

A REVIEW OF SAN FRANCISCO'S FORMULA RETAIL EMPLOYEE RIGHTS ORDINANCES – ONE YEAR AFTER IMPLEMENTATION

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*Challenges and Uncertainty Continue for both
Formula Retail Employees and Employers*

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CHALLENGES AND UNCERTAINTY CONTINUES FOR BOTH FORMULA RETAIL EMPLOYEES AND EMPLOYERS

EXECUTIVE SUMMARY

We were retained by the California Retailers Association to provide an independent and objective analysis of the impacts of the Formula Retail Employee Rights Ordinances (“FRERO’s” or “Retail Workers’ Bill of Rights”) in the City and County of San Francisco, California, approximately one-year after the implementation and adoption of Final Rules.¹ For purposes of this analysis, we examined the practical impacts of implementation of the FRERO’s upon both *Formula Retail Establishment* employees and *Formula Retail Establishment* employers (“FRE”).² The FRERO’s require *Formula Retail Establishments* to provide employees with two weeks’ notice of work schedules, notice of changes to works schedules, and compensation for schedule changes made on less than seven days’ notice and unused on-call shifts. The Ordinance also provides Part-Time employees with the same starting rate of hourly pay, access to time off, and eligibility for promotions, as provided to Full-Time employees. Successor Employers are also required to retain Employees for 90 days upon a change in control of business. In practice, the Ordinance changes the way Employers communicate with and schedule Employees across all Formula Retail Establishments.

¹ “Final Rules Implementing the Formula Retail Employee Rights Ordinances,; Effective Date: March 1, 2016.

² Under the Formula Retail Employee Rights Ordinances initially enacted on November 18, 2014, and amended on July 15, 2015, “Formula Retail Establishment” shall mean a business located in San Francisco that falls under the Planning Code’s definition of “Formula Retail Use,” as amended from time to time, except that the business must have at least 40 retail establishments located worldwide. “Employer” shall mean any Person that owns or operates a Formula Retail Establishment with 20 or more Employees in the City, including corporate officers or executives, who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency entity, employs or exercises control over wages, hours, or working conditions of any individual.

METHODOLOGY

The objective of this analysis is to independently determine the actual and practical implications of San Francisco's Formula Retail Employee Rights Ordinances upon both FRE employees and FRE employers. The FRERO's went into effect on July 3, 2015. Although all Formula Retail Establishments across San Francisco have been expected to comply with the mandates of the FRERO's since the effective date, enforcement regulations and guidelines were not issued by San Francisco's Office of Labor Standards Enforcement until March 1, 2016. Therefore, in order to analyze the impacts of the FRERO's upon Employees and Employers one year after their actual implementation, we surveyed a substantial cross-section of FRE's across San Francisco during January and February, 2017. This Survey included extensive interviews and discussions with representatives from FRE's across San Francisco.

According to the language of the Ordinance, as of September 2014, there were approximately 1,250 FRE's in San Francisco, accounting for 12% of all retailers. There were approximately 35,000 persons employed by these FRE's, accounting for approximately 5 to 6% of San Francisco's total wage and salary employment. Based upon our discussions with various FRE's in San Francisco, including but not limited to Best Buy, Macy's, Ross Stores, Target, Walgreens, the California Bankers Association, and the Golden Gate Restaurants Association, we examined a vast majority of all those covered by the FRERO's. Therefore, our findings are solely based upon the data and information surveyed, examined, and presented in this report.

CONCLUSIONS AND MAJOR FINDINGS

San Francisco's Formula Retail Employee Rights Ordinances as well as the Final Rules Implementing the FRERO's³ have resulted in continuing difficult challenges, uncertainties, and lack of clarity for both FRE Employees and FRE Employers. Through our observations and analysis of the Ordinance's effects, we determined that there is a greater need for a more balanced approach that provides both predictability for employees in their schedules, but also more

³ "Final Rules Implementing the Formula Retail Employee Rights Ordinances (FREROs)," Effective Date: March 1, 2016, San Francisco Police Code Article 33F and Article 33G, City and County of San Francisco Office of Labor Standards Enforcement.

flexibility to meet the current lifestyle obligations of both Full-Time and Part-Time FRE employees as well as the ever-changing retail competitive demands for FRE Employers.

