

**CITY AND COUNTY OF SAN FRANCISCO OFFICE
OF LABOR STANDARDS ENFORCEMENT**

**FINAL RULES
IMPLEMENTING THE
FORMULA RETAIL
EMPLOYEE RIGHTS ORDINANCES (FREROs)**

Effective Date: March 1, 2016

Labor and Employment Code (L.E.C.) Article 41 and
42 (formerly codified as Police Code 33F and 33G)

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Formula Retail Employee Rights Ordinances
L.E.C. Art. 41 and Art. 42

Final Rules
Posted January 29, 2016

Rule 1. Determining Whether a Formula Retail Establishment Has 20 or More Employees

This rule interprets Article 41, Sections 41.2 and 41.4, and Article 42, Section 42.3

Rule 1.1. Where the number of Employees is less than 20 per week for any week during a calendar year, OLSE will calculate business size for that calendar year based upon the average number of Employees per week during the previous calendar year.

Example 1. For five weeks in 2016, a business employed less than 20 people. For the remainder of the weeks in 2016, the business employed 20 or more people. Because the number of Employees has dipped below the 20-employee threshold, OLSE will calculate business size based on the average number of Employees per week in 2015. The calculation would be as follows: (a) For each of the 52 weeks in 2015, determine the total number of Employees who worked for compensation; (b) Add these numbers together; (c) Divide by 52. If this number is below 20, then the Ordinances would not apply to the business for 2016.

Rule 1.2. For new Employers, OLSE will calculate business size based upon the average number of Employees per week for the first twelve weeks after the Employer's first San Francisco Employee(s) began work. For the calendar year in which the twelfth week falls, that 12-week average will constitute the Employer's number of Employees.

Rule 1.3. When there is a Change in Control within the meaning of Article 41, the Successor Employer is a covered Employer under Articles 41 and 42 for the first 12 weeks after the Change in Control, even if the number of Employees dips below 20.

Rule 2. Overtime Pay and Offers of Additional Hours to Part-time Employees

This rule interprets Article 41, Section 41.3

Rule 2.1. An Employer is not required to offer a Part-time Employee any shift for which the Employer would have to pay the Part-time Employee daily or weekly overtime rates for any part of the shift.

Example 1. Company A¹ is a movie theater with 20 Full-time Employees and one Part-time Employee. That Part-time Employee is scheduled to work only one day per week for an eight-hour shift – Mondays from 9:00 a.m. through 5:00 p.m.² Additional hours of work become available – from Monday at 5:00 p.m. through 10:00 p.m. Although the Employer may offer those additional hours to the Part-time Employee and pay overtime rates for the additional hours, the Employer is not obligated to do so.

Example 2. Company B is a bank with 20 Full-time Employees and one Part-time Employee. That Part-time Employee is scheduled to work only one day per week, for a single six-hour shift – Mondays from 9:00 a.m. to 3:00 p.m. An additional four-hour shift becomes available – Mondays from 3:00 p.m. to 7:00 p.m. In this circumstance, the possible outcomes include:

1. The Employer may choose to offer the additional hours to the existing Part-time Employee and pay that Employee her overtime rate for two hours.
2. The Employer may choose to offer two of the additional hours to the existing Part-time Employee, and hire a new Part-time Employee to work the remaining two hours.
3. The Employer may choose to hire a new Part-time Employee to work all of the additional hours.

¹ This company and all companies and/or Employers referenced in the ensuing rules and examples satisfy the definition of Employer under the Ordinances. Similarly, except where otherwise referenced, the Part-time Employees referenced in these rules and examples are current Part-time Employees who satisfy the standards pertaining to qualifications and work experience as stated in Section 41.3(a), and the Employer's obligations are limited by the principle as stated in Section 41.3(a) regarding not having to offer an Employee more than 35 hours of work in a week.

² The shifts illustrated in this and all ensuing rules and examples do not incorporate any meal or rest breaks that may be required by law.

Rule 3.

Offering Additional Hours to Part-Time Employees

This rule interprets Article 41, Section 41.3

Rule 3.1. When offering additional hours to existing qualified Part-time Employees, if no single Part-time Employee is available to work the entirety of the additional hours or shift(s), the Employer must allow an existing Part-time Employee to work a portion of those hours or shift(s) so long as (1) the total number of consecutive hours that the Employee can work is at least four hours, and (2) the remainder of the shift(s) that the Employee cannot work is not less than four hours. In other words, an Employer need not allow an existing Employee to work a shift of less than four hours, nor must an Employer hire a new Employee to work a shift of less than four hours.

Example 1. Company A has two Part-time Employees, Smith and Jones. An eight-hour shift becomes available. Company A offers the shift to Smith and Jones. Jones is unavailable. Smith indicates that he can work only the first four hours of the shift. Company A must allow Smith to work those four hours, and may hire a new Employee to work the remaining four hours.

