

HOUSE No. 3809

The Commonwealth of Massachusetts

PRESENTED BY:

Sean Garballey

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:	DATE ADDED:
<i>Sean Garballey</i>	<i>23rd Middlesex</i>	<i>1/18/2019</i>
<i>Marjorie C. Decker</i>	<i>25th Middlesex</i>	<i>1/29/2019</i>
<i>Lindsay N. Sabadosa</i>	<i>1st Hampshire</i>	<i>1/30/2019</i>
<i>David M. Rogers</i>	<i>24th Middlesex</i>	<i>1/30/2019</i>
<i>Russell E. Holmes</i>	<i>6th Suffolk</i>	<i>1/30/2019</i>
<i>James B. Eldridge</i>	<i>Middlesex and Worcester</i>	<i>1/30/2019</i>
<i>Mike Connolly</i>	<i>26th Middlesex</i>	<i>1/30/2019</i>
<i>Daniel M. Donahue</i>	<i>16th Worcester</i>	<i>1/30/2019</i>
<i>Carlos González</i>	<i>10th Hampden</i>	<i>1/31/2019</i>
<i>Mindy Domb</i>	<i>3rd Hampshire</i>	<i>1/31/2019</i>
<i>Tricia Farley-Bouvier</i>	<i>3rd Berkshire</i>	<i>1/31/2019</i>
<i>Maria Duaine Robinson</i>	<i>6th Middlesex</i>	<i>1/31/2019</i>
<i>Jay D. Livingstone</i>	<i>8th Suffolk</i>	<i>1/31/2019</i>
<i>Mary S. Keefe</i>	<i>15th Worcester</i>	<i>2/1/2019</i>
<i>David Henry Argosky LeBoeuf</i>	<i>17th Worcester</i>	<i>2/1/2019</i>
<i>Natalie M. Higgins</i>	<i>4th Worcester</i>	<i>2/1/2019</i>
<i>Jack Patrick Lewis</i>	<i>7th Middlesex</i>	<i>2/1/2019</i>
<i>Bruce J. Ayers</i>	<i>1st Norfolk</i>	<i>2/1/2019</i>

<i>Elizabeth A. Malia</i>	<i>11th Suffolk</i>	<i>2/1/2019</i>
<i>Denise C. Garlick</i>	<i>13th Norfolk</i>	<i>2/1/2019</i>
<i>John H. Rogers</i>	<i>12th Norfolk</i>	<i>2/1/2019</i>
<i>Nika C. Elugardo</i>	<i>15th Suffolk</i>	<i>2/1/2019</i>
<i>Denise Provost</i>	<i>27th Middlesex</i>	<i>2/1/2019</i>
<i>Tami L. Gouveia</i>	<i>14th Middlesex</i>	<i>2/1/2019</i>
<i>Michelle M. DuBois</i>	<i>10th Plymouth</i>	<i>2/1/2019</i>
<i>Julian Cyr</i>	<i>Cape and Islands</i>	<i>2/1/2019</i>

HOUSE No. 3809

By Mr. Garballey of Arlington, a petition (accompanied by bill, House, No. 3809) of Sean Garballey and others 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:

1 SECTION 1. The General Laws are hereby amended by inserting after chapter 149A the
2 following chapter:-

3 CHAPTER 149B. FAIR EMPLOYEE SCHEDULING PRACTICES

4 Section 1. (a) As used in this chapter, the following terms shall, unless the context clearly
5 requires otherwise, have the following meanings:

6 “Calendar week”, a period of 7 consecutive days beginning on any designated day.

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

10 “Franchisee”, an individual, corporation, partnership or other entity, or group of
11 individuals or entities, that operates 1 or more fast food restaurants or retail stores in the

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

14 “Franchisor”, an individual, corporation, partnership or other entity, or group of
15 individuals or entities, that grants a franchisee the right to operate 1 or more fast food restaurants
16 or retail stores in the commonwealth under its trademark or trade name.

