



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-4583/1
KRP:ahc

2017 ASSEMBLY BILL 866

January 19, 2018 - Introduced by Representatives HEBL, ANDERSON, BERCEAU, CROWLEY, OHNSTAD, SARGENT, SINICKI, SPREITZER, SUBECK and C. TAYLOR, cosponsored by Senator HANSEN. Referred to Committee on Labor.

1 **AN ACT** *to amend* 111.322 (2m) (a) and 111.322 (2m) (b); and *to create* 103.035
2 of the statutes; **relating to:** the rights of employees to request and receive work
3 schedule changes; predictable work schedules for retail, food service, and
4 cleaning employees; granting rule-making authority; and providing a penalty.

Analysis by the Legislative Reference Bureau

This bill provides that an employee who works for an employer, including the state and political subdivisions, that employs at least 15 employees (employer) has the right to request and receive changes to the employee's work schedule under certain circumstances. The bill also provides rights regarding work scheduling for employees in certain retail, food service, or cleaning occupations or other occupations designated by the Department of Workforce Development.

Employee right to request and receive work schedule changes

The bill provides that an employee may request changes to the employee's work schedule, and an employer must negotiate in good faith with the employee to accommodate the employee's request while also meeting the employer's needs. Unless an employer has a bona fide business reason for denying the request, the employer must approve an employee's request if it is directly related to any of the following:

1. A serious health condition of the employee.
2. Responsibilities of the employee as a caregiver for a child or other family member.

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3. Enrollment of the employee in an educational or training program or program of study that leads to a recognized postsecondary credential.

4. Work scheduling conflicts of an employee who is part time with the employee's other employment.

If an employer denies an employee's request, the employer must inform the employee of the reasons for denial, including whether any of the reasons is a bona fide business reason. The term "bona fide business reason" is defined in the bill.

Predictable work schedules for retail, food service, and cleaning employees

The bill provides that an employer that employs an employee in certain retail, food service, or cleaning occupations (service employee) must provide the service employee with a written copy of the service employee's work schedule on or before the service employee's first day of work. With certain exceptions, if an employer changes a service employee's work schedule, the employer must provide the new work schedule no later than 14 days in advance.

If an employer changes a service employee's work schedule with less than 14-days' advance notice, the employer must pay the service employee an amount equal to the service employee's regular rate of pay for one hour of work, unless 1) the service employee consents to the change or 2) the employer requires the service employee to work additional time or an additional work shift because another service employee was scheduled to work that time or work shift and is unexpectedly unavailable to do so.

If an employer uses the following scheduling practices, the employer must compensate a service employee subjected to those practices as follows:

1. If the service employee reports to work and the employer does not allow the service employee to work all time scheduled, the employer shall provide the service employee with the following compensation: a) if the service employee is scheduled to work four hours or less, an amount equal to the service employee's regular rate of pay for all time the service employee is scheduled to work but does not work; or b) if the service employee is scheduled to work more than four hours and works less than four hours, an amount equal to the service employee's regular rate of pay for the difference between four hours and the amount of time the service employee actually works.

2. If the employer requires the service employee to contact the employer, or wait to be contacted by the employer, less than 24 hours before a work shift to determine whether the service employee must report to work, the employer must pay the service employee an amount equal to the service employee's regular rate of pay for one hour of work.

3. If the employer requires the service employee to work a split shift, the employer must pay the service employee an amount equal to the service employee's regular rate of pay for one hour of work.

If a service employee is entitled to more than one type of compensation related to employer scheduling practices with respect to a particular work shift, the employer must pay only one type of compensation, whichever is greatest.

The bill provides that, during any period in which the employer's regular operations are suspended due to an event outside of the employer's control, the

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employer is not required to comply with the service employee work scheduling requirements created in the bill.

The bill authorizes DWD to promulgate rules to apply the protections afforded under the bill to additional occupations if DWD determines that at least 10 percent of the individuals employed in an occupation either typically receive notice of changes to their work schedules less than 14 days before the change takes effect or regularly experience fluctuations in the number of hours the individuals are scheduled to work on a daily, weekly, or monthly basis.

Enforcement

The bill provides that an employer may not interfere with, restrain, or deny the exercise of the right of an employee created in the bill and may not discharge or discriminate against an employee for enforcing the employee's rights under the bill. An employee whose rights are violated may file a complaint with DWD, and DWD must process the complaint in the same manner that employment discrimination complaints are processed under current law. That processing may include the ordering of back pay, reinstatement, compensation in lieu of reinstatement, and costs and attorney fees.

