

2017

Think Like a Lawyer, Act Like a Mogul: Tackling Practical Business Problems in a Changing Legal Landscape

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Available at: <https://open.mitchellhamline.edu/mhlr/vol43/iss5/4>

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**THINK LIKE A LAWYER, ACT LIKE A MOGUL:
TACKLING PRACTICAL BUSINESS PROBLEMS IN A
CHANGING LEGAL LANDSCAPE**

Kathleen Harrell-Latham[†] & Daniel Spicer^{††}

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I. INTRODUCTION

Amidst evolutions of technology and changes in the economy, the practice of law has changed such that being a lawyer today is not the same as it was even ten years ago.¹ Part of this change can be attributed to the tremendous change in the United States workforce and how it is regulated. For example, while the contingent (or temporary) workforce is growing rapidly, local governments are implementing unprecedented laws that dictate how and when businesses schedule and pay people to perform work on their behalf. These laws encompass a variety of types, such as earned sick- and safe-time laws, predictable scheduling (alternatively labeled flexible or fair scheduling) laws, and family and medical leave laws.

1. See Robert W. Denney, *Then and Now: How Lawyers' Choices Have Changed*, L. PRAC., Nov.–Dec. 2010, at 10, 10 (explaining that a “noteworthy segment of lawyers who have been practicing with firms, whether large or small, are . . . going solo . . . by locating their offices in their homes”); Sally Kane, *10 Trends Reshaping the Legal Industry*, THE BALANCE (May 15, 2017), <https://www.thebalance.com/trends-reshaping-legal-industry-2164337> (“New workplace policies such as flex-time, telecommuting, part-time work, phased retirement, temporary leave, compressed schedules and other alternative work arrangements are transforming the law firm environment from sweatshop to one of flexibility.”).

The problem is that these laws result in fragmented regulation of employee scheduling and pay, which has impacted how companies hire and retain contingent talent. In other words, because these laws may differ from city to city, companies that conduct business in more than one place are subjected to one set of laws for certain employees but a different set for others.

This article begins with a background of my non-traditional legal career—an example of the emergence of non-traditional applications of legal training.² It then provides solutions for navigating the non-traditional legal career.³ Next, the article identifies the complex legal problems that arise from the expansion of the contingent workforce.⁴ Finally, it reflects on legal services-based solutions to those complex problems.⁵

II. UNEXPECTEDLY LIVING THE CHANGE IN THE MARKET

My legal career is a direct reflection of the changing legal industry and economy. It started when I accepted a three-week temporary job as an administrative assistant in the legal department of a utility company shortly after graduating from the University of Iowa. I literally packed up my car and moved to Minneapolis from South Dakota that same night. My second temporary assignment was in a financially distressed energy company, which eventually turned into a direct employment relationship that lasted for nearly two years. In my second year at the company, I continued to work full-time while I attended my first year of law school as a part-time student at William Mitchell College of Law.⁶

My day job was chaotic. The company was in the middle of a roll-up and roll-off into a Chapter 11 bankruptcy.⁷ During this time, it was not uncommon for me to walk into an office or department in

2. See *infra* Part II.

3. See *infra* Part III.

4. See *infra* Part IV.

5. See *infra* Part V.

6. William Mitchell College of Law merged with Hamline University School of Law in 2016 and officially became Mitchell Hamline School of Law. See Editorial Board, *After Merger, Mitchell Hamline Has a Chance to Renew Legal Education*, STAR TRIB. (Aug. 20, 2015), <http://www.startribune.com/after-merger-mitchell-hamline-has-a-chance-to-renew-legal-education/322459101/>.

7. See *In re* NRG Energy, Inc., No. 03-cv-3754 (RCC), 2003 WL 21507685 (S.D.N.Y. June 30, 2003); *In re* NRG Energy, Inc., 294 B.R. 71 (Bankr. D. Minn. May 12, 2003).

the corporate office only to find that the employees were gone.⁸ In turn, a big part of my job was to piece together what I could as a non-lawyer for those professionals responsible for the restructuring. At night, I would leave the chaos to attend class at William Mitchell. This experience during my first year of law school laid a critical foundation for my career.

I was eventually laid off along with the majority of employees in the Minneapolis office, as part of the Chapter 11 bankruptcy. As a result, I went to law school full-time during my second and third years.⁹ After graduating, I moved to Wichita, Kansas, due to my husband's job. I found myself in a new, unfamiliar market doing everything possible as the trailing spouse to find employment.

I accepted my first associate attorney position at a boutique commercial law firm doing a range of bankruptcy, finance, and insolvency work for businesses and consumers. I had success in landing this job in a new market because (1) I had relevant work experience during law school thanks to the part-time program offered by William Mitchell; (2) I networked relentlessly; and (3) I volunteered to get local experience, even when it was difficult or outside of my comfort zone.¹⁰ After a couple of years in Kansas, I returned to Minnesota in 2008 to work at a mid-size firm. There, my role was split equally between representing clients in restructuring and insolvency matters and collecting the firm's receivables. The latter was an increasingly important role, considering we were in the middle of the Great Recession.

Like many of my peers, I grew frustrated and tired of traditional private practice. That was compounded by the fact that I was

8. Although this happened in the early 2000s, it is likely that there are many similar stories that could be told by those working in-house during the Great Recession. There are countless accounts of companies shutting down, restructuring, and simply not making it through the challenging financial time. *See, e.g., In re Lehman Bros. Holdings Inc. v. Bank of Am. Nat'l Ass'n*, 544 B.R. 16 (Bankr. S.D.N.Y. Dec. 28, 2015); *In re SemCrude, L.P. v. SemCrude, L.P.*, 407 B.R. 82 (Bankr. D. Del. June 19, 2009); *In re Enron Corp.*, 274 B.R. 327 (Bankr. S.D.N.Y. Jan. 11, 2002).

