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## Shifting the Balance: How a Massachusetts “Fair Workweek” Law Can Protect Workers and their Families from Unstable Schedules

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As laid out in a companion report, [Wrong on Schedule: How Unstable Scheduling Hurts Massachusetts Workers and their Families](#), employers in low-wage service industries like food service and retail often change or cancel hourly workers’ shifts at the last minute, and these schedules can fluctuate wildly from one period to another. Many employers force their staff to work consecutive shifts with little time for rest in between, including so-called “clopening” shifts – in which someone closes a store or restaurant at night and has to open it the next morning. And most workers have no say in their schedules. All of this leads to significant income volatility, as well as having harmful effects on household finances, health, and family and child well-being. And workers of color are much more likely than other workers to face unstable scheduling, and many of its harmful effects.

### Fair workweek laws

In response to the crisis of unstable schedules, a number of states and cities in recent years have enacted so-called “**fair workweek**” laws, covering nearly two million workers.<sup>1</sup> There are two fair workweek proposals now before the Massachusetts Legislature. One proposal is [Senate bill 1110/House bill 3809](#). The other proposal is [Senate bill 1102](#).<sup>2</sup> The table in the Appendix offers a detailed comparison of how (if at all) each legislative proposal handles the problems of unstable scheduling. This report highlights the differences.

Both S.1110/H.3809 and S.1102 address the problems of little to no advance notice, last-minute changes, and “clopening” shifts, though in different ways. (For example, S.1110/H.3809 requires employers to provide schedules 14 days in advance; S.1102 calls for seven.)<sup>3</sup>

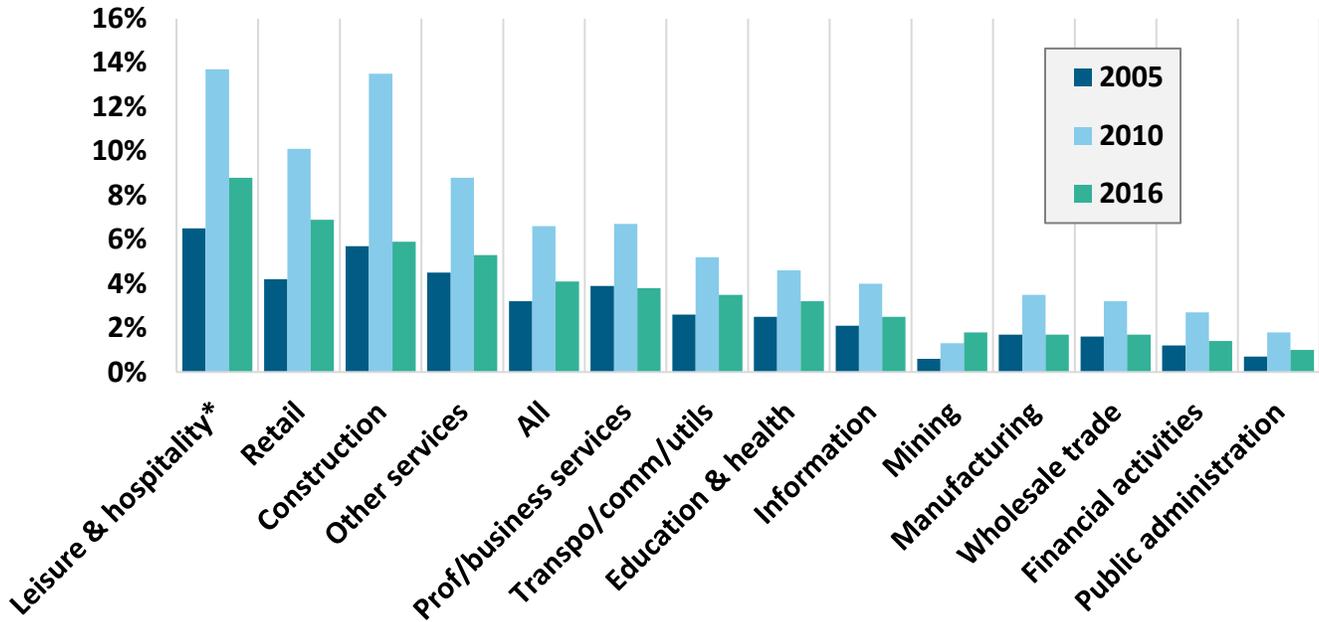
S.1110/H.3809 goes notably further than S.1102 in the addressing the following problems:

### Creating pathways to full-time work

Workers who want full-time work (at least 35 hours) but can only find part-time work are considered “involuntary part-time” workers. Like unemployment, involuntary part-time work – a type of *underemployment* – spikes during recessions. The rate of involuntary part-time work, however, came down more slowly than the unemployment rate since the last recession, and it has been shown to be a particular and persistent problem in the retail, food service, and hospitality industries, as the following chart shows.<sup>4</sup>

## Involuntary part-time employment remains especially elevated in retail, food service, and hospitality well after the Great Recession

Involuntary part-time employment as a percentage of total employment by sector, U.S.