17 “Covered employer”, an employer that is a retail Establishment, a hospitality
18 establishment or a food services establishment, that employs 50 or more employees worldwide
19 regardless of where those employees perform work, including but not limited to chain
20 establishments or franchises associated with a franchisor or network of franchises that employ
21 more than 50 employees in aggregate. In determining the number of employees for purposes of
22 this subsection, all employees performing work for compensation on a full-time, part-time or
23 temporary basis shall be counted, provided that where the number of employees who work for an
24 employer for compensation fluctuates, business size may be determined for the current calendar
25 year based upon the average number of employees who worked for compensation per week
26 during the preceding calendar year, and provided further that in determining the number of
27 employees performing work for an employer that is a chain business, the total number of
28 employees in that group of establishments shall be counted.

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

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

40 “Food services establishment”, the fixed point of sale location for establishments defined
41 in NAICS under code 722 as food services and drinking places.

42 “Hospitality establishment”, hotels and motels, as those terms are provided in NAICS
43 code 721110, and casino hotels, as that term is provided in NAICS code 721120.

44 “NAICS”, 2012 North American Industry Classification System.

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

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

52 “Posted work schedule”, the written notice of work hours required to be provided no later
53 than 14 days before the first day of any new schedule pursuant to subsection (c) of section 2.

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

56 “Shift”, the consecutive hours an employer requires an employee to work or to be on-call
57 to work, provided that a break of 1 hour or less shall not be considered an interruption of
58 consecutive hours.

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

67 “Time of hire”, the period after an offer of employment and acceptance of the offer of
68 employment and on or before the commencement of employment.

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

72 “Work schedule”, all of an employee’s regular and on-call shifts, including specific start
73 and end times for each shift, during a calendar week.

74 Section 2. (a) Upon hiring an employee, a covered employer shall provide such
75 employee with a written, good faith estimate of the employee's work schedule. The employer
76 shall revise the good faith estimate when there is a significant change to the employee's work
77 schedule due to changes in the employee's availability or to the employer's business needs. The
78 good faith estimate is not a contractual offer binding the employer, provided, however, that an
79 estimate made without a good faith basis shall be a violation of this section. The good faith
80 estimate shall contain: (i) the average number of work hours the employee can expect to work
81 each week; (ii) whether the employee can expect to work any on-call shifts; and (iii) a subset of
82 days and a subset of times or shifts that the employee can expect to work, or days of the week
83 and times or shifts on which the employee will not be scheduled to work.

84 (b) At the time of hire and during employment, the employee has the right to make work
85 schedule requests of a covered employer. The requests protected under this section include, but
86 are not limited to: (i) requests not to be scheduled for work shifts during certain days or times or
87 at certain locations; (ii) requests not to work on-call shifts; (iii) requests for certain hours, days,
88 or locations of work; and (iv) requests for more or fewer work hours. The covered employer is
89 encouraged to engage in an interactive process to discuss such employee requests, but may grant
90 or deny the request for any reason that is not unlawful.

91 (c) On or before the commencement of employment, a covered employer shall provide
92 the employee with a written work schedule that runs through the last date of the currently posted
93 schedule. Thereafter, an employer shall provide written notice of work hours no later than 14
94 days before the first day of any new schedule. Nothing in this section shall be construed to
95 prohibit a covered employer from providing greater advance notice of employee's work
96 schedules or changes in schedules than the notice period required by this section. An employer

97 who fails to post a written work schedule at least 14 calendar days before the first day of the
98 work schedule shall compensate each employee in the amount of \$75 per day that the schedule is
99 not posted.

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

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

110 (f) An employee may decline to work any hours not included in the posted work
111 schedule. If the employee voluntarily consents to work such hours, such consent shall be
112 recorded in writing. A communication of an employee's desire to work shifts made available
113 pursuant to section 9 shall constitute written consent.