9. I graduated in three years despite the part-time start because of the flexibility that William Mitchell offered. For a full list of the school's part-time offerings, including a first-of-its-kind online program, see *Juris Doctor Program*, MITCHELL HAMLINE SCH. L., <https://mitchellhamline.edu/academics/juris-doctor-program/> (last visited July 1, 2017).

10. It took nearly six months in the market, which was filled with studying for the bar, networking, volunteering, and taking a number of project jobs as they became available—even if they were not a perfect fit.

responsible for pursuing clients for unpaid legal fees and fighting to retain those fees that had already been paid. In 2012, I began looking to move where I thought the grass would be greener: in-house. However, it turned out that all other mid-level associates and junior partners were doing exactly the same thing after clinging to their jobs during the Great Recession.¹¹ As a result, I spent a year applying, interviewing, and networking in an effort to find an in-house position amidst fierce competition.¹²

Eventually, I went to a legal-research company where I found myself editing, managing, and navigating an unfamiliar process of frequently working with contingent talent. There, I found what I did not want to do: sit in front of a computer all day without depth or diversity of responsibility. So I leapt at an unexpected opportunity that required “restarting” the office of a legal-staffing company in the Midwest. Working in this industry meant that I heard from attorneys at the top of organizations, in confidence, what was really going on in every law firm and legal department. This access put me at the heart of the changing legal-services industry.¹³

The current business climate requires lawyers to do more with less. It is a hard lesson to grasp because many students enter law school with certain aspirations, only to enter practice and find that their expectations were unrealistic or that they are unprepared for the realities of the business of law.¹⁴ There are no easy answers to this complex challenge to the legal profession. And yet, one answer comes to mind, though it requires a mindset shift—thinking like a lawyer but acting like a business mogul.

11. Legal jobs totaled 1,222,200 in 2006, and in 2010, there were only 1,211,900 jobs with an expected growth to only 1,342,000 by 2020. See C. Brett Lockard & Michael Wolf, *Employment Outlook: 2010–2020*, MONTHLY LABOR REV., Jan. 2012, at 84, 89, <https://www.bls.gov/opub/mlr/2012/01/art5full.pdf>. Minnesota is seventh for most lawyers per capita at 44.7 per 10,000 residents. *Id.*

12. The process included hundreds of applications, countless interviews, networking events, and a few turned-down offers.

13. There was also a strange comfort in hearing first-hand that I was not alone in the frustration of forced changes and turmoil within the practice of law in Minnesota and beyond.

14. See Sarah Powell, *Biglaw Practice Today: Cruel Expectations*, ABOVE THE L. (July 25, 2013), <https://abovethelaw.com/career-files/biglaw-practice-today-cruel-expectations/> (explaining that “Biglaw”—the world of the largest law firms—today is “simply a mega-business and it will use you as it sees fit to get what it needs, with no genuine concern for your development, your life balance, your practice interests and goals, your sanity, or anything else”).

III. DEFINING ROLES AMIDST BLURRED LINES

A. *Think Like a Lawyer*

Lawyers are trained to spot issues, make arguments based on the facts, and advocate for their clients. Teaching bankruptcy law as an adjunct professor reminded me how much these skills were drilled into my head during law school and how important they are beyond the courtroom and traditional practice. Interestingly, that teaching experience revealed to me how some students truly struggle with using traditional lawyer skills as problem solvers.¹⁵ In fact, many continue to struggle well after law school.¹⁶ The ability to think like a lawyer is critical in every context—including in the context of managing the lawyer’s own career.¹⁷

There are frequently two big challenges for lawyers attempting to do something other than the law. First, there is an internal struggle to accept that they are seeking a career without the title of “attorney.” These roles are frequently referred to as “J.D. Advantage” or “J.D. Plus,” meaning that a legal education is a benefit but not a requirement.¹⁸ A different non-attorney title, such as CEO or

15. For example, law school stresses the need to incessantly “brief” cases for purposes of memorizing rules and striving to get the perfect grade, rather than understanding the underlying mechanics and asking questions when something is unknown.

16. Law firms face the undeniable churn of newer attorneys who leave after one to two years because they accepted the first job offered rather than thinking about how they wanted to spend their days earning a paycheck; there is also the problem of associates leaving the practice of law entirely. See *Associates Are Fleeing Law Firms in Droves. These Are the Top 3 Reasons Why.*, THE LAW WHISPERER BLOG (Oct. 24, 2016), <http://www.thelawyerwhisperer.com/question/associates-are-fleeing-law-firms-in-droves-these-are-the-top-3-reasons-why/> (explaining that “an increasing number of associates aren’t willing to work the grinding law firm hours required by their employers” and that associates today “have a treasure trove of career options compared to years past”).

17. See Iliina Rejeva, *Are Law Schools Preparing Students for the Future of Law?*, BEFORE THE B. BLOG (July 13, 2016), <https://abaforlawstudents.com/2016/07/13/are-law-schools-preparing-students-for-the-future-of-law/> (“[S]uccessful lawyers and schools of tomorrow must be problem-solvers with a business mindset that can use technology, social media, and soft skills.”).

18. J.D. Advantage roles include compliance analysts, contract managers, law school administrators, and regulatory analysts, among others. See Hilary Mantis, *What Is a J.D. Advantage Career?*, NAT’L JURIST (Dec. 3, 2015), <http://www.nationaljurist.com/national-jurist-magazine/what-jd-advantage-career> (providing two reasons why law school graduates are seeking J.D. Advantage jobs: “a

Director, might be precisely what the lawyer wants, but it is not a “legal” title. Not everyone can resolve this internal struggle.