Source: Robert G. Valletta, Leila Bengali, and Catherine van der List, Federal Reserve Bank of San Francisco, “Cyclical and Market Determinants of Involuntary Part-Time Employment,” March 2018, Table 1 (p. 52) [<https://www.frbsf.org/economic-research/files/wp2015-19.pdf>]

\*Hospitality and food services make up 85 percent of this sector. The rest is in arts, entertainment, and recreation. (U.S. Bureau of Labor Statistics, Current Employment Statistics, Table B-1a. Employees on nonfarm payrolls by industry sector and selected industry detail, seasonally adjusted [<https://www.bls.gov/web/empsit/cese1a.htm>])

- S.1110/H.3809 requires employers to offer additional hours to qualified incumbent employees who want more work before hiring new permanent or temporary employees, and calls for significant penalty compensation when employers fail to comply.<sup>5</sup>
- S.1102 does not address the problem of involuntary part-time work.

### Employees’ input into their schedules

About half of employees surveyed by the SHIFT project report that they have no input into their schedules.<sup>6</sup> As noted above, these workers were much more likely to report experiencing psychological distress, poor sleep, and unhappiness.

- S.1110/H.3809 encourages employers to “engage in an interactive process” with employees who request schedule changes, including working or not working certain days and times; not working on-call shifts; and working additional or fewer hours.<sup>7</sup> S.1110/H.3809 explicitly forbids retaliations against an employee who makes such a request.<sup>8</sup>
- S.1102 grants employees the “right to request to change his or her work schedule, request to limit his or her availability to work particular hours, or otherwise provide input into his or her

work schedule,” but in the same section permits employers to deny “a request by an employee to change or limit their hours or if this results in any change in schedule or reduction in hours.”<sup>9</sup> S.1102 does not explicitly protect employees who make such requests from retaliation.

### Backstopping workers’ power with unemployment insurance

Employers treat their workers better when workers have more power. A 2019 study by Joe LaBriola and Daniel Schneider of the University of California at Berkeley looked at two types of worker power and their impact on scheduling practices. LaBriola and Schneider find that “low-wage workers who are covered by a union experience significantly less work hour volatility than those who are not.”<sup>10</sup> They also found that in tighter labor markets (that is, in states with lower unemployment rates), low-wage workers experience less volatile schedules.<sup>11</sup> The Massachusetts unemployment rate is 2.9 percent, its lowest point since 2000.<sup>12</sup>

These dynamics of worker power are sometimes characterized as “voice and exit.”<sup>13</sup> (LaBriola and Schneider call them “associational power” and “marketplace bargaining power.”) For unionized workers, “voice” is the legal standing to collectively bargain with their employer over working conditions, and a contractual dispute resolution mechanism (typically, grievance and binding third-party arbitration). “Exit” (at least temporarily) can take the form of a strike, as we have seen among public school teachers nationwide; and among workers at Stop & Shop, Marriott, and General Motors.

What about non-unionized workers? This matters, because just 9.3 percent of retail workers, 18 percent of hospitality workers, and 3 percent of food service workers are unionized.<sup>14</sup> As noted above, half of low-wage retail and food service workers have no input into their schedules; their boss tells them when to come and go. That’s why the legal right to request scheduling changes, and protection from retaliation for doing so – in other words, “voice” – is important.

As for “exit,” all workers – even low-wage workers – can more easily leave a bad job for a better one when labor markets are tight, and employers know they have to raise standards and treat workers better to attract and retain the best employees.

Unemployment insurance also empowers workers to exit: when workers know they can leave a bad job and still be assured of income, they can demand better treatment from their employers as a condition of staying. Massachusetts law does give workers the right to collect unemployment insurance if they quit for “good cause for leaving attributable to the employing unit.”<sup>15</sup> Practically, though, some Massachusetts workers who quit a bad job and file for unemployment insurance still face administrative barriers to eligibility, often because of how the person handling their claim interprets the law. Most probably don’t even risk quitting, lest they be found ineligible for unemployment insurance.

- S.1110/H.3809 backstops workers’ power by affirming that employees have the right to collect unemployment insurance if they quit because their employers violate the bill’s stable scheduling requirements, or because of a significant change in schedule “due to changes in the employer’s business needs.”<sup>16</sup>
- S.1102 does not change the state’s unemployment insurance law.

