

SENATE No. 1236

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:	
<i>Marc R. Pacheco</i>	<i>First Plymouth and Bristol</i>	
<i>Jason M. Lewis</i>	<i>Fifth Middlesex</i>	<i>2/23/2021</i>
<i>Christopher Hendricks</i>	<i>11th Bristol</i>	<i>2/23/2021</i>
<i>Jack Patrick Lewis</i>	<i>7th Middlesex</i>	<i>2/23/2021</i>
<i>Patricia A. Duffy</i>	<i>5th Hampden</i>	<i>3/9/2021</i>
<i>Erika Uytterhoeven</i>	<i>27th Middlesex</i>	<i>3/9/2021</i>
<i>Patrick M. O'Connor</i>	<i>Plymouth and Norfolk</i>	<i>3/9/2021</i>
<i>David Henry Argosky LeBoeuf</i>	<i>17th Worcester</i>	<i>3/12/2021</i>
<i>Walter F. Timilty</i>	<i>Norfolk, Bristol and Plymouth</i>	<i>3/31/2021</i>
<i>Maria Duaiame Robinson</i>	<i>6th Middlesex</i>	<i>4/2/2021</i>
<i>Michael D. Brady</i>	<i>Second Plymouth and Bristol</i>	<i>4/2/2021</i>
<i>Thomas M. Stanley</i>	<i>9th Middlesex</i>	<i>4/5/2021</i>

SENATE No. 1236

By Mr. Pacheco, a petition (accompanied by bill, Senate, No. 1236) of Marc R. Pacheco, Jason M. Lewis, Christopher Hendricks, Jack Patrick Lewis and other members of the General Court for legislation relative to the scheduling of employees. Labor and Workforce Development.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. 1110 OF 2019-2020.]

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Second General Court
(2021-2022)**

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

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

6 “Calendar Week”, a period of seven 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 one 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 one or more fast food
16 restaurants 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 and a Food Services Establishment as defined in this Section, that employs 50 or
19 more employees worldwide regardless of where those employees perform work, including but
20 not limited to chain establishments or franchises associated with a franchisor or network of
21 franchises that employ more than 50 employees in aggregate. In determining the number of
22 employees for purposes of this subsection, all employees performing work for compensation on a
23 full-time, part-time or temporary basis shall be counted, provided that where the number of
24 employees who work for an employer for compensation fluctuates, business size may be
25 determined for the current calendar year based upon the average number of employees who
26 worked for compensation per week during the preceding calendar year, and provided further that
27 in determining the number of employees performing work for an employer that is a chain
28 business, the total number of 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 law if this law is accepted by vote or by appropriation
32 as provided in Article CXV of the Amendments to the Constitution of the Commonwealth.

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

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

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

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

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

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

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

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

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 148F. Advance Notice of Work Schedules.

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

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

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

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

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

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

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

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

91 (4) Requests for more or fewer work hours.

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

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

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

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

113 (f) An employee may decline to work any hours not included in the posted work
114 schedule. If the employee voluntarily consents to work such hours, such consent must be
115 recorded in writing. A communication of an employee's desire to work shifts made available
116 pursuant to section 6 shall constitute written consent.

117 Section 148G. Compensation for Changed Work Schedules.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

141 Section 148H. Right to Rest Between Work Shifts.

142 (a) An employee may decline, without penalty, any work hours that are scheduled or
143 otherwise occur: (1) less than 11 hours after the end of the previous day's shift, or (2) during the
144 11 hours following the end of a shift that spanned two days. An employee may consent to work
145 such shifts; however, consent must be provided in writing, either for each such shift or for
146 multiple shifts, and may be revoked in writing at any time during employment.

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

150 Section 148I. Offer of Work to Existing Employees.

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

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

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

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

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

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

172 (1) A Covered Employer shall distribute hours to employees whose regular workplace is
173 the location where the hours described in the notice will be worked; or, if no such employee
174 accepts the hours within the time defined in this section, to employees whose regular workplace
175 is a covered location other than the location where such hours will be worked; or, if no such
176 employee accepts the hours described in the notice within the time defined in this section, to
177 temporary or seasonal workers who have been continuously assigned for at least four weeks to
178 the location where the hours described in the notice will be worked.

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

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

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

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

191 (3) Existing employees have accepted a subset of the offered work hours, in which case
192 the existing employees must be awarded that subset of work hours and external applicants may
193 be offered the remaining hours, provided that the employer is not required to award partial shifts

194 to existing employees if doing so would require the employer to hire a new employee to fill a
195 shift of less than 4 hours.

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

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

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

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

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

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

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

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

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

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

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

232 Section 148K. Regulations.

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

236 Section 148L. Notice.

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

243 Section 148M. Employer Records.

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

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

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

261 (c) Employers may record employee consent and employee requests pursuant to sections
262 148F(f), 148G(b)(1) and 148H(a) using any printed or printable communication in physical or
263 electronic format, including a communication that is transmitted through email, text message, or
264 a computer system, or is otherwise sent and maintained electronically.

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

272 SECTION 2. Section 27C of said chapter 149 is hereby amended by inserting in line 4,
273 after the word “148B,” the following words:-, 148E, 148F, 148G, 148H, 148I, 148J, 148K, 148L,
274 148M, 148N,;

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

277 SECTION 3. Section 150 of said chapter 149, is hereby amended, by inserting after the
278 word “148C,” in line 22 the following words:-, 148E, 148F, 148G, 148H, 148I, 148J, 148K,
279 148L, 148M, 148N.

280 SECTION 4. Subsection (e) of section 25 of chapter 151A, is hereby amended, by
281 inserting at the end thereof the following words:- No disqualification shall be imposed if the
282 individual establishes to the satisfaction of the commissioner that the reason for the individual's
283 separation was due to the employer's failure to comply with sections 148E, 148F, 148G, 148H,
284 148I, 148J, 148K, 148L, 148M, 148N of chapter 149, or due to a significant change to the
285 employee's work schedule due to changes in the employer's business needs.