Second, many lawyers encounter resistance from non-lawyers in charge of hiring for the non-traditional role. For example, non-legal employers might “assume that an applicant with a law degree is just marking time until he or she leaves for one of the many high-paying legal jobs.”¹⁹ They might also wonder why someone with a law degree does not want to practice law.²⁰ And non-legal employers often do not like “the idea of hiring someone who they imagine will have a sophisticated understanding of employment law.”²¹ This resistance is therefore premised, for better or worse, on many misconceptions of lawyers.²²

Those who succeed in receiving a job offer from a non-legal employer do so because of their training as a lawyer. To get that offer, a lawyer needs to understand the facts, know her personal skills and flaws, and clearly articulate why she is the best option.²³ On its face, it is not that different from arguing the facts of a case in a law school class.²⁴ The challenge is to translate and display the “lawyer” trappings in a way that business people will understand and appreciate.²⁵

Lawyers, however, are afraid to fail at trying something different, which frequently results in a failure to act. In the context of both a career and a business, windows to certain opportunities will close if those opportunities are not seized at critical stages. Thus, the ability to act like a business mogul, as defined below, is a critical skill to achieve success in law and in business.

competitive job market in which J.D. grads have had trouble finding traditional legal jobs, and the long term desire of many recent law grads to go into alternative legal careers”).

19. See Bryan Caplan, *Is an Unused J.D. a Negative Signal?*, ECONLOG BLOG (July 21, 2015), http://econlog.econlib.org/archives/2015/07/is_an_unused_jd.html (citing PAUL CAMPOS, DON’T GO TO LAW SCHOOL (UNLESS) (2012)).

20. *Id.*

21. *Id.*

22. Every lawyer has encountered bewildering questions about lawyers by non-lawyer family members and friends. Interestingly, sophisticated businesspeople also carry misconceptions about lawyers’ interests and skills. For example, I was asked by a CEO of a mid-size company in the Twin Cities during a fourth-round interview for an in-house Assistant General Counsel role, “Are you sure that you will be OK with not going to court?”

23. See Rejeva, *supra* note 17.

24. *Id.*

25. *Id.*

B. *Act Like a Mogul*

Lawyers love to separate business from the law, which is truly a disservice to their clients and themselves. After all, the point of legal advice is to further the client's business. At its core, the practice of law is a business.²⁶ Merriam Webster provides a simple definition of "business": "the activity of making, buying, or selling goods or providing services in exchange for money," "work that is part of a job," or "the amount of activity that is done by a store, company, factory, etc."²⁷ What is often lost among attorneys is the understanding of how legal advice fits into the rest of the business client's activities. Fundamentally, that requires action.

1. *What Is a Mogul?*

A business mogul is defined as "a person who dominates an enterprise or industry."²⁸ The word "mogul" is a variant of the word "Mongol," which is frequently used in reference to the empire of Genghis Kahn.²⁹ In becoming a mogul, Sean Diddy Combs (colloquially known as "P. Diddy") has said the most important thing for him in achieving his success is as follows:

Don't be afraid to close your eyes and dream. But then open your eyes and see. As a dream[er] [or] visionary, I dream these . . . things that are not in my reality. If I open my eyes [and] look out the windows, it's not what I see. But it is important that I open my eyes and see what it [is] going to take to achieve those dreams. You get that from hard work, . . . sacrifice, work ethics, discipline. And . . . as an entrepreneur, I always say if it doesn't make dollars then it doesn't make sense.³⁰

26. See Deborah Bucknam, *The Practice of Law Is a Profession and a Business—and That's a Good Thing*, L. PRAC., Sept. 2006, at 56, 56, https://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v32_is6_an21.html.

27. *Business*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/business> (last visited July 1, 2017).

28. *Mogul*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/mogul.asp> (last visited July 1, 2017).

29. *Tycoon*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/tycoon> (last visited July 1, 2017).

30. *Diddy's Common Sense Tips for Becoming a Business Mogul*, FORBES, <http://www.forbes.com/video/2727181893001> (last visited July 1, 2017).

Thus, perhaps a business mogul is best defined as someone who has a vision but also acts to build that vision into a reality. In the mogul's eyes, it is not enough to sit and think about what will be. Instead, moguls act to make their vision a reality despite the potentially serious risks.

2. *As Applied to Lawyers*

This same logic can and should be applied by lawyers—regardless of whether they are in private practice, in-house, or in some other business role. Unfortunately, where many lawyers fail themselves, and where a business mogul would not, is the failure to repeatedly invest in themselves. For example, countless new law graduates abandon the law before they get started because they cannot hold out for a job in practice or otherwise default to accepting a less desirable but higher paying job.³¹

The most impactful career advice I have received came at a time when I was not ready to hear it, but these words continue to carry unexpected weight: “Every hour you spend now is an investment in yourself. You may be able to make more money elsewhere but a career is built on what you do—not what you make. Put the time in and focus on the quality and importance of what you are doing.” That is as true now as it was then, for both my legal career and the countless other careers I have witnessed. Lawyers who are not willing to invest in themselves often find themselves (knowingly or not) stagnating, losing relevance, getting laid off with few options, or abandoning their legal skills.

The ability to not only see the issues but also to act on them is what separates the typical from the extraordinary. Love him or hate him, Mark Zuckerberg epitomizes a business mogul.³² He identifies

31. In many cases, abandoning the search for the desired lawyer job is not a voluntary choice, as current graduates are leaving school with astronomical educational debt and limited earning potential. See Elizabeth Olson, *Burdened with Debt, Law School Graduates Struggle in Job Market*, N.Y. TIMES (Apr. 26, 2015), <https://www.nytimes.com/2015/04/27/business/dealbook/burdened-with-debt-law-school-graduates-struggle-in-job-market.html>. However, there are a number of people in this population who take the less desirable job while they continue working towards building a solo practice, volunteering as a lawyer, or networking to obtain the desired job. See Mantis, *supra* note 18.