### Industry coverage and employer size

As we saw, workers in retail, food service, and hospitality are most likely to be involuntarily employed part-time. They are also among the most susceptible to unstable scheduling practices.<sup>17</sup> In Massachusetts, these industries employ 22 percent of the state's hourly workers.<sup>18</sup> And they are more likely than other industries to employ people of color in these hourly jobs.<sup>19</sup>

These industries are also characterized by a fairly high degree of concentration when it comes to employment. That is, a relatively small share of firms account for a relatively large share of employment. Specifically:

- While only 7 percent of retail companies in Massachusetts have 50+ employees, this 7 percent accounts for 77 percent of all retail employment in the state.<sup>20</sup>
- While only 8 percent of hospitality and food services companies in Massachusetts have 50+ employees, this 8 percent accounts for 57 percent of all hospitality and food services employment in the state.<sup>21</sup>

Over 90 percent of Massachusetts companies in these industries employ fewer than 50 people.

Taking employer size into account matters because larger employers are more likely to be using workforce management (WFM) software.<sup>22</sup> To date larger employers have been using WFM software in hopes of maximizing hour-by-hour flexibility in setting labor costs relative to customer traffic. This just-in-time employment model, as we have seen, hurts workers and their families.

The good news for employers who use WFM software is that if required by law to change their scheduling practices, they could do so by using the very same software. That's because WFM software can be programmed to incorporate complex scheduling requirements such as those established by law or collective bargaining agreements.<sup>23</sup> WFM software also helps employees manage their own scheduling preferences, swap shifts, and pick up extra hours.

- S.1110/H.3809 focuses on the industries wherein workers experience the most instability. It also focuses on firms with 50 or more employees, who may be more likely than smaller companies to be using workforce management software now, thus easing implementation of the law if enacted.
- S.1102 does not target particular industries nor set an employer size threshold.

<b>COMPARISON OF S.1110/H.3809 AND S.1102</b>			
<b>PROBLEM</b>	<b>SOLUTION</b>	<b>S.1110/H.3809</b>	<b>S.1102</b>
Frontline workers in particular consumer-facing industries are most at risk for unstable schedules.	Focus on high-risk consumer-facing industries like food service and retail.	Industries covered: <ul style="list-style-type: none"> <li>• Retail</li> <li>• Food service</li> <li>• Hospitality</li> </ul>	Covers all industries, including those where unstable scheduling may not be a problem.
Larger employers are more likely to be using workforce management (WFM) software to impose unstable schedules on their workers.	Focus on larger employers, who can also use WFM software to easily program fair workweek requirements into their algorithms.	Employee size threshold: <ul style="list-style-type: none"> <li>• 50 or more worldwide</li> <li>• Chains and franchises count as a single employer.</li> </ul>	Covers employers of all sizes, irrespective of their ability to implement the law easily with WFM software they may already be using.
Employers often provide notice of shifts only a few days in advance.	Require employers to provide a set schedule well in advance, and to pay their workers when they don't.	Good faith estimate of schedule upon hiring, including: <ul style="list-style-type: none"> <li>• The average number of hours an employee can expect to work weekly.</li> <li>• Whether the employee will be expected to work on-call shifts.</li> <li>• The days and times the employee can expect to work, or will not be scheduled to work.</li> </ul>	No good faith estimate of schedule upon hiring required.  Employees are not protected during “any initial probationary or training period of up to 90 days.”
		Advance notice: <ul style="list-style-type: none"> <li>• 14 days’ notice of schedules.</li> <li>• \$75 paid daily to workers for each day the schedule is not posted.</li> <li>• Employees must consent to work hours not posted 14 days in advance.</li> </ul>	Advance notice: <ul style="list-style-type: none"> <li>• 7 days’ notice of schedules.</li> <li>• No penalty for failure to post schedules 7 days in advance.</li> </ul>