114 Section 3. (a) For each employer-initiated change to the posted work schedule that
115 occurs after the advance notice required in subsection (c) of section 2, a covered employer shall
116 pay an employee predictability pay at the following rates:

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

119 (2) No less than one-half times the employee's regular rate of pay per hour for any
120 scheduled hours the employee does not work when the covered employer: (i) subtracts hours
121 from a regular or on-call shift; or (ii) cancels a regular or on-call shift.

122 (b) A covered employer is not required to pay predictability pay under this section or
123 obtain written consent pursuant to subsection (f) of section 2 when:

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

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

129 (3) the employee did not intend to work a scheduled shift for any reason;

130 (4) the covered employer's operations cannot begin or continue due to:

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

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

133 (iii) a fire, flood or other natural disaster;

134 (iv) a state of emergency declared by the president of the United States or the governor;

135 or

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

137 Section 4. (a) An employee may decline, without penalty, any work hours that are
138 scheduled or otherwise occur: (1) less than 11 hours after the end of the previous day's shift; or
139 (2) during the 11 hours following the end of a shift that spanned 2 days. An employee may
140 consent to work such shifts; provided, however, that consent must be provided in writing, either
141 for each such shift or for multiple shifts, and may be revoked in writing at any time during
142 employment.

143 (b) The employer shall compensate the employee for each instance that the employee
144 works a shift described in subsection (a) at 1 and one-half times the employee's scheduled rate of
145 pay for the hours worked that are less than 11 hours apart.

146 Section 5. (a) Before hiring new employees from an external applicant pool or
147 subcontractors, including hiring through the use of temporary services or staffing agencies, a
148 covered employer shall offer work shifts to existing employees.

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

151 The notice shall be in English and in the primary languages of the employees at the
152 particular workplace and shall be posted in a conspicuous location at the workplace that is
153 readily accessible to all employees. The notice shall also be provided electronically to each
154 employee if the covered employer customarily communicates in such manner with employees.

155 The notice shall include a description of the position and its required qualifications, the
156 schedule of available shifts, the length of time the employer anticipates requiring coverage of the
157 additional hours, the process by which employees may notify the employer of their desire to

158 work the offered shifts, and an advisement that an employee may accept a subset of the shifts
159 offered.

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

163 (c) A covered employer shall distribute hours, in accordance with the criteria contained in
164 the notice required by subsection 5(f)(3), to 1 or more employees who have accepted such shifts
165 and who, to a reasonable employer acting in good faith, are qualified to perform the work,
166 provided, however, that:

167 (1) a covered employer shall distribute hours to employees whose regular workplace is
168 the location where the hours described in the notice will be worked; or, if no such employee
169 accepts the hours within the time defined in this section, to employees whose regular workplace
170 is a covered location other than the location where such hours will be worked; or, if no such
171 employee accepts the hours described in the notice within the time defined in this section, to
172 temporary or seasonal workers who have been continuously assigned for at least 4 weeks to the
173 location where the hours described in the notice will be worked; and

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

179 (d) A covered employer may hire individuals from an external applicant pool or
180 subcontractors to perform the work described in the notice required by this section if the
181 employer provides notice of available work shifts to all employees as required herein, and:

182 (1) no employee responds to the written notice of available work shifts by the end of the
183 posting period;

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

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

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

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

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

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

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

202 (g) A covered employer who fails to offer hours of work as required by this section shall
203 compensate each existing employee \$100 for each such occurrence. An employer who fails to
204 award hours to the qualified employee who is eligible to receive the hours under the policy
205 required by subsection (f) shall compensate the qualified employee in the amount of \$1,000.

206 Section 6. (a) It shall be unlawful for an employer or any other person to interfere with,
207 restrain, or deny the exercise of, or the attempt to exercise, any right protected under this chapter.

208 (b) No person shall take any adverse action against an employee that penalizes such
209 employee for, or is reasonably likely to deter such employee from, exercising or attempting to
210 exercise any right protected under this chapter. Taking an adverse action includes: threatening,
211 intimidating, disciplining, discharging, demoting, suspending or harassing an employee;
212 assigning an employee to a lesser position in terms of job classification, job security, or other
213 condition of employment; reducing the hours or pay of an employee or denying the employee
214 additional hours; informing another employer that an employee has engaged in activities
215 protected by this chapter, and discriminating against the employee, including actions or threats
216 related to perceived immigration status or work authorization.

