC 35-9011 "Dining Room & Cafeteria Attendants & Bartender Helpers," all as published for Philadelphia County by the Pennsylvania Department of Labor and Industry. This average shall be calculated and published annually by the Agency by no later than June 15 of each year, based on the most recently published data at the time of publication; however, the rate shall not be less than it was the previous year. The rate shall be effective from July 1 to the next June 30.

When Hours are added and/or date or time or location of a work Shift is changed:

Example 1. Dwayne's rate of pay is \$15.00. The Posted Work Schedule indicates that Dwayne is scheduled for the afternoon Shift on Wednesday at the North Philly location. On Monday, Dwayne is informed that he is needed at the West Philly location instead for his Wednesday afternoon Shift, however his total hours remain the same. Dwayne is owed one (1) hour of Predictability Pay calculated at his rate of pay since the location of his work Shift has changed from what

was posted in the Posted Work Schedule.

Example 2. Melissa works as a bar-back. Her rate of pay is \$8.50 an hour. The Posted Work Schedule indicates that she is scheduled for the Friday afternoon Shift. On Friday afternoon the workplace is busy and Melissa is asked to stay two additional hours. She accepts the additional hours and is owed Predictability Pay because the increase in hours was not due to one of the exemptions identified in §9-4603 (2). Since Melissa's rate of pay is higher than \$7.25, her Predictability Pay is based on her rate of \$8.50.

Example 3. Candace works as a bartender and is paid \$4 an hour. The Posted Work Schedule indicates that she is scheduled for the Monday afternoon Shift. On Sunday Candace learns that she has been reassigned to the Monday closing Shift and the Thursday afternoon Shift. Candace is owed one (1) hour of Predictability Pay for Monday since the time of her work Shift has changed, and one (1) hour of Predictability Pay for Thursday since her total hours have increased, from what was posted in the Posted Work Schedule. In this example, assume the Predictability Pay for the Tipped Employees in the current year is calculated at \$11 an hour*. Candace is therefore entitled to \$11 for each incidence of Predictability Pay.

*Reminder: See the Tipped Rate published by the Agency.

When hours are removed from the Employee's Schedule because a Shift has been shortened or cancelled; including shortening or cancelling or not calling-in an Employee for an On-Call Shift:

Example 1. The Posted Work Schedule indicates that Ericka is scheduled for the afternoon Shift on Wednesday. On Monday, Ericka learns the Shift was cancelled. The Shift was scheduled for 8 hours, and Ericka's rate of pay is \$12 an hour.

Ericka's Predictability Pay is calculated as follows:

$$8 \text{ (hours)} \times \$12 \text{ (rate of pay)} = \$96$$

$$96 \div 2 \text{ (}\frac{1}{2}\text{ of what Ericka would have earned, had she worked as scheduled)} = \$48$$

$$\text{Predictability Pay} = \underline{\$48}$$

Example 2. Andrew works as a hotel housekeeping attendant and his rate of pay is \$15.00. The Posted Work Schedule indicates that Andrew is scheduled for 8 hours on Wednesday. On Wednesday, Andrew is cut after 5 hours. Since Andrew's rate of pay is \$15.00 an hour his Predictability Pay is based on his rate of pay.

Andrew's Predictability Pay is calculated as follows:

$$3 \text{ (hours)} \times \$15 = \$45$$

$$45 \div 2 \text{ (}\frac{1}{2}\text{ of what Andrew would have earned, had he worked as scheduled)} = \$22.50$$

$$\text{Predictability Pay} = \underline{\$22.50}$$

Example 3. Rich works as a waiter and is paid \$2.83 an hour. The Posted Work Schedule indicates that Rich will work from 7 AM – 2 PM on Sunday. On Sunday, Rich is cut from the floor at 11:30 AM. In this example, assume the Predictability Pay for the current year is calculated at \$11 an hour*.

Rich's Predictability Pay is calculated as follows:

$$2.5 \text{ (hours)} \times \$11 = \$27.50$$

$$\$27.50 \div 2 \text{ (}\frac{1}{2} \text{ of what Rich would have earned, had he worked as scheduled)} = \$13.75$$

$$\text{Predictability Pay} = \underline{\$13.75}$$

*Reminder: See the Tipped Rate published by the Agency.