Example 2. Company B has two Part-time Employees, Smith and Jones. Smith is scheduled to work from noon to 4:00 p.m. on Monday. An eight-hour shift, from 4:00 p.m. to midnight on Monday becomes available. Company B offers the shift to Smith and Jones. Jones is unavailable. Smith states that he can work only the first 30 minutes of the additional shift (i.e., until 4:30 p.m.). Company B must allow Smith to work those 30 minutes, and may hire a new Employee to work the remaining 7 1/2 hours.

Example 3. Company C has two Part-time Employees. An eight-hour shift, from 4:00 p.m. to midnight on Monday becomes available. Company C offers the shift to the Parttime Employees, neither of whom is scheduled to work on Monday or Tuesday. One of them is unavailable to work any of the additional hours, and one of them is available to work only the first two hours of the eight-hour shift. Company C may hire a new Employee to work the full-eight-hour shift.

Example 4. Company D has two Part-time Employees, Smith and Jones. Smith is scheduled to work from noon to 4:00 p.m. on Monday. A four-hour shift, from 4:00 p.m. to 8:00 p.m. on Monday becomes available. Company D offers the shift to Smith and Jones. Jones is unavailable. Smith indicates that he can work only the first 30 minutes of the shift. Company D may hire a new Employee to work the full four-hour shift.

Rule 4. Predictability Pay

This rule interprets Section 42.4

Rule 4.1. An Employee's "regular hourly rate" under Section 42.4(c)(2) and 42.4(d) shall be calculated as follows: divide the employee's total earnings in base wages plus commissions or piece rates for the prior calendar year by the total hours worked as a commissioned or piece rate employee during the prior calendar year. For employees without a prior calendar year's work history, divide the employee's total earnings in base wages plus commissions or piece rates since the employee's date of hire by the total hours worked as a commissioned or piece rate employee since that date.

Rule 4.2. If an Employer requires an Employee to leave work early, but compensates the Employee for the entire scheduled shift, the Employer does not owe predictability pay.

Example 1. Employee A is scheduled to work an 8-hour shift. On a particular day, business is slow. After the Employee has worked 7.5 hours of her shift, the Employer notifies the Employee that she may go home. The Employer pays the Employee for the full 8-hour shift at the Employee's regular hourly rate. The Employer does not owe predictability pay.

Rule 5. Calculating Predictability Pay When an Employer Adds Hours to or Subtracts Hours From a Scheduled Shift With Less Than 24-Hours' Notice

This rule interprets Section 42.4

Rule 5.1. The number of hours of predictability pay owed by an Employer who adds hours to or subtracts hours from a scheduled shift with less than 24-hours' notice is determined by the number of hours added to or subtracted from the originally scheduled shift. If the Employer adds four hours or less to or subtracts four hours or less from a shift with less than 24-hours' notice, the Employer owes two hours of predictability pay. If the Employer adds more than four hours to or subtracts more than four hours from a shift with less than 24-hours' notice, the Employer owes four hours of predictability pay.

Example 1. An Employee is scheduled to work an 8-hour shift. Less than 24 hours before the shift begins, the Employer cancels the shift. The Employer owes four hours of predictability pay.

Example 2. An Employee is scheduled to work a 6-hour shift, from noon to 6:00 p.m. Less than 24 hours before the shift begins, the Employer informs the Employee that the shift will be extended from noon to 7:00 p.m. The Employer owes two hours of predictability pay.

Example 3. An Employee is scheduled to work an 8-hour shift, from noon to 8:00 p.m. Less than 24 hours before the shift begins, the Employer informs the Employee that the shift will be from noon to 3:00 p.m. The Employer owes four hours of predictability pay.

Rule 5.2. The number of hours of predictability pay owed by an Employer who moves a scheduled shift with less than 24-hours' notice to another time on the same day or to another day but does not change the shift's overall length shall be determined as follows:

- For each shift that is moved less than four hours, the Employer owes two hours of predictability pay.
- For each shift of more than four hours that is moved more than four hours, the Employer owes four hours of predictability pay.

Rule 5.3. The number of hours of predictability pay owed by an Employer who, with less than 24-hours' notice, both 1) moves a scheduled shift to a different time and 2) changes the shift's duration shall be four hours if the sum total of the number of hours added to or subtracted from the shift plus the number of hours that the Employer has moved the shift is four or more. The number of hours of predictability pay owed by an Employer who, with less than 24-hours' notice, both 1) moves a scheduled shift to a different time and 2) changes the shift's duration

shall be two hours if the sum total of the number of hours added to or subtracted from the shift plus the number of hours that the Employer has moved the shift is less than four.