The bill also provides that DWD or an employee whose rights are violated may bring an action in circuit court against the employer without regard to exhaustion of any administrative remedy. If the circuit court finds that a violation has occurred, the employer is liable to the employee for compensatory damages, reasonable attorney fees and costs, and, under certain circumstances, liquidated damages equal to 100 percent of the amount of compensatory damages awarded to the employee. In addition to any damages imposed on an employer in an administrative proceeding or circuit court action, an employer that willfully violates the protections created in the bill may be required to forfeit not more than \$1,000 for each violation.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 103.035 of the statutes is created to read:

2 **103.035 Work schedule flexibility and predictability. (1) DEFINITIONS.**

3 In this section:

4 (a) "Bona fide business reason" means a reason that justifies an employer's
5 action and that is based on the employer's determination that taking a different
6 action would have any of the following results:

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1 1. Additional costs to the employer, including costs of lost employee
2 productivity, retaining or hiring employees, or transferring employees between work
3 locations.

4 2. A significant detrimental effect on the employer's ability to meet
5 organizational needs or customer demand.

6 3. A significant inability of the employer, despite the employer's best efforts,
7 to reorganize work among other employees.

8 4. A significant detrimental effect on the employer's business performance.

9 5. Insufficient work during the period an employee proposes to work.

10 6. Unfairness to other employees who request changes to work schedules if
11 granting all requests would have a significant detrimental effect on the employer's
12 ability to meet organizational needs.

13 (b) "Child" means an individual who is all of the following:

14 1. A biological, adopted, or foster child; a stepchild; a legal ward; or a child of
15 a person standing in the place of a parent with respect to that child.

16 2. An individual to whom any of the following applies:

17 a. The individual is less than 18 years of age.

18 b. The individual is 18 years of age or older and is incapable of self-care because
19 of a mental or physical disability.

20 (c) "Domestic partner" has the meaning given in s. 40.02 (21c) or 770.01 (1).

21 (d) "Employee" means an employee who is employed by an employer.

22 (e) "Employer" means an employer that employs at least 15 employees.

23 "Employer" includes the state, its political subdivisions, and any office, department,
24 independent agency, authority, institution, association, society, or other body in state

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1 or local government created or authorized to be created by the constitution or any
2 law, including the legislature and the courts.

3 (f) "Family member" means any of the following:

4 1. A spouse or domestic partner of an employee.

5 2. A parent, child, sibling, brother-in-law, sister-in-law, grandparent, or
6 grandchild of an employee or of an employee's spouse or domestic partner.

7 3. Any other individual who is related by blood, marriage, or adoption to an
8 employee or to an employee's spouse or domestic partner and whose close association
9 with the employee, spouse, or domestic partner makes the individual the equivalent
10 of a family member of the employee, spouse, or domestic partner.

11 (g) "Grandchild" means the child of a child.

12 (h) "Grandparent" means the parent of a parent.

13 (i) "Nonexempt employee" means an employee who is not employed in a bona
14 fide executive, administrative, or professional capacity, as described in 29 USC 213

15 (a) (1).

16 (j) "Parent" means a biological parent, foster parent, adoptive parent,
17 stepparent, or legal guardian of an employee or of an employee's spouse or domestic
18 partner.

19 (k) "Part-time employee" means an employee who works on average fewer than
20 30 hours per week for a particular employer.

21 (L) "Service employee" means a nonexempt employee who is employed in an
22 occupation designated by the department under sub. (3) (g) or in any of the
23 occupations classified under the following codes set forth in the Standard
24 Occupational Classification system, 2010 edition, published by the bureau of labor
25 statistics of the U.S. department of labor:

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1 1. Major group code 35-0000 — Food preparation and serving related
2 occupations.

3 2. Broad occupation code 37-2010 — Building cleaning workers.

4 3. Detailed occupation code 41-1011 — First-line supervisors of retail sales
5 workers.

6 4. Minor group code 41-2000 — Retail sales workers.

7 (m) “Sibling” means a brother, sister, half brother, half sister, stepbrother,
8 stepsister, foster brother, or foster sister, whether by blood, marriage, or adoption.

9 (n) “Split shift” means a work shift that consists of work time that is not
10 continuous. For purposes of determining whether a work shift is continuous, any of
11 the following breaks in work time are not considered:

12 1. One or more breaks for meals that total one hour or less.