Example 4. Yessenia works as a retail clerk and is paid \$8.50 per hour. The Posted Work Schedule indicates that she is scheduled for 5 hours On-Call Shift on Monday. On Monday, Yessenia is not called in to work. Since Yessenia's rate of pay is \$8.50 her Predictability Pay is based on her rate of pay.

Yessenia's Predictability Pay is calculated as follows:

$$5 \text{ (hours)} \times \$8.50 = \$42.50$$

$$\$42.50 \div 2 \text{ (}\frac{1}{2} \text{ of what Yessenia would have earned, had she been called in)} = \$21.25$$

$$\text{Predictability Pay} = \underline{\$21.25}$$

6.0. Exemptions from Predictability Pay. There are several instances in the ordinance where a Covered Employer may claim an exemption from Predictability Pay.

- a. **24-hour window for initial changes.** Pursuant to §9-4603(2)(g), the Covered Employer has 24-hours to make changes to the Posted Work Schedule after it is initially posted. Changes made within this window are not subject to Predictability Pay. The final version of the Posted Work Schedule must be time-stamped with its final date and time to document that it was issued within the 24-hour window.
 - i. **Correction to the Ordinance.** In § 9-4603(2)(g) the Fair Workweek Employment Standards Ordinance states that there is an exemption to Predictability Pay where "Changes are made to the Posted Work Schedule within 24 hours after the advance notice required in §9-4602(3)." The code section referenced should be §9-4602(4)." The Regulations apply the exemption as intended.
 - ii. **Extra notice permissible.** Employers may extend the 24-hour period of exemption from the Fair Workweek Employment Standards Ordinance by posting their Posted Work Schedules earlier than required by the ordinance. The exemption period expires 24 hours after the deadline to post the new Schedule.

Example 1. Effective April 1, 2020, Employers are required to post the Posted Work Schedule at least ten (10) days before the first day of the new Schedule. For a Schedule that begins on April 1, 2020 if the Employer posts the Schedule at 8:00 AM on March 22, the Employer has until 8:00 AM on March 23 to make corrections and post a final Work Schedule without paying Predictability Pay.

If, for the same Schedule that begins on April 1, the Employer posts its Posted Work Schedule eleven (11) days in advance at 8:00 AM on March 21, the Employer would still have until 8:00 AM on March 23 to make corrections and post a final Work Schedule without paying

Predictability Pay.

Example 2. Effective January 1, 2021, the Schedule shall be posted at least fourteen (14) days in advance. For a Schedule that begins on January 1, 2021, if the Employer posts the Schedule at noon on December 18, 2020, the Employer has until noon on December 19, 2020, to make corrections and post a final Work Schedule without paying Predictability Pay.

If for the same Schedule that begins on January 1, 2021 the Employer posts its Posted Work Schedule sixteen (16) days in advance at noon on December 16, the Employer would still have until noon on December 19 to make corrections and post a final Work Schedule without paying Predictability Pay.

- b. Voluntary Changes.** Covered Employers are not required to pay Predictability Pay when adding or subtracting hours and/or Shifts based on voluntary changes requested by the Employee. This exemption includes: voluntary additions or subtractions of hours that are initiated by the Employee, the use of sick leave, vacation leave, or other leave policies offered by the Employer, or a mutually agreed-upon Shift trade or coverage arrangement between Employees.
 - i.** Such requests shall be in writing to qualify for the exemption from Predictability Pay.
 - ii.** Employers should be aware that documentation of such requests should be recorded as soon as possible.

Example 1. On Thursday morning, Jillian calls out because of a flat tire. On Jillian's next Shift she provides written confirmation that the reduction of hours was voluntary. Jillian's Employer does not owe her Predictability Pay for the Shift she is missing, because the change was Employee initiated. The manager decides not to fill the Shift. Nothing else is required by the ordinance.