FRE Employees have encountered problems with scheduling flexibility and lifestyle changes, including but not limited to the demands of school, parenting, caregiving, and potential unexpected and changing daily responsibilities. In addition, FRE Employees (especially Part-Time Employees) in need of extra income are having more difficulty adding extra work hours. Moreover, FRE Employers have experienced added unnecessary administrative burdens, removal of their ability to be flexible in running their businesses with changing economic and inventory demands, increased administrative and penalty costs for Predictability Pay and scheduling mandates, and unreasonable interference in their communication and relationships with their employees – many of whom went into retail for the scheduling flexibility due to school, family, and lifestyle choices.

Additionally, the impact upon the local economy could become significant with decreased retail profitability, lower retail sales taxes, decreased customer service, and the reduction in work hours and income to FRE Employees across the City. This is increasingly burdensome for FRE Employees as the cost-of-living continues to skyrocket across the City and County of San Francisco to among the highest in the nation. Moreover, it could also have a longer-term impact upon San Francisco residents, visitors, and consumers through higher retail prices and/or fewer retail choices.

Our analysis of the San Francisco FRERO's uncovered the following observations and impacts upon FRE Employees and FRE Employers:

IMPACTS UPON FORMULA RETAIL ESTABLISHMENT EMPLOYEES

- **FRE Employees choose to work in retail because of the flexibility it affords them to meet the demands of their varied lifestyles as well as the ability to supplement their income in one of the highest cost of living locales in the Nation.**
- **FRE Employees often do not know their own availability two weeks in advance and are frustrated with not being able to change their schedules easily. Instead of greater**

flexibility working in retail, FRE Employees are equally frustrated with a more formal and rigid scheduling process under the FRERO's.

- **Under the FRERO's, FRE Employees are now required to request time off for vacations, school exams, and other needs at least three to four weeks before their actual work schedules, further limiting their personal flexibility.**
- **FRE Employees have asked for extra hours and the FRE Employer cannot always accommodate their requests due to the continued uncertainty and the opaque nature of when Predictability Pay must be paid.**
- **The size of the FRE and number of Employees also provides additional challenges as fewer Employees within a FRE location limit further the flexibility to change work schedules or exchange additional hours in any given 14-day scheduling period.**
- **FRE Employees have also questioned the need for the change in scheduling requirements, the change to more formal communication with FRE Employers, and the ultimate benefit they derive from the implementation of the FRERO's.**

IMPACTS UPON FORMULA RETAIL ESTABLISHMENT EMPLOYERS

- **One of the most important impacts upon FRE Employers has been the change in store culture, away from open communication to a more scripted dialogue due to the limitations on communications caused by the FRERO's ambiguous and unclear language, especially as it relates to "Employer-initiated" actions. Rather than incur the potential for "coercive" action and thereby enforcement of penalties, FRE Employers would choose to leave a work shift unfilled.**
- **No less impactful upon FRE Employers is the increased administrative burden and costs incurred due to compliance with the FRERO's. FRE Employers are now required to spend more time on ensuring scheduling compliance and less time on staffing, training, and nurturing workplace culture.**
- **With fixed monthly workforce budgets to be allocated in each FRE Employer location, FRERO's are causing an unforeseen "ripple effects." Some FRE Employers are often bound by forces out of their control to change FRE Employee schedules due to unreliable delivery schedules, resulting in predictability pay. Paying Predictability**

Pay penalties earlier in the week or month leaves less for the remaining shifts, thereby causing a “ripple effects” of understaffing and decreased customer service.

- **The requirement of two week schedules also negatively impacts quality of new hire training. Rather than scheduling training with the most appropriate staff members, FRE Employers have had to pair up new hires with whoever is available. Employees who feel they are not properly trained sometimes leave employment soon after being hired.**
- **In the retail environment, labor hours are allocated and schedules written based on anticipated sales volume and consumer demand. Under the FRERO's, schedules cannot be as easily changed to meet unexpected consumer demand that occurs within the 14-day window without incurring counterintuitive penalties.**
- **The expense of Predictability Pay penalties is also seen as overly punitive and counterproductive. Severe penalties result in FRE Employers making business decisions to avoid situations that could trigger Predictability Pay. The end result is that last minute unfilled work hours continue to go unfilled and extra hours are not available to those FRE Employees that desire them.**

SUMMARY OF ANALYSIS AND MAJOR FINDINGS

I. Overview of Formula Retail Employee Rights Ordinances

The San Francisco Board of Supervisors enacted two ordinances on November 18, 2014. Collectively, these ordinances have been referred to as the “Formula Retail Employee Rights Ordinances” or the “Retail Workers Bill of Rights.” These Ordinances may apply to *Formula Retail Establishments* (retail chains with 40 or more locations worldwide that employ 20 or more people within the City) that are engaged in the following types of retail sales or service establishments:

Amusement Game Arcade	Sales and Service, Nonretail
Bar	Sales and Service, Other Retail
Drive-up Facility	Sales and Service, Retail
Eating and Drinking Use	Service, Financial
Limited Restaurant	Service, Fringe Financial
Liquor Store	Service, Limited Financial
Massage Establishment	Service, Personal
Movie Theater	Take-out Food
Restaurant	Tobacco Paraphernalia Establishment

To satisfy the definition of *Formula Retail Use*, the business must maintain at least two of the following features:

- A standardized array of merchandise;
- A standardized facade;
- A standardized decor and color scheme;
- Uniform apparel;
- Standardized signage;
- A trademark or servicemark.

