SENATE DOCKET, NO. 1881 FILED ON: 1/18/2019

SENATE . . . . . No. 1110

The Commonwealth of Massachusetts

PRESENTED BY:

Marc R. Pacheco

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to the scheduling of employees.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	
Marc R. Pacheco	*First Plymouth and Bristol*	
Tommy Vitolo	*15th Norfolk*	*1/27/2019*
Mike Connolly	*26th Middlesex*	*1/29/2019*
Joanne M. Comerford	*Hampshire, Franklin and Worcester*	*1/29/2019*
Jason M. Lewis	*Fifth Middlesex*	*1/30/2019*
James B. Eldridge	*Middlesex and Worcester*	*1/30/2019*
James T. Welch	*Hampden*	*1/30/2019*
José F. Tosado	*9th Hampden*	*1/30/2019*
Anne M. Gobi	*Worcester, Hampden, Hampshire and Middlesex*	*1/30/2019*
Sal N. DiDomenico	*Middlesex and Suffolk*	*1/30/2019*
Patricia D. Jehlen	*Second Middlesex*	*1/31/2019*
Mary S. Keefe	*15th Worcester*	*2/1/2019*
David Henry Argosky LeBoeuf	*17th Worcester*	*2/1/2019*
Thomas M. Stanley	*9th Middlesex*	*2/1/2019*
Jack Patrick Lewis	*7th Middlesex*	*2/1/2019*
John H. Rogers	*12th Norfolk*	*2/1/2019*
Julian Cyr	*Cape and Islands*	*2/1/2019*

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By Mr. Pacheco, a petition (accompanied by bill, Senate, No. 1110) of Marc R. Pacheco, Tommy Vitolo, Mike Connolly, Joanne M. Comerford and other members of the General Court for legislation relative to the scheduling of employees. Labor and Workforce Development.

The Commonwealth of Massachusetts

In the One Hundred and Ninety-First General Court
(2019-2020)

An Act relative to the scheduling of employees.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 149 of the General Laws is hereby further amended by inserting after section 148D the following sections:-

Section 148E. Fair Workweek Act. (a) For the purposes of sections 148E through 148N, inclusive, the following words, unless the context clearly requires otherwise, shall have the following meanings:-

"Calendar Week", a period of seven consecutive days beginning on any designated day.

"Chain", a set of establishments that do business under the same trade name or brand or that are characterized by standardized options for decor, marketing, packaging, products and services, regardless of the type of ownership of each individual establishment.

"Franchisee", an individual, corporation, partnership or other entity, or group of individuals or entities, that operates one or more fast food restaurants or retail stores in the

commonwealth under a franchise agreement with another individual, corporation, partnership or other entity, or group of individuals or entities.

"Franchisor", an individual, corporation, partnership or other entity, or group of individuals or entities, that grants a franchisee the right to operate one or more fast food restaurants or retail stores in the commonwealth under its trademark or trade name.

"Covered Employer,", an employer that is a Retail Establishment, a Hospitality Establishment and a Food Services Establishment as defined in this Section, that employs 50 or more employees worldwide regardless of where those employees perform work, including but not limited to chain establishments or franchises associated with a franchisor or network of franchises that employ more than 50 employees in aggregate. In determining the number of employees for purposes of this subsection, all employees performing work for compensation on a full-time, part-time or temporary basis shall be counted, provided that where the number of employees who work for an employer for compensation fluctuates, business size may be determined for the current calendar year based upon the average number of employees who worked for compensation per week during the preceding calendar year, and provided further that in determining the number of employees performing work for an employer that is a chain business, the total number of employees in that group of establishments shall be counted.

"Employee", any person who performs services for an employer for wage, remuneration or other compensation, except that employees employed by cities and towns shall only be considered Employees for purposes of this law if this law is accepted by vote or by appropriation as provided in Article CXV of the Amendments to the Constitution of the Commonwealth.

“Employer”, any individual, corporation, partnership or other private or public entity, including any agent thereof, who engages the services of an employee for wages, remuneration or other compensation, except the United States government shall not be considered an Employer and cities and towns shall only be considered Employers for the purposes of this law if this law is accepted by vote or by appropriation as provided by Article CXC of the Amendments to the Constitution of the Commonwealth.

“Food Services Establishment”, the fixed point of sale location for establishments defined in the 2012 North American Industry Classification System (“NAICS”) under code 722 as food services and drinking places.

“Hospitality Establishment”, the meaning provided in NAICS code 721110 for hotels and motels and code 721120 for casino hotels.

“On-call shift” or “on-call hours”, time that an employer requires an employee to be available to work, and to contact the employer or its designee or wait to be contacted by the employer or its designee to determine whether the employee must report to work at that time.