Example 2. Wayne is scheduled for Thursday night but wants to give up that Shift to attend a parent- teacher conference at his son's school. He contacts another Employee, Mariella, and she agrees to cover the Shift. Wayne and Mariella inform the manager of the change and document in writing that it is a mutually agreed-upon coverage agreement between two Employees. Since this is a mutually agreed-upon Shift trade or coverage arrangement between Employees there is no requirement for Predictability Pay. Nothing else is required by the ordinance.

Example 3. On a slow weekday night, the manager announces to Employees that they will take volunteers if anyone wants to be cut early. Rebecca and Fonda both volunteer to go home early and agree to record in writing that the reduction of hours is voluntary. The Employer does not owe Rebecca or Fonda any Predictability Pay for the reduction of hours because the reduction was voluntary.

Example 4. Same as above but no one volunteers. The manager cuts two Employees chosen randomly, Manny and Amanda. The Employer owes Manny and Amanda Predictability Pay.

- c. Employee Initiated Changes & Mass Communication of Additional Hours.** Pursuant to §9-4603(2)(e), when additional hours become available due to an Employee initiated change (e.g. calling in sick) an Employer is not required to pay Predictability Pay if mass communication is used to fill the

available hours.

- i. The communication shall make clear that accepting such hours is voluntary and that Employees have the right to decline such hours.
- ii. A mass Written Communication can be electronic or on paper, whichever is standard in the particular workplace, so long as it is genuinely and readily available to all Employees.

Example 1. On a Tuesday morning Nate calls out sick from his scheduled afternoon Shift. After Nate calls out sick, the Employer follows the mass communication protocol and issues a mass communication to the other staff informing them that Nate's Shift is available. Dana responds to the mass communication and volunteers to work Nate's Shift. The Employer does not owe Dana any Predictability Pay for the addition of hours because the addition was in response to an Employee-initiated change and in response to a mass communication that hours were available.

Example 2. Same as above, however this time the Employer does not mass communicate the open Shift and instead unilaterally assigns Jesse to cover Nate's Shift. The additional hours were not voluntary. The Employer owes Jesse Predictability Pay for the new hours he is required to work. The Employer may also owe Presumed Damages, pursuant to §9-4611(6).

- d. **The Covered Employer's Operations Cannot Begin or Continue.** Example of when an Employer's operation cannot begin or continue are: Closing of the Employer's operations due to a health or safety concern that involved a 911 call, a gas leak, flooded streets, violence at the place of business, pipe bursting inside the business, among other things.
- e. **Hotel Banquets.** Covered Employers are not required to pay Predictability Pay when a hotel banquet event is scheduled, due to circumstances that are outside the Employer's control, after the Employer provides the Posted Work Schedule.
 - i. Hotel banquet events qualifying under this exemption are catered events staffed by a hotel's banquet department staff. If a hotel does not have a banquet department, this exemption does not apply.
 - ii. A banquet is scheduled at the time that the customer provides a deposit, gives a credit card authorization, signs a contract, or reserves a space, whichever comes first, in connection with a specific date.
 - iii. Only hotel staff who are scheduled to work at the banquet, including kitchen staff, food prep, set-up, waiters, bartenders, and other staff associated with the event itself shall be included in the exemption from Predictability Pay.
- f. **Ticketed Events.** Covered Employers are not required to pay Predictability Pay when a Ticketed Event is cancelled, scheduled, rescheduled, postponed, delayed, increases in expected attendance by 20% or more, or increases in duration, due to circumstances that are outside the Employer's control and that occur after the Employer provides the Posted Work Schedule.
 - i. Ticketed Events qualifying under this exemption are events where tickets are available for sale to

the general public. Events which are generally understood to be family events, such as weddings, sweet sixteens, bridal showers, etc., are not exempted under this section. Events which are generally understood to be private events, such as company trainings, end-of-year parties, corporate retreats, etc., are not exempted under this section.