13 2. A break that is requested by the employee.

14 (o) “Work schedule” means the days and times during each successive work
15 period when an employee is required by an employer to perform duties of
16 employment.

17 (p) “Work shift” means the specific times during a day that an employer
18 requires an employee to work.

19 (q) “Written” does not include a communication that is transmitted or received
20 by electronic means.

21 **(2) EMPLOYEE RIGHT TO REQUEST AND RECEIVE WORK SCHEDULE CHANGES.** (a)
22 *Employee right to request work schedule changes.* 1. An employee may request a
23 change in the terms and conditions of employment related to any of the following
24 work schedule issues:

25 a. The number of hours the employee is required to work or be on call for work.

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1 b. The days or times when the employee is required to work or be on call for
2 work.

3 c. The location where the employee is required to work.

4 d. The amount of notification the employee receives regarding changes to the
5 employee's work schedule.

6 e. Minimizing fluctuations in the number of hours the employee is scheduled
7 to work on a daily, weekly, or monthly basis.

8 2. An employee who makes a request under subd. 1. shall specify in the request
9 whether it is related to any of the following:

10 a. A serious health condition, as defined under s. 103.10 (1) (g), of the employee.

11 b. The employee's responsibilities as a significant provider of ongoing care,
12 including responsibility for securing ongoing care, of the employee's child, family
13 member with a serious health condition, as defined under s. 103.10 (1) (g), or parent
14 who is 65 years of age or older.

15 c. The employee's responsibilities as a significant provider of education,
16 including responsibility for securing education, of the employee's child.

17 d. The employee's enrollment in an educational or training program or program
18 of study that leads to a recognized postsecondary credential.

19 e. If the employee is a part-time employee, conflicts with the employee's other
20 employment.

21 (b) *Evaluating requests for work schedule changes.* If an employer receives a
22 request from an employee under par. (a), the employer shall either grant the request
23 without modification or negotiate in good faith with the employee to find a
24 compromise that meets the employee's and the employer's work scheduling needs,
25 including by considering any alternative proposals offered by the employee. If the

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1 employer denies the request and any alternative proposals offered, the employer
2 shall inform the employee of the reasons for denial, including whether any of the
3 reasons is a bona fide business reason.

4 (c) *Requests related to serious health conditions, caregiving, education, or other*
5 *part-time employment.* Notwithstanding par. (b), if an employer receives a request
6 from an employee under par. (a) that is directly related to any of the issues described
7 under par. (a) 2., the employer shall grant the request unless the employer has a bona
8 fide business reason for denying the request.

9 (d) *Verification of reasons for requested changes.* If an employer receives a
10 request from an employee under par. (a), the employer may require the employee to
11 provide additional information to clarify or explain the reasons for the employee's
12 requested work schedule change if the employer needs that information to properly
13 evaluate the request under par. (b) or (c).

14 **(3) PREDICTABLE WORK SCHEDULES FOR RETAIL, FOOD SERVICE, AND CLEANING**
15 **EMPLOYEES.** (a) *Advance notice of work schedules required.* 1. On or before the first
16 day of work of a new service employee, an employer shall provide the service
17 employee with a written copy of the service employee's work schedule.

18 2. Except as provided in pars. (b) and (c), if an employer changes a work
19 schedule provided to a service employee under subd. 1. or this subdivision, the
20 employer shall provide the service employee with a written copy of the new work
21 schedule no later than 14 days before the new work schedule begins.

22 3. An employer shall post a copy of a work schedule provided under this
23 paragraph in any of the following ways:

24 a. In one or more conspicuous places where notices to employees are
25 customarily posted.

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1 b. On an Internet site accessible by all of the employer's employees.

2 4. If an employer changes a work schedule after it is posted under subd. 3., the
3 employer shall revise the posted work schedule to reflect those changes.

4 (b) *Employer-initiated changes to work schedules without advance notice.* 1.
5 An employer may change, without the advance notice required under par. (a) 2., a
6 work schedule provided to a service employee under par. (a) 1. or 2. as provided in
7 this paragraph. Except as provided under subd. 2., if the employer changes a work
8 schedule provided to a service employee under par. (a) 1. or 2. less than 14 days before
9 the new work schedule begins, the employer shall provide the service employee
10 compensation for the change in an amount equal to the service employee's regular
11 rate of pay for one hour of work in addition to any other compensation earned by the
12 service employee.