On December 9, 2014, San Francisco Mayor Edwin Lee sent the Ordinances back to the Board of Supervisors unsigned, with a letter asking for a more collaborative process on the legislation. A broad business coalition worked with the Mayor's office to provide some compliance relief by providing incremental change to the original legislation. The amended Ordinance became effective on July 3, 2015. Enforcement regulations and guidelines were subsequently issued by San Francisco's Office of Labor Standards Enforcement and became effective on March 1, 2016. However, all Formula Retail Establishments across San Francisco were expected to be in compliance with the mandates of the Ordinance as of July 3, 2015.

A. Summary of FRERO's

1) Predictive Scheduling:

- Post Employee schedules 14 days in advance in a conspicuous place at the workplace or transmit the work schedule electronically.
- Changes with less than 7 days but more than 24 hours or more, the Employee will get 1 hour of *Predictability Pay* (which is equal to one hour of pay at the Employee's regular hourly rate); changes made with less than 24 hours' notice, the Employee will get 2 hours of pay for each shift of four hours or less; changes with less than 24 hours' notice, 4 hours of pay at regular rate for each shift that is more than 4 hours. The *Predictability Pay* is in addition to the pay that the employee will otherwise get for working their assigned shift.
- For any "On-Call Shifts" (when Employee is required to be available but is not called into work), the Employee will get 2 hours of pay for each "On-Call Shift" of four hours or less; and 4 hours of pay for each "On-Call Shift" of more than four hours.
- Provides Part-Time (PT) employees (34 hours a week or less) with access to time off and eligibility for promotions as Full-Time (FT) employees (35 hours a week or more).

2) Offering Additional Hours and Estimated Hours:

- Before hiring new employees, employers must offer additional hours to existing PT employees: 1) if they are qualified and 2) the work is the same or similar to work the employee has performed.
- Employers are to offer PT employees only the number of hours needed to get them to 35 hours per week, which according to the FRERO's, is FT.
- Employers are required to make offers in writing or by posting the offer in a conspicuous location in the workplace and must retain the written offer for no less than 3 years.
- These requirements extend to companies that subcontract services with Formula Retailers, e.g. security and janitorial workers.

3) Change of Ownership (to another Formula Retailer Establishment):

- Requires employers to retain workers for a 90-day period where there is a sale, assignment, transfer, contribution or other disposition such as a consolidation, merger, and reorganization.
- Under the 90-day retention provision, the successor employer must provide a "retention list" with the names, contact info, date of hire, rate of pay, average number of hours worked in the last 6 months before the change.
- Successor employers must employ the existing employees for 90 days and cannot discharge them without cause.
- Successor employers must publicly post a notice of the change in control at their store locations for at least 30 days and provide very specific noticing requirements.

II. Impacts of the Formula Retail Employee Rights Ordinances Upon Formula Retail Establishment Employees

The impacts of the FRERO's upon FRE Employees have presented some difficult dilemmas for Employee flexibility as well as added challenges for Part-Time Employees. FRE Employees have been frustrated by the two-week scheduling mandate because they have had personal matters for which they would like to have the day off, but either did not know in advance of the need or forgot to provide their manager with notice such as school finals and exams, doctor's appointments, and volunteer and/or family commitments. Part-Time FRE Employees have made it known they would like to be scheduled additional hours that may become available even at the last minute. In sum:

- FRE Employees often do not know their own availability two weeks in advance and are frustrated with not being able to change their schedules when needed. For example, prior to the adoption of the FRERO's, many FRE Employees were assigned work hours within a range of hours the FRE Employees selected themselves. FRE Employees were able to advertise their shifts for others to pick up if they were not able to or did not want to work those hours. Others could pick up those shifts without the intervention of a Manager and the pick-up of hours was strictly Employee initiated. However, with the compliance mandates and formal recordkeeping requirements under the FRERO's as well as unclear or nonexistent guidelines provided in the Final Regulations, FRE Employees are

less likely to allow such a practice to ensure that Predictability Pay penalties are not incurred.