“Predictability Pay”, payments to an employee, calculated on an hourly basis at the employee’s regular hourly rate, as compensation from changes made by the employer to an employee’s work schedule. An employer must pay an employee predictability pay, when required by this Chapter, in addition to any wages earned for work performed by the employee.

“Posted Work Schedule”, the written notice of work hours required to be provided no later than 14 days before the first day of any new schedule pursuant to section 3(c).

"Retail Establishment", the fixed point of sale location for an establishment defined in the NAICS under codes 441110 to 453998 as a retail trade establishment.

"Shift", the consecutive hours an employer requires an employee to work or to be on-call to work, provided that a break of one hour or less shall not be considered an interruption of consecutive hours. If an employee intended not to work a scheduled shift for any reason, no predictability pay shall be due.

"Successor", any person to whom an employer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys in bulk and not in the ordinary course of the employer's business, a major part of the property, whether real or personal, tangible or intangible, of the employer's business. For purposes of this definition, "person" means an individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, corporation, business trust, partnership, limited liability partnership, company, joint stock, company, limited liability company, association, joint venture, or any other legal or commercial entity.

"Time of hire", the period after an offer of employment and acceptance of the offer of employment and on or before the commencement of employment.

"Writing", a printed or printable communication in physical or electronic format including a communication that is transmitted through electronic mail, text message or computer system or is otherwise sent and stored electronically.

"Work schedule", all of an employee's regular and on-call shifts, including specific start and end times for each shift, during a Calendar Week.

Section 148F. Advance Notice of Work Schedules.

(a) Upon hiring an employee, a Covered Employer shall provide such employee with a written, good faith estimate of the employee's work schedule. The employer shall revise the good faith estimate when there is a significant change to the employee's work schedule due to changes in the employee's availability or to the employer's business needs. The good faith estimate is not a contractual offer binding the employer, but an estimate made without a good faith basis is a violation of this section. The good faith estimate shall contain:

(1) The average number of work hours the employee can expect to work each week;

(2) Whether the employee can expect to work any on-call shifts;

(3) A subset of days and a subset of times or shifts that the employee can expect to work, or days of the week and times or shifts on which the employee will not be scheduled to work.

(b) At the time of hire and during employment, the employee has the right to make work schedule requests. The requests protected under this section include but are not limited to:

(1) Requests not to be scheduled for work shifts during certain days or times or at certain locations,

(2) Requests not to work on-call shifts,

(3) Requests for certain hours, days, or locations of work,

(4) Requests for more or fewer work hours.

The employer is encouraged to engage in an interactive process to discuss such employee requests, but may grant or deny the request for any reason that is not unlawful.

(c) On or before the commencement of employment, a Covered Employer shall provide the employee with a written work schedule that runs through the last date of the currently posted schedule. Thereafter, an employer shall provide written notice of work hours no later than 14 days before the first day of any new schedule pursuant to section 148F(d). Nothing in this Section shall be construed to prohibit an Employer from providing greater advance notice of Employee's work schedules and/or changes in schedules than that required by this Section. An employer who fails to post a written work schedule at least fourteen calendar days before the first day of the work schedule must compensate each employee in the amount of $75 per day that the schedule is not posted.

(d) Written notice of the work schedule shall be provided by posting the work schedule in a conspicuous place at the workplace that is readily accessible and visible to all employees and transmitting the posted work schedule to each employee. Such transmission may be done electronically if electronic means are regularly used to communicate scheduling information to employees. The posted work schedule shall include the shifts of all current employees at that worksite, whether or not they are scheduled to work or be on-call that week.

(e) A Covered Employer shall provide notice of any proposed changes to the employee's posted work schedule as promptly as possible and prior to the change taking effect. The Covered Employer must revise the written work schedule to reflect any changes within 24 hours of making the change.

(f) An employee may decline to work any hours not included in the posted work schedule. If the employee voluntarily consents to work such hours, such consent must be

recorded in writing. A communication of an employee's desire to work shifts made available pursuant to section 6 shall constitute written consent.

Section 148G. Compensation for Changed Work Schedules.

(a) For each employer-initiated change to the posted work schedule that occurs after the advance notice required in section 148F(c), a Covered employer shall pay an employee predictability pay at the following rates:

(1) One hour of predictability pay when the Covered Employer adds hours of work or changes the date, time, or location of a work shift with no loss of hours.

(2) No less than one-half times the employee's regular rate of pay per hour for any scheduled hours the employee does not work when the Covered Employer:

(i) Subtracts hours from a regular or on-call shift;

(ii) Cancels a regular or on-call shift.