- ii. Ticketed Events such as concerts and sporting events shall be considered scheduled when the date and time of the event becomes known to the Employer. Ticketed Events that are hosted on behalf of a customer shall be considered scheduled at the time that the customer provides a deposit, gives a credit card authorization, signs a contract, or reserves a space, whichever comes first, in connection with a specific date.
- iii. This exemption for certain Ticketed Events applies to Schedule changes for Employees scheduled to work on the premises at which the Ticketed Event, as defined in section 9-4601(14), was scheduled to occur. Only staff who are scheduled to work at the Ticketed Event itself shall be included in the exemption from Predictability Pay. If the Employer intends to claim an exemption under this section, the Employer shall retain records to justify the exemption for a period of two years.
- iv. Events for which admission is free or the price is de minimis are not exempted under this section.

7.0 Right to Rest between Work Shifts. Pursuant to §9-4604, an Employer may not require an Employee to commence a Shift sooner than nine hours after the completion of a previous Shift. Commencement and completion shall be determined by the Employee's Posted Work Schedule.

- a. An Employee may voluntarily consent to work a Shift that commences sooner than nine hours after the completion of a previous Shift, but an Employer may not accept that consent unless it is in writing.
 - i. In the event that consent is given and accepted an Employer shall provide an Employee with \$40 compensatory pay for each such Shift worked.
 - ii. In the event that a Shift is required without consent and that Shift is worked, the Covered Employer shall provide the Employee with \$40 compensatory pay and the Employer may be liable for fines in accordance with this ordinance, pursuant to section 9-4611(6).

8.0 Offer of Work to Existing Employees. Pursuant to § 9-4605, this Section 8.0 sets forth the required prerequisites that an Employer must follow before hiring any additional Employee or Employees or contracting with any additional workers or staffing companies. An Employer who does not hire or contract with any new Employees to fill additional hours is not required to comply with this ¶ 8.0. See ¶ 5.0.

Example: If additional hours become available on a permanent basis because an Employee has resigned or because of increased sales activity, or if additional hours become available on a temporary basis because of a special promotion or because of seasonal fluctuations, these provisions must be followed before hiring or contracting with anyone who is not an existing Employee. This

example is not an exhaustive list.

8.1 Existing Employee. For purposes of this Section 8.0, an “existing Employee” includes any Employee who works at the workplace where additional hours are available, regardless whether the Employee currently works in the same position for which the additional hours are available; and regardless of the number of hours the Employee has been scheduled in previous weeks.

Exception: If it is a regular practice of the Employer to schedule Employees across multiple locations in the City, then all Employees at such locations they own and operate shall be considered “existing Employees.”

8.2. Notice. The Employer shall provide written notice of available work Shifts for at least 72 hours, unless a shorter period is necessary in order for the work to be timely performed. When an Employer has less than 72 hours’ notice to fill an open Shift, the Employer may offer an existing Employee the opportunity to work the Shift temporarily during the 72-hour notice period.

8.3 When Predictability Pay applies to an Offer of Work. If the Employer offers and the Employee accepts additional work hours that occur within the posting period defined in Section 9-4602(3) (Advance Notice of Work Schedule), the Employer will need to obtain written consent pursuant to section 9-4602(6); and the Employer will need to pay the worker the applicable Predictability Pay defined in section 9-4603(1)(a), unless an exception to the Predictability Pay is present.

8.4 Notice and Posting of new work hours. The notice communicating the offer of work must be in writing and posted in a conspicuous location in the workplace where notices to Employees are customarily posted. The notice must also be shared electronically if scheduling information is customarily made available to Employees in an electronic format.

The notice communicating the offer of work must contain the following information:

- a. Available work Shifts or days and times they must be available to work;
- b. Length of time the Employer anticipates requiring coverage of the additional hours;
- c. Description of the position;
- d. Required qualifications for the position;
- e. The process by which Employees may notify the Employer of their desire to work the offered hours;
- f. If the notice is being posted for less than 72 hours pursuant to rule 8.2, the notice shall contain that information.

8.5 Distributing new work hours. Existing Employees at the workplace where the additional hours are made available must be given priority in distributing additional hours provided that they are qualified to perform the work. If it is a regular practice of the Employer to schedule Employees across multiple locations in the City that the Employer owns and operates, and no qualified Employee where the additional hours are made available volunteers for the hours, then existing Employees at the Employer’s other locations in the City must be given priority before any outside hiring commences.