- Under the FRERO's, FRE Employees are now required to request time off for vacations, school exams, and other needs at least three to four weeks before their actual work schedules, further limiting their personal flexibility. In order for FRE Employers to meet the 2-week scheduling requirement, they need to know FRE Employee vacation and scheduling change requests in advance to make appropriate accommodations for all FRE Employees. This places an added burden on FRE Employees that did not exist prior to the FRERO's adoption (due to more informal and last-minute communication).
- FRE Employees have asked for extra hours and the FRE Employer cannot always accommodate their requests due to the continued uncertainty and the opaque nature of when Predictability Pay has to be paid. Prior to the Ordinance, additional hours as they became available were posted on an on-line board or bulletin boards within the retail store for Employees. Managers did not assign these additional hours, and these additional hours could be picked up until the day of the schedule and provided primarily PT FRE Employees the added flexibility to balance work and their personal lives. However, this informal practice no longer occurs as Managers have taken a more conservative approach to limit any possibility of Predictability Pay penalties. A more formal process has been implemented by all FRE Employers.
- The size of the FRE and number of Employees also provides additional challenges as fewer Employees limit further the flexibility to change work schedules or exchange additional hours. The number of FRE Employees range from 25 to 1,200 depending upon the FRE Employer and location across San Francisco. Obviously, the locations with fewer Employees have much less flexibility in changing schedules during the mandated timeframes.
- FRE Employees have also questioned the need for the change in scheduling requirements, the change to more formal communication with FRE Employers, and the ultimate benefit they derive from the implementation of the FRERO's. As the old saying goes, "If it's not broke, don't fix it."

III. Impacts of the Formula Retail Employee Rights Ordinances Upon Formula Retail Establishment Employers

The impacts of the FRERO's upon FRE Employers has uncovered a number of complex and difficult challenges of their own. Our survey of various San Francisco FRE Employers highlighted the following difficulties, uncertainties, and issues:

- One of the most important impacts upon FRE Employers has been the change in store culture, away from open communication to a more scripted dialogue due to the limitations on communications caused by the FRERO's ambiguous and unclear language, especially as it relates to "Employer-initiated" actions. Rather than incur the potential for "coercive" action and thereby enforcement of penalties, FRE Employers have chosen to leave a work shift unfilled.
- No less impactful upon FRE Employers is the increased administrative burden and costs incurred due to compliance with the FRERO's. FRE Employers are now required to spend more time on ensuring scheduling compliance and less time on staffing, training, and developing workplace culture. For example, FRE Employers have had to develop San Francisco-specific compliance practices to accommodate the FRERO's. In some instances, FRE Employers are spending in excess of 20% of their Human Resources' time on scheduling, at the cost of Employee training, new hiring, Employee benefits, and other supportive Employee programs.
- With fixed monthly workforce budgets to be allocated in each FRE Employer location, FRERO's are causing an unforeseen "ripple effects." Some FRE Employers are often bound by forces out of their control (not covered under the exceptions to the FRERO's⁴) to change FRE Employee schedules due to unreliable delivery schedules, resulting in Predictability Pay penalties to be incurred (for example, a truck delayed in San Francisco or Bay Area traffic, which happens almost weekly). Paying Predictability Pay penalties earlier in the week or month leaves less for the remaining shifts, thereby causing a "ripple effects" of

⁴ Subsection 3300G.4(e) creates seven exceptions to the requirements of subsections (c) and (d). These exceptions are: (1) ...threats to Employees or property; (2) ...public utilities fail; (3) ...Act of God or other cause not within the Employer's control; (4) ...Employee previously scheduled to work is unable to work; (5) ...Another Employee has not reported to work; (6) ...Employer requires the Employee to work overtime; (7) ...Employee trades shifts...or requests a change in shift(s)...

understaffing and decreased customer service. This unintended consequence causes overburdened staffs during short-staffed hours due to budgetary constraints. Not only does it impact FRE Employees and Employers negatively, but it also adversely affects customers with longer wait times or lack of adequate assistance.