32. See Michell Pratt, *Blueprint to a Mogul: How to Be S.M.A.R.T. Like Zuckerberg*, NUSKOOL BLOG (2014), <http://www.nuskool.com/learn/lesson/blueprint-mogul-smart-mark-zuckerberg/>.

issues, promotes himself, and takes action, helping himself build an empire.³³ He has not always been successful, but he acts nonetheless.³⁴ Many would contend that his actions could have or should have been better thought out.³⁵ Again, those who can do both—identify issues and act, even in the face of criticism—are most likely to achieve success in some form. This combination of skills, to think critically and act, is proving more important than ever in light of the changing forces in the legal profession and how business is done.

C. *Critical Trends Impacting Lawyers and Business Moguls*

Currently, lawyers and business moguls alike are facing two undeniable economic forces: (1) the rise of the contingent workforce, and (2) a fundamental shift of the legal-services industry. It is against this backdrop that I reflected on the fact that, first, those who can think like a lawyer are able to identify all the issues and potential negative consequences but frequently experience “analysis paralysis,” or the inability to act. And second, those who act like a mogul risk it all if they fail to identify and address important risks to their operations.³⁶ It is only those who have both skills—to think critically and act—who can seize the opportunity presented by systemic change. With that in mind, this article now turns to the contingent workforce and fundamental shift in the legal industry.

33. See *id.* (explaining that in achieving his success, Zuckerberg “set a mission or focus, and he decided how he was going to achieve it”).

34. *Id.*

35. See Matt Rosoff, *People Are Inexplicably Upset About Mark Zuckerberg’s Decision to Give away 99% of His Fortune*, BUS. INSIDER (Dec. 2, 2015), <http://www.businessinsider.com/mark-zuckerberg-skeptics-abound-2015-12>; Richard Waters, *Mark Zuckerberg Responds to Criticism over Fake News on Facebook*, FIN. TIMES (Nov. 19, 2016), <https://www.ft.com/content/80aacd2e-ae79-11e6-a37c-f4a01f1b0fa1>.

36. See Julie Bort, *Troubled Startup Zenefits Just Laid Off Almost Half Its Staff—Here’s the Full Email Sent to Employees*, BUS. INSIDER (Feb. 9, 2017), <http://www.businessinsider.com/zenefits-layoffs-cut-nearly-500-employees-full-email-2017-2>; Elizabeth Dove, *The Theranos Problem*, THE MKT. MOGUL (Nov. 4, 2015), <http://themarketmogul.com/theranos-problem/>.

1. *Rise of the Contingent Workforce*

a. *Defining the Contingent Workforce*

The United States workforce has changed so rapidly over the past ten years that relevant governmental agencies have yet to reach consensus on defining the workforce population.³⁷ For purposes of this article, “contingent talent” is defined as people who are working for a defined period of time with no expectation of an ongoing relationship.³⁸ This broad definition includes people who are or consider themselves to be independent contractors, temporary employees, freelancers, or consultants.³⁹ In other words, they are temporary. These individuals work across all sectors of the economy at every level of the organizational hierarchy. Although there is no easy way of defining and reporting all of the individual work assignments or alternative work arrangements that may arise under a contingent relationship,⁴⁰ the U.S. Census Bureau and the Department of Labor have begun the process of updating their definition and reporting on this growing workforce as part of the 2017 Census Workplace Report.⁴¹

b. *Impact of the Contingent Workforce*

The size of the contingent workforce is significant. In any given week in the United States, there are more than three million temporary and contract employees working for staffing firms.⁴²

37. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 3-4 (2015) [hereinafter CONTINGENT WORKFORCE REPORT].

38. This definition is similar to the definition provided by the Bureau of Labor Statistics. See *Contingent and Alternative Work Arrangements*, BUREAU OF L. STAT. (July 27, 2005, 10:00 AM), <https://www.bls.gov/news.release/conemp.nr0.htm> (“Contingent workers are those who do not have an implicit or explicit contract for ongoing employment.”). This article’s definition was chosen for the sake of simplicity, as there are many technical nuances to some of the alternatively accepted industry definitions that are not relevant for purposes of this article.

39. *Id.*

40. CONTINGENT WORKFORCE REPORT, *supra* note 37, at 4.

41. See *Why This Counts: Measuring “Gig” Work*, BUREAU OF L. STAT. BLOG (Mar. 3, 2016), <https://blogs.bls.gov/blog/2016/03/03/why-this-counts-measuring-gig-work/>.

42. *Staffing Industry Statistics*, AM. STAFFING ASS’N, <https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/> (last visited July 1, 2017).

Annually, staffing agencies alone hire sixteen million people to work contingently.⁴³ These people power an industry that generated \$147 million in 2015 and only continues to grow.⁴⁴ Under the increasingly broad definitions, contingent talent is currently anticipated to be 40% of the United States workforce by 2020.⁴⁵

c. What Has Driven the Rise of the Gig Economy?

The gig economy refers to “the increased tendency for businesses to hire independent contractors and short-term workers, and the increased availability of workers for these short-term arrangements.”⁴⁶ Millennials and baby boomers are the largest drivers of the shift to the gig economy. Millennials are generally defined as people who were born between 1980 and 1997.⁴⁷ Baby boomers are generally defined as people who were born between 1946 and 1964.⁴⁸ These generations have different motivations and goals in the workplace, but both demand flexibility and choice in their work, and both challenge traditional notions of employment.⁴⁹ As discussed below, these demographic shifts and changing motivations are having a tremendous impact on business and the legal profession.

2. Law Firms and the Forced Adaptation to the Gig Economy

Rather than embracing it, lawyers and law firms feel forced to adapt to the gig economy and the contingent workforce. This

43. *Id.*

44. *Id.*

45. CONTINGENT WORKFORCE REPORT, *supra* note 37, at 4.

46. See Larry Alton, *Why the Gig Economy Is the Best and Worst Development for Workers Under 30*, FORBES (Jan. 24, 2018), <https://www.forbes.com/sites/larryalton/2018/01/24/why-the-gig-economy-is-the-best-and-worst-development-for-workers-under-30/#4a267d8d6d76>. The gig economy is highlighted by on-demand services such as car sharing. *Id.*

47. Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RES. CTR. (Apr. 25, 2016), <http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/>.