8.6 Qualifications. A decision to hire new Employees from an external applicant pool or subcontractors rather than allocating the work to existing Employees violates the ordinance when the circumstances indicate lack of good faith or an unreasonable exercise of judgment.

Example 1: An Employer posts an opportunity for additional hours with a notice that states that the position requires experience in both cashier and inventory. Two Employees express a desire to work the hours: Rudy regularly works in both cashier and inventory positions for this Employer, while Stefan works in a cashier position but worked in inventory in a previous job. The Employer assigns all additional hours to Rudy. This assignment reflects a reasonable, good faith judgment regarding qualifications

Example 2: An Employer posts an opportunity for additional hours with a notice that states that the position requires experience as a bartender. The only existing Employee who expresses a desire for the hours is Stefan, who works in a server position and has two years of bartending experience in a previous job. The manager rejects Stefan as unqualified and hires a new Employee, Maria, who has two years of bartending experience in a previous job. This action appears to violate the requirement to determine qualifications reasonably and in good faith, because Maria has similar qualifications as Stefan – two years of bartending experience from a previous job.

Example 3: An Employer posts an opportunity for additional hours with a notice that states that the position requires experience in both cashier and inventory. The only existing Employee who expresses a desire for the hours is Remi, who works in a cashier position and has two years of inventory experience in a previous job. The manager rejects Remi as unqualified and hires a new Employee, Paul, with three years of inventory experience. Paul is assigned to work exclusively as a cashier. This action appears to violate the requirement to determine qualifications reasonably and in good faith, because inventory experience is not relevant to the position.

Example 4: An Employer rejects an existing Employee, Evelyn, as not qualified for additional hours on the basis of poor performance; and the Employer instead arranges with a temp agency for a temporary worker. Evelyn’s personnel file indicates no disciplinary issues, and performance reviews characterize her work as “good.” The Employer’s decision appears to violate the requirement to determine qualifications reasonably and in good faith, because there is no evidence of Evelyn’s poor performance.

8.7 Distributing additional hours. The Employer may distribute all additional hours to one qualified Employee or distribute the hours among several qualified Employees. The Employer has discretion to distribute hours among qualified existing Employees subject to the limitations specified in section 9-4605(3)(b). An Employer is not required to assign available Shifts when it would require the Employer to pay overtime.

Example 1: An Employer posts an opportunity for two eight-hour Shifts, one on Monday and the other on Tuesday. Tricia expresses a desire to work the Monday Shift and Javier expresses a desire to work the Tuesday Shift. Both have the requisite qualifications but giving Tricia the Shift would put Tricia into overtime. The Employer must assign the Tuesday work to Javier and may hire a new Employee who is available for the Monday Shift.

8.8 Hiring external staff. If the conditions for hiring external staff are satisfied, the Employer must offer

those new Employees the Shifts and the jobs that were advertised in the notice to existing workers.

Example 1: The Employer posts an opportunity for hours from 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the existing Employees express a desire to work the additional hours. The Employer hires a new Employee and, during the first month of employment, assigns him to work 8 pm to 12 am on Friday, Saturday and Sunday. On occasion, the Employer also assigns the new Employee to fill Shifts during the day or on other evenings, to meet increased demand or fill in for absent Employees. The Employer has complied with the ordinance by hiring a new Employee to perform the work described in the notice.

Example 2: The Employer posts an opportunity for hours from 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the existing Employees express a desire to work the additional hours. The Employer hires a new Employee and, during the first month of employment, assigns her to Shifts between the hours of 9 am and 7 pm. The Employer has not complied with the ordinance because the hours in the notice do not match the hours actually assigned to the Employee and the Employee is assigned hours that were not previously offered to existing Employees.