(b) A Covered Employer is not required to pay predictability pay under section 148H or obtain written consent pursuant to section 148F (f) when:

(1) An employee requests a shift change in writing, including but not limited to the use of sick leave, vacation leave, or other leave policies offered by the employer;

(2) A schedule change is the result of a mutually agreed upon shift trade or coverage arrangement between employees, subject to any existing employer policy regarding required conditions for employees to exchange shifts;

(3) The Covered Employer's operations cannot begin or continue due to:

(i) Threats to the employees or the employer's property;

(ii) The failure of a public utility or the shutdown of public transportation;

(iii) A fire, flood or other natural disaster;

(iv) A state of emergency declared by the President of the United States or the Governor of the state; or

(v) Severe weather conditions that pose a threat to employee safety.

Section 148H. Right to Rest Between Work Shifts.

(a) An employee may decline, without penalty, any work hours that are scheduled or otherwise occur: (1) less than 11 hours after the end of the previous day's shift, or (2) during the 11 hours following the end of a shift that spanned two days. An employee may consent to work such shifts; however, consent must be provided in writing, either for each such shift or for multiple shifts, and may be revoked in writing at any time during employment.

(b) The employer shall compensate the employee for each instance that the employee works a shift described in subsection 148F (a) at one and one-half times the employee's scheduled rate of pay for the hours worked that are less than eleven hours apart.

Section 148I. Offer of Work to Existing Employees.

(a) Before hiring new employees from an external applicant pool or subcontractors, including hiring through the use of temporary services or staffing agencies, a Covered Employer shall offer work shifts to existing employees.

(b) The employer shall post written notice of available work shifts for at least 72 hours, unless a shorter posting period is necessary in order for the work to be timely performed.

(1) The notice shall be in English and in the primary language(s) of the employees at the particular workplace, posted in a conspicuous location at the workplace that is readily accessible to all employees. The notice shall also be provided electronically to each employee if the Covered Employer customarily communicates in such manner with employees.

(2) The notice shall include a description of the position and its required qualifications, the schedule of available shifts, the length of time the employer anticipates requiring coverage of the additional hours, the process by which employees may notify the employer of their desire to work the offered shifts, and an advisement that an employee may accept a subset of the shifts offered.

(3) The employer may post the notice concurrently at the location where the hours described in the notice will be worked, locations other than the location where the work is to be performed, and to external candidates.

(c) A Covered Employer shall distribute hours, in accordance with the criteria contained in the notice required by subsection 5(f)(3), to one or more employees who have accepted such shifts and who, to a reasonable employer acting in good faith, are qualified to perform the work, provided that:

(1) A Covered Employer shall distribute hours to employees whose regular workplace is the location where the hours described in the notice will be worked; or, if no such employee accepts the hours within the time defined in this section, to employees whose regular workplace is a covered location other than the location where such hours will be worked; or, if no such

employee accepts the hours described in the notice within the time defined in this section, to temporary or seasonal workers who have been continuously assigned for at least four weeks to the location where the hours described in the notice will be worked.

(2) The Employer's system for distribution of hours shall not discriminate on the basis of race, color, creed, religion, ancestry, national origin, sex, sexual orientation, gender identity, disability, age, marital or familial status, nor on the basis of family caregiving responsibilities or status as a student, and the Employer may not distribute hours in a manner intended to avoid application of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18001.

(d) A Covered Employer may hire individuals from an external applicant pool or subcontractors to perform the work described in the notice required by section 148G(b)(2) if the employer provides notice of available work shifts to all employees as required herein, and:

(1) No employee responds to the written notice of available work shifts by the end of the posting period; or

(2) Within the posting period, the employer receives written confirmation from eligible employees that they are not interested in accepting the available work shifts; or

(3) Existing employees have accepted a subset of the offered work hours, in which case the existing employees must be awarded that subset of work hours and external applicants may be offered the remaining hours, provided that the employer is not required to award partial shifts to existing employees if doing so would require the employer to hire a new employee to fill a shift of less than 4 hours.

(e) This section 148G shall not be construed to require any Covered Employer to offer employees work hours paid at a premium rate under state or federal law, or to prohibit such employer from offering such work hours.

(f) An employer must notify employees in writing of their policy for offering and distributing work hours under this section, at the time of hire and within 24 hours of any change, and must post the notice in an accessible location in the workplace. The notice shall communicate:

(1) Where employees can access written notices of available work hours;

(2) The process by which employees may notify the employer of their desire to work the available work hours;

(3) The criteria for distribution of work hours among qualified and interested employees.