COMPARISON OF S.1110/H.3809 AND S.1102			
PROBLEM	SOLUTION	S.1110/H.3809	S.1102
Employers often impose last-minute changes and cancelations to workers' schedules.	Require employers to compensate workers for changes or cancelations within the advance notice period.	<p>Changes and predictability pay:</p> <ul style="list-style-type: none"> <li>• Employers must pay employees one hour of predictability pay for adding or changing hours to a shift.</li> <li>• Employers must pay employees half-pay for subtracting or canceling hours.</li> <li>• Employers would not owe predictability pay when the employee requests a shift change or leave, or when a business cannot open for specific reasons including official states of emergency and "severe weather conditions that pose a threat to employee safety."</li> </ul>	<p>Changes and predictability pay:</p> <ul style="list-style-type: none"> <li>• Employers must pay employees one hour of predictability pay for subtracting, canceling, or adding hours.</li> <li>• Employers must pay employees one hour of predictability pay for, within 24 hours of the start of the shift, shortening the shift to three or fewer hours, changing the timing of the shift without changing the number of hours, or adding hours.</li> <li>• Employer must pay employees three hours of predictability pay for shortening or canceling a shift within 24 hours of the scheduled start.</li> <li>• Employers must pay employees for three hours or the number of hours the employee was scheduled to work (whichever is less) when employees show up to work a scheduled shift.</li> <li>• Employers would not owe predictability pay when the employee requests a shift change or leave, or "if an employee intended to not be present for a shift or when an employer subtracts hours from an employee's work schedule for disciplinary reasons."</li> <li>• The requirements do not apply to "events beyond an employer's control," including "failure of equipment... the addition or cancellation of an event... and weather."</li> </ul>

COMPARISON OF S.1110/H.3809 AND S.1102			
PROBLEM	SOLUTION	S.1110/H.3809	S.1102
Employers often prefer to hire multiple part-time workers to avoid paying benefits. Involuntary part-time employment is higher during recessions and the first years of recoveries.	Require employers to offer additional hours, when available, to qualified, available incumbent part-time employees before hiring new employees.	<p>Access to additional hours:</p> <ul style="list-style-type: none"> <li>• When an employer has additional hours to offer, it must offer shifts to existing employees who are qualified and available before hiring new employees—even temporary workers.</li> <li>• Employers will not be required to offer hours to existing employees if that means paying overtime or Sunday premium pay.</li> <li>• Employers who fail to <u>offer</u> the additional hours as required must pay each existing employee \$100 for each instance.</li> <li>• Employers who fail to <u>award</u> the hours to a qualified employee must pay that employee \$1,000.</li> </ul>	No access to additional hours.
Back-to-back shifts, especially “clopenings,” rob workers of rest time.	Require employers to give workers time to rest by banning “clopening” shifts and other back-to-back shifts.	<p>Right to rest:</p> <ul style="list-style-type: none"> <li>• Employers may not require employees to work a shift starting within 11 hours of the end of the previous day’s shift, or within 11 hours of the end of an overnight shift.</li> <li>• If an employee consents to work such a shift, the employer must pay them time-and-a-half.</li> </ul>	<p>Right to rest:</p> <ul style="list-style-type: none"> <li>• Employers may not require employees to work a shift starting within 10 hours of the end of the previous day’s shift, or within 6 hours of the end of an overnight shift.</li> <li>• Employees are not owed premium pay if they consent to work such a shift.</li> </ul>

COMPARISON OF S.1110/H.3809 AND S.1102			
PROBLEM	SOLUTION	S.1110/H.3809	S.1102
Workers lack input into their schedules.	Require employers to consider scheduling requests, and ban retaliation against workers who make such requests.	<p>Right to request:</p> <ul style="list-style-type: none"> <li>• Employees have the right to request schedule changes, including working or not working certain days and times; not working on-call shifts; additional or fewer hours.</li> <li>• Employers are “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.”</li> <li>• Employers may not retaliate in any way against workers who make scheduling requests.</li> </ul>	<p>Right to request:</p> <ul style="list-style-type: none"> <li>• Employers may deny a request to change or limit hours, or if the request “results in any change in schedule or reduction in hours.”</li> </ul>
Workers feel trapped if they feel like the choice in between a job with unstable scheduling and no income.	Allow workers who quit if any of the above four requirements are violated to collect unemployment insurance.	<p>Employees can collect unemployment insurance if they quit in response to:</p> <ul style="list-style-type: none"> <li>• A violation of any of the above provisions.</li> <li>• A significant change in schedule “due to changes in the employer's business needs.”</li> </ul>	No additional unemployment insurance protection for employees who quit due to unstable schedules.