Example 1. An Employee is scheduled to work from 9:00 a.m. to noon. Less than 24 hours before the shift begins, the Employer changes the shift so that it begins at 11:00 a.m. and ends at 1:00 p.m. The Employer owes two hours of predictability pay because the total number of hours subtracted from the shift (i.e., one hour) plus the number of hours by which the shift has been moved (i.e., two hours) is less than four.

Example 2. An Employee is scheduled to work from 11:00 a.m. to 5:00 p.m. Less than 24 hours before the shift begins, the Employer changes the shift so that it begins at 10:00 a.m. and ends at 1:00 p.m. The Employer owes four hours of predictability pay because the total number of hours subtracted from the shift (i.e., three hours) plus the number of hours by which the shift has been moved (i.e., one hour) is four or more.

Rule 6. Predictability Pay

This rule interprets Section 42.4

Rule 6.1. Per Section 42.4(c)(2) of the ordinance, an Employer owes predictability pay if the Employer “requires” an Employee to come into work for a previously unscheduled shift. “Requiring” an Employee to come into work within the meaning of Section 42.4(c)(2) includes the following scenarios:

- a) the Employer unilaterally schedules a shift change that is not requested by or consented to by the Employee;
- b) the Employer makes coming into work for that shift a condition of employment (i.e., the Employee must work that shift or she will lose her job); or
- c) the Employer pressures or coerces the Employee to come into work for the shift, or pressures or coerces the Employee to work one or more additional shifts. Even if the Employer categorizes, labels or describes the shift change as a “request” rather than a “requirement,” if the Employer pressures or coerces the Employee in a manner that would discourage a reasonable Employee from declining the shift change, it is deemed a “requirement” rather than a voluntary, employee-requested change. Whether an Employer pressures or coerces an Employee to come in to work for the shift shall be determined based on the totality of the circumstances.

Examples of “pressuring or coercing” an Employee to come into work within the meaning of subsection (c) of this Rule include but are not limited to:

- taking or threatening to take any adverse employment action against the Employee if the Employee declines the shift change; and
- suggesting or implying that the Employer may take an adverse employment action against the Employee if the Employee declines the shift change.

Examples of an “adverse employment action” include, but are not limited to, firing or demoting the Employee; loss of benefits; reprimands or disciplinary action; diminished job responsibilities; failure to promote the Employee; assigning the Employee to work fewer hours; and assigning the Employee to work less desirable shifts such as shifts that the Employer knows to be inconvenient for the Employee or shifts during which the Employee is likely to earn less tips or lower commissions.

Example 1. Company A’s corporate headquarters notifies Company A’s store manager that the store will hold a one-day “flash sale” three days later. The manager posts a

signup sheet indicating that Employees may volunteer to work additional shifts due to the sale. Employees 1, 2, and 3 sign up to work additional shifts. Company A does not owe predictability pay.

Example 2. Same facts as in Example 1, except that instead of posting a sign-up sheet, the store manager asks to speak privately with Employee 1. In that private conversation, the manager tells Employee 1, “I’d like you to work during the flash sale. I’m not requiring you to work, but it’s important to me that my employees be team players. I need to know I can count on you to step up and be flexible with your schedule.” Based on this conversation, Employee 1 reasonably believes adverse action will be taken against her if she declines to work the sale, and so she agrees to come in to work. Company A owes predictability pay.

Example 3. Company B uses computer software to generate its Employees’ schedules. An Employee is scheduled to work on Monday and Tuesday. On Monday morning, the Employee consults her schedule and sees that, in addition to her Monday and Tuesday shifts, she has also been scheduled to work on Wednesday. Company B owes one hour of predictability pay for work performed on Wednesday.

Example 4. Company C is a restaurant. On Monday, there are five servers scheduled to work the dinner shift. Business is slower than expected. Halfway through the shift, the manager informs the servers that one of them must go home early, but that they can choose which server does so. After talking it over, Employee Jones volunteers to go home early. Company C owes predictability pay to Employee Jones because reasonable employees would believe that adverse action will be taken against one or more of them if someone did not agree to go home early.

Example 5. Company C is a restaurant. On Monday, there are five servers scheduled to work the dinner shift. Business is slower than expected. Halfway through the shift, the manager informs the servers that one of them may go home early, but that no one is required to do so. After talking it over, Employee Smith volunteers to go home early. Company C does not owe predictability pay to Employee Smith because the Employer did not coerce the shift change.

Rule 6.2. The standard in Rule 6.1 for determining whether an Employer “requires” an Employee to come in to work for a previously unscheduled shift is the same as the standard for determining whether the Employer has moved a previously scheduled shift to another date or time or has canceled a previously scheduled shift in a manner that requires predictability pay.

Example 1. An Employee is scheduled to work a four-hour shift. Two days before the shift, the store manager tells the Employee that her shift will be extended by four hours. The Employer owes one hour of predictability pay.