48. *Id.*

49. The opinion of this author is that there is already too much written about the motivations and characteristics of millennials and baby boomers. Accordingly, this is not an article about the motivations of these generations. The point of including this discussion is to explain why there has been such a tectonic shift and explosive growth in the gig economy.

acquiescence is the product of at least two driving forces: pricing pressures and increased competition.

a. Pricing Pressures

Clients drive pricing pressures, but law firms that have diversified their approach have continued to experience growth. For example, firms that brought in-house routine legal-related work—such as document review or ancillary business consulting—in an efficient manner are heralded as strategically protecting their financial futures.⁵⁰ However, those that ignore the commoditization of legal work are viewed as antiquated.⁵¹

b. Increased Competition

The nature of competition for legal services has changed. Long gone are the days of closed competition; instead, it is a new age of competition across multiple playing fields. Even the biggest of firms face challenges from the emergence of Legal Process Outsourcing (“LPO”) providers, which offer legal services through less traditional methods.⁵² However, LPO is now old news in terms of competition for legal services.⁵³ There is an increasing encroachment of accounting and consulting firms, which firms have long bemoaned as poaching the business of traditional law firms. For example, in the same way that many large law firms have internal e-discovery practices, so too do large accounting firms.⁵⁴ This presents the

50. See Eric A. Seeger & Thomas S. Clay, *2016 Law Firms in Transition Survey*, ALTMAN WEIL (2016), http://www.altmanweil.com/dir_docs/resource/95e9df8e-9551-49da-9e25-2cd868319447_document.pdf (finding that 88.3% of surveyed firm leaders felt that the trend to commoditize legal work is permanent and that their confidence has consistently declined by 2% per year for the past five years).

51. See *id.*

52. See, e.g., INTEGREON, <http://www.integreon.com/DefaultHome> (last visited July 1, 2017); PANGAEA LEGAL SERVS., <http://www.pangealegal.org/> (last visited July 1, 2017); QUISLEX, <http://www.quislex.com/> (last visited July 1, 2017).

53. Most LPOs have been around since at least the 1990s. They emerged well before the smartphone, texting, metadata, screen sharing, e-discovery, and several other major technology shifts. See Ron Friedman, *The Impact of Legal Process Outsourcing (LPO) You Might Not Have Noticed*, L. PRAC. TODAY (Jan. 2017), http://www.americanbar.org/content/dam/aba/publications/law_practice_today/the-impact-of-legal-process-outsourcing-you-might-not-have-noticed.authcheckdam.pdf.

54. Some examples include Deloitte, PwC, KPMG, and Grant Thornton. See *Deloitte Discovery Solutions and eDiscovery Consulting Services*, DELOITTE,

question of whether it is truly innovative or even strategically sound for law firms to only now begin engaging in the same “commoditized” functions to seize additional revenue when countless others have already been in that industry for years without the same constraints as a law firm.

In addition to LPO providers, competition comes from an emergence of platforms where in-house counsel can seek more affordable assistance directly from attorneys who have rejected the traditional law firm approach.⁵⁵ In-house counsel can even use LinkedIn to obtain numerous bids on a project.⁵⁶ This increasing competition has invariably put the squeeze on larger law firms, which end up taking work that would have otherwise gone to mid-size or smaller law firms.⁵⁷

The traction that these platforms have gained is due, in part, to the rejection by highly skilled lawyers of the traditional law firm or traditional options. Lawyers are increasingly leaving larger firms, establishing boutiques without the same overhead or legacy obligations, or leaving private practice entirely.⁵⁸ The contraction of law schools and declining enrollment are also creating a talent vacuum.⁵⁹ All of this results in a delayed reaction by lawyers, and

<https://www2.deloitte.com/us/en/pages/advisory/solutions/deloitte-discovery.html> (last visited July 1, 2017); *Digital Forensics and eDiscovery*, PwC, <http://www.pwc.com/us/en/forensic-services/digital-forensics-ediscovery.html> (last visited July 1, 2017); *eDiscovery*, KPMG, <https://advisory.kpmg.us/risk-consulting/forensics/ediscovery.html> (last visited July 1, 2017); *Forensic Advisory Services*, GRANT THORNTON, <https://www.granthornton.com/services/advisory/business-risk/forensic-advisory.aspx> (last visited July 1, 2017).

55. See, e.g., HIRE AN ESQUIRE, <https://hireanesquire.com/> (last visited July 1, 2017); PRIORI, <https://www.priorilegal.com/> (last visited July 1, 2017); UPCOUNSEL, <https://www.upcounsel.com/> (last visited July 1, 2017).

56. See Amanda Sibley, *How to Run LinkedIn Ad Campaigns: A Beginner's Guide*, HUBSPOT BLOG (Jan. 2013), <https://blog.hubspot.com/marketing/linkedin-advertising-campaigns>.

57. See Asma Khalid, *From Post-it Notes to Algorithms: How Automation Is Changing Legal Work*, NPR (Nov. 7, 2017), <https://www.npr.org/sections/alltechconsidered/2017/11/07/561631927/from-post-it-notes-to-algorithms-how-automation-is-changing-legal-work>. Technology and outsourcing have also lowered the cost for document-review projects. See Jaron Luttich, *Heads Up: Your Comfy Document Review Is Dying*, H5 BLOG (June 15, 2015), <https://www.h5.com/heads-up-your-comfy-document-review-is-dying/> (“Over the past 10 years, the cost of hiring an army of temporary attorneys for document review has fallen precipitously. In some markets, it’s now 40% cheaper than it was in 2005.”).

58. See Denney, *supra* note 1, at 10.

59. See Khalid, *supra* note 57.

once lawyers react, their evaluation and potential adoption of different approaches to the delivery of services and revenue generation often feels forced.⁶⁰ These complexities in the legal-services industry are only one reflection of a dramatically changing economy with an entirely new and undefined workforce that is increasingly at odds with the evolving regulatory environment.