217 (c) Protections of this section shall apply to any person who mistakenly but in good faith
218 alleges violations of this chapter.

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

224 Section 7. The attorney general shall coordinate the implementation, administration, and
225 enforcement of this Chapter, and shall promulgate such regulations or guidelines as it may deem
226 necessary for such purposes.

227 Section 8. Each covered employer shall post and keep posted, in conspicuous places on
228 the premises of the employer where notices to employees and applicants for employment are
229 customarily posted, a notice, to be prepared or approved by the attorney general, setting forth the
230 rights and privileges provided under this chapter, stating that retaliation against employees for
231 exercising such rights is prohibited, and providing such other information as the attorney general
232 may require.

233 Section 9. (a) Covered employers shall keep records necessary to demonstrate
234 compliance with this chapter, including but not limited to good faith estimates of work
235 schedules, written work schedules and any modifications thereto, written consent for work shifts
236 as required by this chapter, and offers of work shifts to existing employees and responses to
237 those offers. Employers shall retain such records for a period of 2 years, and shall allow the
238 attorney general access to such records, with appropriate notice and at a mutually agreeable time,
239 to monitor compliance with the requirements of this chapter. When an issue arises as to a
240 covered employer's compliance with this chapter, if the employer does not maintain or retain

241 adequate records documenting compliance, or does not allow the attorney general reasonable
242 access to such records within 30 days of the attorney general’s request, it shall be presumed that
243 the employer has violated the chapter, absent clear and convincing evidence otherwise.

244 (b) Upon request by any employee, and in accordance with the rules of the attorney
245 general, a covered employer must provide such employee with work schedules in writing for any
246 previous week worked for the past 2 years, including the originally posted and modified versions
247 of work schedules.

248 (c) Employers may record employee consent and employee requests pursuant to
249 subsection (f) of section 2, clause (1) of paragraph (b) of section 3 and subsection (a) of section 4
250 using any printed or printable communication in physical or electronic format, including a
251 communication that is transmitted through email, text message, or a computer system, or is
252 otherwise sent and maintained electronically.

253 Section 10. Nothing in this chapter shall be construed to discourage employers from
254 adopting or retaining scheduling policies more generous than policies that comply with the
255 requirements of this chapter and nothing in this chapter shall be construed to diminish or impair
256 the obligation of an employer to comply with any contract, collective bargaining agreement, or
257 any employment benefit program or plan in effect on the effective date of this section that
258 provides to employees greater scheduling rights than the rights established under this chapter.

259 SECTION 2. Section 27C of chapter 149 of the General Laws, as appearing in the 2016
260 Official Edition, is hereby amended by striking out, in lines 5 and 15, the words “or section 1A,
261 1B or 19 of chapter 151” and inserting in place thereof, in each instance, the following words:- ,
262 section 1A, 1B or 19 of chapter 151 or chapter 149B.

263 SECTION 3. Said section 27C of said chapter 149, as so appearing, is hereby further
264 amended by inserting after the words “or 148B”, in lines 29, 37 and 89, in each instance, the
265 following words:- or chapter 149B.

266 SECTION 4. Section 150 of said chapter 149, as so appearing, is hereby amended, by
267 striking out, in line 22, the words “or section 19 of chapter 151” and inserting in place thereof the
268 following words:- , section 19 of chapter 151 or chapter 149B

269 SECTION 5. Clause (e) of section 25 of chapter 151A of the General Laws, as so
270 appearing, is hereby amended by inserting after the first paragraph the following paragraph:- No
271 disqualification shall be imposed if the individual establishes to the satisfaction of the
272 commissioner that the reason for the individual's separation was due to the employer's failure to
273 comply with chapter 149B, or due to a significant change to the employee's work schedule due to
274 changes in the employer's business needs.