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- <sup>1</sup> Julia Wolfe, Janelle Jones, and David Cooper, Economic Policy Institute, “‘Fair workweek’ laws help more than 1.8 million workers,” July 19, 2018, pp. 1-3. [<https://www.epi.org/files/pdf/145586.pdf>]
- <sup>2</sup> Senate bill 1110 (<https://malegislature.gov/Bills/191/S1110>); House bill 3809 (<https://malegislature.gov/Bills/191/H3809>); Senate bill 1102 (<https://malegislature.gov/Bills/191/S1102>)
- <sup>3</sup> S.1110, p. 7; S.1102, pp.4-5.
- <sup>4</sup> Lonnie Golden, Economic Policy Institute, “Still falling short on hours and pay,” December 5, 2016, p. 14 [<https://www.epi.org/files/pdf/114028.pdf>]; Robert G. Valletta, Leila Bengali, and Catherine van der List, Federal Reserve Bank of San Francisco, “Cyclical and Market Determinants of Involuntary Part-Time Employment,” March 2018 p. 12 (and Table 1 on p. 52) [<https://www.frbsf.org/economic-research/files/wp2015-19.pdf>].
- <sup>5</sup> S.1110, pp. 9-12.
- <sup>6</sup> Daniel Schneider and Kristen Harknett, “Hard Times: Routine Schedule Unpredictability and Material Hardship among Service Sector Workers,” October 2019, Table 2 on p. 36 [<https://equitablegrowth.org/wp-content/uploads/2019/10/WP-Schneider-and-Harknett-Hard-Times.pdf>]; Daniel Schneider and Kristen Harknett, “Consequences of Routine Work-Schedule Instability for Worker Health and Well-Being,” *American Sociological Review*, Vol. 84 (February 2019), p. 98 (and Table 2 on p. 99).
- <sup>7</sup> S.1110, p. 6.
- <sup>8</sup> S.1110, pp. 12-13.
- <sup>9</sup> S.1102, p. 5.
- <sup>10</sup> Joe LaBriola and Daniel Schneider, “Worker Power and Class Polarization in Intra-Year Work Hour Volatility,” *Social Forces*, June 11, 2019, p. 20.
- <sup>11</sup> Joe LaBriola and Daniel Schneider, “Worker Power and Class Polarization in Intra-Year Work Hour Volatility,” *Social Forces*, June 11, 2019, pp. 18-19.
- <sup>12</sup> Massachusetts Executive Office of Labor and Workforce Development, Labor Force and Unemployment Data
- <sup>13</sup> Richard B. Freeman, “The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations,” *The Quarterly Journal of Economics*, June 1980, pp. 643- 673 [<https://www.nber.org/papers/w0242.pdf>].
- <sup>14</sup> U.S. Bureau of Labor Statistics, Union Membership Table 3 [<https://www.bls.gov/news.release/union2.t03.htm>]
- <sup>15</sup> Massachusetts General Laws Chapter 151A § 25(e) [<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151a/Section25>]
- <sup>16</sup> S.1110, p. 16.
- <sup>17</sup> Susan J. Lambert, Peter J. Fugiel, and Julia R. Henly, “Precarious Work Schedules Among Early-Career Employees in the US: A National Snapshot,” August 27, 2014, p. 13. [[https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/5/1068/files/2018/05/lambert.fugiel.henly\\_precarious\\_work\\_schedules.august2014\\_0-298fz5i.pdf](https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/5/1068/files/2018/05/lambert.fugiel.henly_precarious_work_schedules.august2014_0-298fz5i.pdf)]
- <sup>18</sup> MassBudget analysis of 2016-2018 Current Population Survey Merged Outgoing Rotation Group (CPS MORG) data,
- <sup>19</sup> MassBudget analysis of 2016-2018 CPS MORG
- <sup>20</sup> MassBudget analysis of U.S. Census Bureau, 2016 (2016 ASE)
- <sup>21</sup> MassBudget analysis of 2016 ASE
- <sup>22</sup> Stacey Harris and Erin Spencer, “Sierra-Cedar 2018–2019 HR Systems Survey White Paper, 21st Annual Edition,” 2018, Figure 64 on p. 51 [[https://www.sierra-cedar.com/wp-content/uploads/Sierra-Cedar\\_2018-](https://www.sierra-cedar.com/wp-content/uploads/Sierra-Cedar_2018-)

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[2019 HRSystemsSurvey WhitePaper.pdf](#)]. 56 percent of larger companies use workforce management (WFM) software for labor scheduling, compared with 43 percent of smaller companies. 42 percent of larger companies use WFM for labor budgeting, compared with 29 percent of smaller companies. While Sierra-Cedar defines smaller companies as those with fewer than 2,500 employees (p. 126), the Figure 64 suggests that WFM technology adoption does increase with business size.

<sup>23</sup> For examples from two WFM software vendors, see Jennifer Shambroom, Deputy, “Predictive Scheduling & Fair Workweek: Is Your Business Compliant?,” June 7, 2019 [<https://www.deputy.com/blog/predictive-scheduling-fair-workweek-is-your-business-compliant>]; Kronos, “Unions and Manufacturing: A Team Effort,” 2019 [<https://www.kronos.com/resource/download/34136>].