(g) An employer who fails to offer hours of work as required by this section must compensate each existing employee $100 for each such occurrence. An employer who fails to award hours to the qualified employee who is eligible to receive the hours under the policy provided pursuant to section 148G(f) of this section must compensate the qualified employee in the amount of $1,000.

Section 148J. Exercise of Rights Protected; Retaliation Prohibited.

(a) It shall be unlawful for an employer or any other person to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Chapter.

(b) No person shall take any adverse action against an employee that penalizes such employee for, or is reasonably likely to deter such employee from, exercising or attempting to

exercise any right protected under this chapter. Taking an adverse action includes threatening, intimidating, disciplining, discharging, demoting, suspending or harassing an employee; assigning an employee to a lesser position in terms of job classification, job security, or other condition of employment; reducing the hours or pay of an employee or denying the employee additional hours; informing another employer that an employee has engaged in activities protected by this chapter, and discriminating against the employee, including actions or threats related to perceived immigration status or work authorization.

(c) Protections of this section shall apply to any person who mistakenly but in good faith alleges violations sections 148E through 148N, inclusive.

(d) It shall be considered a rebuttable presumption of retaliation if the employer or any other person takes an adverse action against an employee within 90 calendar days of the employee's exercise of rights protected in sections 148E through 148N, inclusive. In the case of seasonal employment that ended before the close of the 90 calendar day period, the presumption also applies if the employer fails to rehire a former employee at the next opportunity for work in the same position.

Section 148K. Regulations.

The Attorney General is authorized to coordinate the implementation, administration, and enforcement of sections 148E through 148N, inclusive, and shall promulgate such regulations or guidelines as it may deem necessary for such purposes.

Section 148L. Notice.

Each Covered Employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Attorney General, setting forth the rights and privileges provided under sections 148E through 148N, inclusive, stating that retaliation against employees for exercising such rights is prohibited, and providing such other information as the Attorney General may require.

Section 148M. Employer Records.

(a) Covered Employers shall keep records necessary to demonstrate compliance with sections 148E through 148N, inclusive, including but not limited to good faith estimates of work schedules, written work schedules and any modifications thereto, written consent for work shifts as required by sections 148E through 148N, inclusive, and offers of work shifts to existing employees and responses to those offers. Employers shall retain such records for a period of two years, and shall allow the Attorney General access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of sections 148E through 148N, inclusive. When an issue arises as to a Covered Employer's compliance with sections 148E through 148N, inclusive, if the employer does not maintain or retain adequate records documenting compliance, or does not allow the Attorney General reasonable access to such records within 30 days of the Attorney General's request, it shall be presumed that the employer has violated sections 148E through 148N, inclusive, absent clear and convincing evidence otherwise.

(b) Upon request by any employee, and in accordance with the rules of the Attorney General, a Covered Employer must provide such employee with work schedules in writing for

any previous week worked for the past two years, including the originally posted and modified versions of work schedules.

(c) Employers may record employee consent and employee requests pursuant to sections 148F(f), 148G(b)(1) and 148H(a) using any printed or printable communication in physical or electronic format, including a communication that is transmitted through email, text message, or a computer system, or is otherwise sent and maintained electronically.

Section 148N. Nothing in sections 148E through 148N, inclusive, shall be construed to discourage employers from adopting or retaining scheduling policies more generous than policies that comply with the requirements of these sections, and nothing in these sections shall be construed to diminish or impair the obligation of an employer to comply with any contract, collective bargaining agreement, or any employment benefit program or plan in effect on the effective date of this section that provides to employees greater scheduling rights than the rights established under this Chapter.

SECTION 2. Section 27C of said chapter 149 is hereby amended by inserting in line 4, after the word “148B,” the following words:-, 148E, 148F, 148G, 148H, 148I, 148J, 148K, 148L, 148M, 148N,;

and in said section 27C of said chapter 149, by inserting in line 15 after the word “148B,” the following words:- , 148E, 148F, 148G, 148H, 148I, 148J, 148K, 148L, 148M, 148N,.

SECTION 3. Section 150 of said chapter 149, is hereby amended, by inserting after the word “148C,” in line 22 the following words:-, 148E, 148F, 148G, 148H, 148I, 148J, 148K, 148L, 148M, 148N.

SECTION 4. Subsection (e) of section 25 of chapter 151A, is hereby amended, by inserting at the end thereof the following words:- No disqualification shall be imposed if the individual establishes to the satisfaction of the commissioner that the reason for the individual's separation was due to the employer's failure to comply with sections 148E, 148F, 148G, 148H, 148I, 148J, 148K, 148L, 148M, 148N of chapter 149, or due to a significant change to the employee's work schedule due to changes in the employer's business needs.