13 2. An employer is not required to pay compensation to a service employee under
14 subd. 1. for a change to the service employee's work schedule if any of the following
15 applies to the change:

16 a. The service employee consents to the change.

17 b. The employer requires the service employee to work additional time or an
18 additional work shift because another service employee was scheduled to work that
19 time or work shift and is unexpectedly unavailable to do so.

20 (c) *Employee-initiated changes to work schedules.* An employer may allow a
21 service employee to agree to work in place of another service employee if the service
22 employees mutually agree to the change. The employer is not required to provide
23 compensation under par. (b) 1. to a service employee with respect to a work shift trade
24 under this paragraph.

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1 (d) *Compensation for reporting time, on-call time, and split shifts.* 1. Except
2 as provided in subd. 4., if a service employee reports to work and the service
3 employee's employer does not allow the service employee to work all time that the
4 service employee is scheduled to work, the employer shall provide the service
5 employee with the following compensation:

6 a. If the service employee is scheduled to work 4 hours or less, an amount equal
7 to the service employee's regular rate of pay for all time the service employee is
8 scheduled to work but does not work in addition to any other compensation earned
9 by the service employee for time the service employee actually works.

10 b. If the service employee is scheduled to work more than 4 hours and works
11 less than 4 hours, an amount equal to the service employee's regular rate of pay for
12 the difference between 4 hours and the amount of time the service employee actually
13 works in addition to any other compensation earned by the service employee for time
14 the service employee actually works.

15 2. Except as provided in subd. 4., if an employer requires a service employee
16 to contact the employer, or wait to be contacted by the employer, less than 24 hours
17 before a work shift to determine whether the employer will require the service
18 employee to report to work for that work shift, the employer shall provide the service
19 employee compensation in an amount equal to the service employee's regular rate of
20 pay for one hour of work in addition to any other compensation earned by the service
21 employee for time the service employee actually works.

22 3. Except as provided in subd. 4, if an employer requires a service employee to
23 work a split shift, the employer shall provide the service employee compensation in
24 an amount equal to the service employee's regular rate of pay for one hour of work

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1 in addition to any other compensation earned by the service employee for time the
2 service employee actually works.

3 4. If a service employee is entitled to more than one type of compensation under
4 subds. 1. to 3. with respect to a particular work shift, the employer shall pay the
5 service employee the compensation required under subd. 1., 2., or 3., whichever is
6 greatest.

7 (e) *Manner of payment of additional compensation.* An employer that is
8 required to provide compensation to a service employee under par. (b) 1. or (d) shall
9 pay that compensation on the service employee's regular pay check or other wage
10 payment. The employer shall identify on the pay check, pay envelope, or paper
11 accompanying the wage payment the amount of and reason for all additional
12 compensation paid.

13 (f) *Exception.* An employer is not required to comply with this subsection
14 during a period in which the employer's regular operations are suspended due to an
15 event outside of the employer's control.

16 (g) *Designating additional covered occupations.* The department may
17 promulgate rules to apply the protections afforded under pars. (a) to (f) to additional
18 occupations. The department may designate an occupation under this paragraph if
19 the department determines that at least 10 percent of the individuals employed in
20 the occupation either typically receive notice of changes to their work schedules less
21 than 14 days before the change takes effect or regularly experience fluctuations in
22 the number of hours the individuals are scheduled to work on a daily, weekly, or
23 monthly basis.

24 (4) PROHIBITED ACTS. (a) No employer may interfere with, restrain, or deny the
25 exercise of the right of an employee to request and receive a change in the terms and

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1 conditions of employment as provided under sub. (2). No employer may interfere
2 with, restrain, or deny the exercise of the right of a service employee to receive
3 advance notice of work schedules as provided under sub. (3) (a), receive
4 compensation as provided under sub. (3) (b) 1. and (d), or request approval to trade
5 work shifts as provided under sub. (3) (c).

6 (b) No employer may discharge or discriminate against an employee in
7 promotion, in compensation, or in the terms, conditions, or privileges of employment
8 for exercising a right of an employee described under par. (a), opposing a practice
9 prohibited under this section, filing or indicating an intent to file a complaint or
10 otherwise attempting to enforce a right under this section, or testifying, assisting,
11 or participating in any manner in any investigation, action, or proceeding to enforce
12 a right under this section.