IV. THINKING LIKE A LAWYER TO IDENTIFY ISSUES

At a time of political transition and gridlock, businesses operating with mobile workforces across multiple jurisdictions face a uniquely challenging legal environment. This complexity is caused by a wave of the lowest levels of government attempting to tackle some of the largest social issues to expedite change. Thinking like a lawyer, it seems unlikely that this tide will turn any time in the near future. In fact, many business and special interest circles expect that the patchwork will only grow as the gridlock persists.

The focus of this article is on the laws enacted by those lowest levels of government mandating benefits from private employers for employees in the areas of sick or safe time, predictable scheduling, and paid family and medical leave, followed by a discussion of the persistent question of preemption.

A. *Proliferation of Earned Sick- and Safe-Time Laws*

The landscape of work is changing with a wave of new laws that attempt to change the employment relationship. The biggest illustration of such efforts is the proliferation of earned sick- and safe-time laws enacted at the city, county, or state levels. For purposes of this article, an earned sick- and safe-time (“ESST”) ordinance is one that obligates companies to pay an employee for time off for a designated reason.

1. *Application and Exclusion*⁶¹

Although these laws state a shared goal, the requirements of each law are as diverse as the governing bodies that approved their passage.⁶² Application of an ESST ordinance begins with the

60. See Denney, *supra* note 1, at 10.

61. For a comparison of these laws in cities across the United States, see Appendix I, *infra*.

62. See *infra* Appendix I.

definition of “employee” within the law. These definitions frequently expressly exclude certain categories of individuals that would otherwise be considered employees.⁶³ At the same time, the exclusions largely fail to exclude contingent talent because they are premised on the misconception that such individuals are generally 1099 contractors, rather than W2 employees.⁶⁴ The growing contingent workforce presents unique issues regarding the role those workers play within organizations and the workforce. For example, it is not uncommon for a contingent worker to work in multiple cities with multiple “employers” in the same week, month, or year.⁶⁵

2. *Accrual and Usage Waiting Period*⁶⁶

Once it is established whom an ESST law covers, the next question is how workers can earn and use time. As with the definitions of employees, it is apparent that the ordinances are quite varied when it comes to accrual rates and waiting periods before usage of accrued sick or safe time.⁶⁷ There are even greater complexities in the nuances of the exceptions, reporting requirements, and remedies available in these laws. Moreover, employers of contingent talent have a significant challenge as their employees are inherently short-term, with uncertain duration from

63. See *infra* Appendix I.

64. *Understanding Employee vs. Contractor Designation*, IRS (July 20, 2017), <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>. Is an Uber driver an employee? Regulatory authorities from the city to the state level are filing worker-misclassification lawsuits against many on-demand companies, like Uber, resulting in record-breaking settlements and many on-demand companies finding themselves embroiled in expensive litigation over this nuanced legal question. See Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FAST COMPANY (Feb. 17, 2015), <https://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> (“If Uber, Lyft, and others don’t stop relying on contract workers, business could crumble. Is it time for a new definition of employee?”).

65. This is in no way limited to the “day laborer” and in fact is equally applicable to attorneys performing document review at e-discovery vendors or law firms. The nature of project work means that time on the assignment is limited and that the individual employee is mobile across client organizations, employers, and cities to an exponential degree as compared to the traditional employment model.

66. For a list of accrual and usage waiting periods by city, see Appendix II, *infra*.

67. See *infra* Appendix II.

the outset, and have frequent breaks in service even if they may hit the qualification threshold.

3. Remedies⁶⁸

ESST laws typically provide for remedies, and the diversity in the remedies and rights under the ESST laws is of importance because of their impact on businesses. In some jurisdictions, there is a private cause of action for the employee who believes he is aggrieved under an ESST law.⁶⁹ In others, cities have implemented an administrative procedure to impose fines, penalties, and enforcement on employers without providing aggrieved employees the right to sue the employer.⁷⁰

B. Laws Attempting to Create Predictability of Employee Schedules

In addition to ESST laws, municipalities and states have also begun to enact laws that encourage predictability, or alternatively penalize an unexpected variance, in the schedule of an employee. These laws are particularly challenging for employers that are staffing firms or large employers choosing to hire specifically because the purpose of contingent work is to respond to the unexpected. Arguably, if the need necessitating the additional headcount was certain, then it would not be necessary nor desirable to use contingent workers. However, by thinking like a lawyer, we recognize there is no certainty in anything. Accordingly, the obligations under these predictable schedule laws are particularly onerous to employers of contingent talent. Specifically, these laws may include the obligation to provide “reporting pay,” which is payment to a worker for showing up for a shift even if it was cancelled, or requiring “predictability pay” for changes to a worker’s schedule with less notice than the designated time (ranging from seven to twenty-eight days).⁷¹

68. For a summary of such rights and remedies by jurisdiction, see Appendix III, *infra*.

69. See *infra* Appendix III.

70. See *infra* Appendix III.

71. See *infra* Appendix IV.

1. *Showing up to Guaranteed Wages*

Reporting pay, or the duty to pay an employee for showing up, is the most common enactment of this type of law.⁷² These laws apply only to non-exempt employees, or those that are entitled to overtime at the rate of 1.5 times their regular pay when working over forty hours per week or as otherwise specified by law.⁷³ Fundamentally, the employee needs to show up and is guaranteed compensation at a set threshold regardless of whether she works five minutes or fifty. This and other predictable scheduling laws also require a business to consider notice requirements, compensation computation, and remedies.

Thus, the challenge for business moguls is that reporting pay laws impose considerable constraints on the ability of a business to seize unexpected opportunities within the market. The requirement to provide reporting pay not only adds another expense but also creates an ongoing liability which may constrain funding for growth opportunities.