Example 3: The Employer posts an opportunity for hours from 8 pm to 12 am on Friday, Saturday, and Sunday nights. None of the existing Employees express a desire to work the additional hours. The Employer hires three new Employees: Rob, Danielle and Madison. The Employer assigns Rob to work 8 pm to 12 am on Friday, Saturday and Sunday. The Employer assigns Madison and Danielle to Shifts between the hours of 9 am and 7 pm. The hiring of Madison and Danielle does not comply with the ordinance because they are not performing the work described in the notice and are working hours that were not previously offered to existing Employees.

8.9 Postings in Primary Language of Employees. Pursuant to section 9-4605(2)(a), Employers shall post all “notice(s) of available work Shifts” to existing Employees in English and any other language that is the primary language of at least 5% of their existing Employees.

- a. Employers may also post “notice(s) of available work Shifts” in a language spoken by less than 5 % of existing Employees.
- b. If a Covered Employer receives a request for a specific language from an existing Employee the Employer shall honor that request.
- c. The Agency shall accept as a valid posting a translation done by an official translation service, documents translated by an existing Employee who is fluent and literate in the language in question, or any free translation service publicly available online.

8.10 New Locations. The provisions of § 9-4605 and this ¶ 8.0 shall not apply with respect to the hiring of new Employees at a New Location.

9.0 Employer Records. Each Employer shall maintain for at least two years for each Employee a record of his or her name, hours worked, pay rate, initial Posted Work Schedule and all subsequent changes to that Schedule, consent to work hours where such consent is required by the ordinance, and documentation of the time and method of offering additional hours of work to existing staff. The records shall not be amended or redacted in any way.

9.1 Employee record request. When an Employee requests records under section 9-4609(2), the Employer shall provide the records electronically (in a format that is commonly used) at no cost to the Employee. If the Employee requests hard copies, the Employer may charge the Employee no more than its actual cost to produce the records. The records shall not be amended or redacted in any way.

- a. The Employer shall have thirty days to comply with the request from an Employee. The 30-day response period starts when the request is made.
- b. The requests shall be made in writing. The 30-day response period begins when a request is received in writing.
- c. In the event the Employer deems the request to be overly burdensome or harassing, the Employer may notify the Agency, at which time the Agency will determine if the Employee is or is not entitled to the information.
 - i. The Employer must make this request of the Agency within two-weeks of receiving the Employee request.

10.0 Presumed Damages. The damages are as follows for violations of section 9-4602 and 9-4605:

- a. For a written estimate under section 9-4602(1) that is incomplete or lacks a good faith basis, \$200 per impacted Employee.
- b. For an Employer's failure to provide a written Work Schedule as required by section 9-4602(3) or to post the Work Schedule as required by section 9-4602(4), \$50 per impacted Employee for each pay period in which the violation occurs or continues.
- c. For an Employer's failure to promptly notify the Employee of changes to the Posted Work Schedule as required by section 9-4602(5), \$25 per impacted Employee for each pay period in which the violation occurs or continues.
- d. For an Employer's failure to obtain written consent for added work hours as required by section 9-4602(6), \$100 per impacted Employee for each pay period in which the violation occurs or continues.
- e. For an Employer's failure to provide written notice of available work hours as required by section 9-4605(2), \$50 per impacted Employee for each pay period in which the violation occurs or continues.
- f. For an Employer's failure to provide written notice of its policy for distributing work hours as required by section 9-4605(6), \$50 per impacted Employee for each pay period in which the violation occurs or continues.
- g. For an Employer's failure to award available work hours as required by section 9-4605(4), \$1,000 per impacted Employee for each pay period in which the violation occurs or continues.

The Agency reserves the right to impose triple damages for Employers found to be repeat offenders.

10.1. New Locations. Presumed damages shall not be available with respect to violations relating to Employees at a New Location, except with respect to ¶ 10.0(b).

11.0 Fines and Penalties. Agency's power to impose penalties and fines for violation of this Chapter shall be effective upon publication of the appropriate regulations in a prominent location on the City's Website. Until such time, the Agency shall refer to the Law Department any requests for fines, penalties or other remedial action. Remedies may include reinstatement and full restitution to the Employee for lost wages and benefits, including Predictability Pay and Presumed Damages as required by this Chapter.