13 **(5) ENFORCEMENT.** (a) *Administrative proceeding.* An employee whose rights
14 are interfered with, restrained, or denied in violation of sub. (4) (a) or who is
15 discharged or discriminated against in violation of sub. (4) (b) may file a complaint
16 with the department, and the department shall process the complaint in the same
17 manner that employment discrimination complaints are processed under s. 111.39.
18 If the department finds that a violation has occurred, the department may order the
19 employer to take action to remedy the violation, including any action authorized
20 under s. 111.39.

21 (b) *Civil action.* 1. The department or an employee whose rights are interfered
22 with, restrained, or denied in violation of sub. (4) (a) or who is discharged or
23 discriminated against in violation of sub. (4) (b) may bring an action in circuit court
24 against an employer on the basis of the violation without regard to exhaustion of any
25 administrative remedy.

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1 2. In an action under subd. 1., if the circuit court finds that a violation of sub.
2 (4) (a) or (b) has occurred with respect to an employee, the circuit court shall order
3 the defendant to pay to the employee all of the following:

4 a. Compensatory damages in an amount that the circuit court or jury finds
5 appropriate.

6 b. Unless the employer proves that the employer acted in good faith and had
7 a reasonable basis for believing that the act or omission that constituted the violation
8 was not a violation of this section, an additional amount as liquidated damages equal
9 to 100 percent of the amount of compensatory damages determined under subd. 2.

10 a.

11 c. Notwithstanding s. 814.04 (1), reasonable attorney fees and costs incurred
12 in the action.

13 3. Damages awarded under subd. 2. are in addition to any back pay or other
14 amounts awarded under s. 111.39 or 111.395.

15 **(6) PENALTIES.** In addition to any damages imposed under sub. (5), an employer
16 that willfully violates this section may be required to forfeit not more than \$1,000 for
17 each violation. Each day of continued violation constitutes a separate offense.

18 **(7) NOTICE POSTED.** An employer shall post, in one or more conspicuous places
19 where notices to employees are customarily posted, a notice in a form approved by
20 the department setting forth employees' rights under this section. An employer that
21 violates this subsection shall forfeit not more than \$100 for each violation.

22 **SECTION 2.** 111.322 (2m) (a) of the statutes is amended to read:

23 111.322 **(2m)** (a) The individual files a complaint or attempts to enforce any
24 right under s. 103.02, 103.035, 103.10, 103.11, 103.13, 103.28, 103.32, 103.34,

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1 103.455, 104.12, 109.03, 109.07, 109.075, 146.997, or 995.55, or ss. 101.58 to 101.599
2 or 103.64 to 103.82.

3 **SECTION 3.** 111.322 (2m) (b) of the statutes is amended to read:

4 111.322 (2m) (b) The individual testifies or assists in any action or proceeding
5 held under or to enforce any right under s. 103.02, 103.035, 103.10, 103.11, 103.13,
6 103.28, 103.32, 103.34, 103.455, 104.12, 109.03, 109.07, 109.075, 146.997, or 995.55,
7 or ss. 101.58 to 101.599 or 103.64 to 103.82.

8 **SECTION 4. Nonstatutory provisions.**

9 (1) PREDICTABLE WORK SCHEDULES FOR RETAIL, FOOD SERVICE, AND CLEANING
10 EMPLOYEES; TRANSITIONAL PROVISIONS. No later than the effective date of this
11 subsection, an employer, as defined in section 103.035 (1) (e) of the statutes, shall
12 provide each service employee, as defined in section 103.035 (1) (L) of the statutes,
13 with a written copy of the service employee's work schedule, as defined in section
14 103.035 (1) (o) of the statutes. That work schedule is considered a work schedule
15 provided to a service employee under section 103.035 (3) (a) 2. of the statutes for all
16 purposes under section 103.035 of the statutes, including that the employer shall
17 post a copy of the work schedule as provided in section 103.035 (3) (a) 3. of the
18 statutes and, if the employer changes that work schedule, section 103.035 (3) (a) 2.
19 of the statutes applies to that change.

20 **SECTION 5. Initial applicability.**

21 (1) This act first applies to an employee who is covered by a collective
22 bargaining agreement that contains provisions inconsistent with section 103.035 of
23 the statutes on the day on which the collective bargaining agreement expires or is
24 extended, modified, or renewed, whichever occurs first.

25 **SECTION 6. Effective date.**