2. *The Surge of Support for Predictability Pay Laws*

Predictability pay laws are emerging, at least in part, in an effort to protect the contingent workforce. Predictability pay laws require compensating employees for schedule variances—the very nature of contingent work. San Francisco was the first city to pass a predictability pay law in 2014.⁷⁴ The San Francisco law applies to chain retail stores with at least forty locations worldwide and twenty or more employees in San Francisco, including janitorial and security contractors.⁷⁵ This law requires covered employers in San Francisco to provide notices to employees in the following situations:

- good-faith notice to new employees of the expected number of shifts each month and the days and times of those shifts;

72. For a summary of reporting pay laws, see Appendix IV.

73. See, e.g., CAL. DEPT. OF INDUS. RELATIONS, INDUSTRIAL WELFARE COMM'N WAGE ORDERS 1–16, § 5.

74. Two laws, “Hours and Retention Protections for Formula Retail Employees Ordinance” and “Fair Scheduling and Treatment of Formula Retail Employees Ordinance,” were passed on November 25, 2014, and became effective on October 3, 2015. S.F., CAL., POLICE CODE arts. 33F, 33G (Am. Legal Publishing through 2015).

75. See *id.* §§ 3300F.2, 3300G.3.

- notice of a first right of refusal to existing part-time employees prior to making an offer for work to contractors or staffing agencies;
- notice of retention to any employees who have worked for at least the past six months or a period of ninety days after any sale of a retail location; and
- notice posted of rights in any workplace or job site where their employees work.⁷⁶

Employees protected by the ordinance can also expect to receive the following in an effort to provide a more predictable schedule:

- two weeks' notice of their expected shifts, including date and time;
- predictability pay for schedule changes with less than seven days' notice, ranging from one to four hours of pay at their regular compensation rate; and
- compensation for time spent on-call, even if ultimately called to report to work, ranging from two to four hours depending on the length of the shift and amount of notice.

The ordinance provides for an administrative remedy and damages through the San Francisco Office of Labor Standard Enforcement.⁷⁷ The final rules implementing the San Francisco ordinance became effective March 1, 2016.⁷⁸

The San Francisco ordinance captured national attention. For example, New York Attorney General Eric Schneiderman issued information requests to thirteen large retail companies about their on-call employee procedures, despite such practices being legal in New York.⁷⁹ Recognizing that he could not unilaterally enact a predictability law, Schneiderman still had a substantial impact on bringing about the desired predictability without a blanket law.⁸⁰

76. *Id.*

77. *Id.* § 3300G.11.

78. CITY & CTY. OF S.F., CAL., OFFICE OF LABOR STANDARDS ENF'T, FINAL RULES IMPLEMENTING THE FORMULA RETAIL EMPLOYEE RIGHTS ORDINANCES (FREROS) (Jan. 29, 2016), <http://sfgov.org/olse/sites/default/files/Document/FRERO%20Final%20Rules.pdf> (effective March 1, 2016).

79. Amanda Marcotte, *New York A.G. to Investigate Employers Who Keep Low-Wage Workers "On Call,"* SLATE.COM (Apr. 15, 2015), http://www.slate.com/blogs/xx_factor/2015/04/13/keeping_employees_on_call_the_new_york_attorney_general_wants_to_know_more.html.

80. Hiroko Tabuchi, *Retailers Scrutinized for Schedules and Staffing*, N.Y. TIMES (Apr. 13, 2015), <https://www.nytimes.com/2015/04/13/business/retailers-scrutinized-for-schedules-and-staffing.html>.

Specifically, six companies agreed to discontinue on-call practices nationally, and one agreed to stop its on-call practices in New York.⁸¹

Seattle enacted the Secure Scheduling Act in 2016, effective July 1, 2017.⁸² This law is limited to retail and fast-food businesses with over 500 employees worldwide and full-service restaurants with over 500 employees and over forty locations worldwide.⁸³ Employers subject to the law must provide their employees with their schedules at least fourteen days prior to the schedule. The employer must pay employees a premium, or predictability pay, for any changes in the schedule within that fourteen-day window, without regard to why those changes occur.⁸⁴ Employers must pay individuals one hour of predictability pay for each such change.⁸⁵ This obligation does not apply when the employee initiates the change; additional hours are made available through mass communications or employees swapping shifts.⁸⁶ Employees are also entitled to a rest period of at least ten hours between shifts, or they are entitled to time and a half for the second shift.⁸⁷

The predictability pay laws enacted thus far have been limited to retail and restaurant environments. However, governing bodies now considering the issue are taking a much broader approach. For example, in 2015, Minneapolis considered a “Fair Scheduling” ordinance similar to that of San Francisco and Seattle. But the proposed ordinance was applicable to all industries.⁸⁸ Although defeated at an early stage, it went beyond the scope or intent of both the Seattle and San Francisco laws.⁸⁹ Thus, Minneapolis considered

81. Retailers receiving the letter and agreeing to discontinue “on call” scheduling include Abercrombie, Urban Outfitters, J. Crew, Gap, Bath & Body Works, and Victoria’s Secret. *Id.*

82. Seattle, Wash., Ordinance No. 125135 (Am. Legal Publishing through 2016).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Curtis Gilbert, *Mpls. Businesses Line up Against ‘Fair Scheduling’ Rule*, STAR TRIB. (Sept. 22, 2015) (“Under the proposal, [all] Minneapolis employers would have to compensate workers for any unexpected schedule changes.”).

89. See, e.g., Peter Callaghan, *Minneapolis Fair-Scheduling Ordinance Would Be the Most Sweeping in the Country*, MINNPOST (Oct. 7, 2015), <https://www.minnpost.com/politics-policy/2015/10/minneapolis-fair-scheduling-ordinance-would-be-most-sweeping-country>.

a blanket law requiring set schedules across all industries—including law firms.⁹⁰

These laws have far-reaching consequences. The large retailers currently impacted in New York and Washington must assess how to shift their operations while their competition may seize this as an opportunity. Moreover, the companies supplying contingent labor or otherwise reliant on the retail stores will invariably be affected. This is an industry of high overhead and complex financing agreements that has already been feeling the pinch,⁹¹ and it remains to be seen what impact such continued pressures will have on this industry.