- The requirement of two week schedules also negatively impacts quality of new hire training. Rather than scheduling training with the most appropriate staff members, FRE Employers have had to pair up new hires with whoever is available. Employees who feel they are not properly trained sometimes leave employment soon after being hired.
- In the retail environment, labor hours are allocated and schedules written based on anticipated sales volume and consumer demand. For example, more labor is scheduled for holiday weeks such as Fourth of July, Thanksgiving, and Christmas, when the number of customers and thus sales can be expected to increase. However, there are other factors that impact customer traffic and sales that cannot be predicted. Ideally, Managers in these instances would be able to add Employees to the schedule, but are unable to do so due to the FRERO's narrow requirements. This results not only in lost sales, but also lost hours to PT Employees who wanted the work, and also long lines and inconvenience to customers.
- Similarly, events occur nearby to retail stores, such as company or charity events (races), celebrations, and/or parades that are not well publicized and/or unknown to FRE Employers until the last minute that impact sales and thus labor needs (for example events for which streets on which retail stores are situated are closed off and thus customers decrease). In these cases, FRE Employers required to schedule two weeks in advance are unable to schedule appropriately – they can be overstaffed or understaffed depending upon the consumer demand.
- The expense of Predictability Pay penalties is also seen as overly punitive and counterproductive. Severe penalties result in FRE Employers making business decisions to avoid situations that could trigger Predictability Pay. The end result is that last minute unfilled work hours continue to go unfilled and extra hours are not available to those Employees that desire them.

IV. Potential Economic Impacts of the Formula Retail Employee Rights Ordinances

It is important to note that Retail Sales Taxes are one of the most important sources of revenue to the state and local government. According to the most recently available California State Board of Equalization Annual Report FY 2014-2015, Retail Sales Tax results in over \$50 billion in revenue to the state and local government or nearly 84% of all collected tax revenues.⁵ More specifically, Local Sales and Use Taxes provided more than \$140 million in revenues to the City and County of San Francisco in FY 2014-2015.⁶ As a result, with limited revenue generation tools available to local governments not only in San Francisco, but across the state of California, any reduction in Retail Sales Tax could have a severe detrimental economic impact upon a local community.

As noted above, the FRERO's have created a difficult and inflexible situation of potentially fewer work hours for FRE Employees with FRE Employers less able to fill open schedules within 7 days of availability. If additional work hours become available within less than 7 days, the end result is that the FRE Employer does not have the ability to fill these hours without incurring Predictability Pay penalties which negatively impacts customer service, coverage, and profitability. This could ultimately result in loss of jobs and hours, thereby affecting the bottom line. Lesser Retail Sales results in lesser Retail Sales Taxes – creating a spiraling negative economic impact upon important state and local government revenues. In addition, fewer available work hours results in lower incomes for Part-time Employees, further resulting in a negative impact to the local economy as these FRE Employees will have less to spend themselves as consumers and residents.

V. Conclusion

San Francisco's Formula Retail Employee Rights Ordinances as well as the Final Rules Implementing the FRERO's have resulted in continuing difficult challenges, uncertainties, and lack of clarity for both FRE Employees and FRE Employers. Through our observations and analysis of

⁵ California State Board of Equalization Annual Report FY 2014-2015, pg. 9.

⁶ http://www.boe.ca.gov/annual/2014-15/table_15/table21a_2014-15.pdf, downloaded on February 27, 2017.

the FRERO's effects, we determined that there is a greater need for a more balanced approach that provides both predictability for employees in their schedules, but also more flexibility to meet the current lifestyle obligations of both Full-Time and Part-Time FRE employees as well as the ever-changing retail competitive demands for FRE Employers.

FRE Employees have encountered problems with scheduling flexibility and lifestyle changes, including but not limited to the demands of school, parenting, caregiving, and potential unexpected and changing daily responsibilities. In addition, FRE Employees (especially Part-Time Employees) in need of extra income are having more difficulty adding extra work hours. Moreover, FRE Employers have experienced added unnecessary administrative burdens, removal of their ability to be flexible in running their businesses with changing economic and inventory demands, increased administrative and penalty costs for Predictive Pay and scheduling mandates, and unreasonable interference in their communication and relationships with their employees – many of whom went into retail for the scheduling flexibility due to school, family, and lifestyle choices.

In addition, the impact upon the local economy could become significant with decreased retail profitability, lower retail sales taxes, decreased customer service, and the reduction in work hours and income to FRE Employees across the City. This is increasingly burdensome for FRE Employees as the cost-of-living continues to skyrocket across the City and County of San Francisco to among the highest in the nation. Moreover, it could also have a longer-term impact upon San Francisco residents, visitors, and consumers with higher retail prices and/or fewer retail choices.

Finally, it is of utmost importance in governing retail scheduling practices that practical impacts upon both Employees and Employers be fairly and objectively considered. Real problems and issues should be identified and reasonable solutions considered that encourage rather than discourage open communication and collaboration between and among all parties.