These predictability pay and scheduling laws and the resulting actions of affected employers fundamentally challenge the ability of contingent talent to continue to work and the sheer existence of the on-demand organizations that have grown so popular in the last five years. These people make their living through an organization's or industry's need to fill some unexpected gap in resources. Organizations are disincentivized to provide new or more creative work arrangements to their employees, leverage freelancers, or take on projects that may continuously burden their bottom line. It is quite possible that such organizations could elect to abandon certain markets or automate jobs in order to offset the burden.

C. *Initiatives to Pay Employees During Times of Family or Medical Leave*

The third segment of laws being passed in this fractured wave are those requiring benefits for family or medical leave. Currently, there are three states that require paid family medical leave.⁹² A paid family leave law will become effective in New York in 2018, making it

90. The momentum behind the minimum-wage hike is believed to be fueling a return to the predictable-scheduling proposals. *See, e.g.*, Justin Miller, *In \$15's Wake, Fair Scheduling Gains Momentum*, AM. PROSPECT (Sept. 20, 2016), <http://prospect.org/article/15-wake-fair-scheduling-gains-momentum>.

91. *See, e.g.*, *In re Sports Authority Holdings Inc.*, No. 16-386-SLR, 2016 WL 3041846 (D. Del. 2016); *In re Am. Apparel, Inc. Shareholder Litig.*, 855 F. Supp. 2d 1043 (C.D. Cal. 2012); *In re RS Legacy Corp.*, 62 Bankr. Ct. Dec. 94 (Bankr. D. Del. 2016); *In re Aeropostale, Inc.*, 555 B.R. 369 (Bankr. S.D.N.Y. 2016).

92. California, Rhode Island, and New Jersey require paid family medical leave. *See Paid Family Leave*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/paid-family-leave-resources.aspx> (last updated 2017).

the fourth state.⁹³ Instead of having employers foot the bill, the state programs are funded through payroll taxes and administered through a state insurance fund.⁹⁴ A similar law was passed by the state of Washington; however, the implementation was indefinitely postponed due to funding issues.⁹⁵

In 2004, California became the first state to enact a paid family leave statute.⁹⁶ Entirely funded by employee contributions, this law provides that individuals can receive up to six weeks of paid leave during a twelve-month period.⁹⁷ Claimants are entitled to receive 55% wage replacement with a cap of \$1,014 for weekly benefit payments.⁹⁸ The scope of coverage was extended in 2013 to include care for a grandparent or grandchild.⁹⁹ In 2014, approximately 13.1 million individuals were covered by the California Paid Family Medical Leave Act.¹⁰⁰ The California “program has paid 1.8 million claims and authorized \$4.6 billion in benefits payments” since its enactment in 2004.¹⁰¹ Additionally, the program has seen a persistent increase in the number of claims filed and benefits paid annually.¹⁰² Despite this growth, there continues to be skepticism that everyone who could be filing claims is aware of the program.¹⁰³

93. Paid Family Leave Benefits Law, ch. 54 § 200, 2016 N.Y. Sess. Laws (S. 6406-C) (McKinney).

94. *Paid Family Leave*, *supra* note 92.

95. *Id.* (“The state of Washington passed a paid family leave law in 2007, originally to take effect in October, 2009. However, subsequent legislation has indefinitely postponed the implementation of Washington’s paid family leave law until a funding mechanism is developed and funds are appropriated.”).

96. Paid Family Leave Act, ch. 4, 2004 Cal. Stat. 5903 (codified at CAL. UNEMP. INS. CODE §§ 3000–3006); *see also* Patrick McGreevy, *Brown Signs California Law Boosting Paid Family-Leave Benefits*, LA TIMES (Apr. 11, 2016), <http://www.latimes.com/politics/la-pol-sac-paid-family-leave-california-20160411-story.html>.

97. CAL. UNEMP. INS. CODE § 3301(2)(d) (2014).

98. McGreevy, *supra* note 96.

99. S. 770, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

100. EMP. DEV. DEP’T STATE OF CAL., PAID FAMILY LEAVE: TEN YEARS OF ASSISTING CALIFORNIANS IN NEED 1 (2014).

101. *Id.* at 2.

102. *See id.* (stating that there has been an 87.5% increase in benefits paid over nine years).

103. *See* ANDREW CHANG & CO., CALIFORNIA PAID FAMILY MEDICAL LEAVE RESEARCH 3 (2015) (“Despite its successes, some question whether PFL is accessible to all those who could benefit from the program.”).

New Jersey enacted its statewide paid family and medical leave act in 2009.¹⁰⁴ The program is funded entirely by employee payroll contributions, without any employer contributions.¹⁰⁵ In 2016, .08% of taxes paid by New Jersey employees were contributed to the fund, with a maximum yearly contribution of \$26.08.¹⁰⁶ If employees begin covered leave more than fourteen days after their last day of work, they receive benefits through the unemployment office.¹⁰⁷ There were 32,033 claims filed in New Jersey in 2015 with an average weekly benefit of \$516.¹⁰⁸ The average benefit period in New Jersey was 5.2 weeks in 2015.¹⁰⁹ Employers have the option to require employees to exhaust their paid time off prior to using this benefit, which has the anticipated effect of reducing the overall benefit period for claimants.¹¹⁰

Interestingly, other states considering these laws have taken a different approach. For example, in 2016, a Minnesota Senate Committee considered a bill mandating “private companies with more than 21 workers to offer family and medical leave.”¹¹¹ The bill required companies and employees to pay into an insurance fund to cover wages for pregnancy, bonding, or family-care leave.¹¹² Some Minnesota businesses opposed the bill, explaining that, like MNsure,

104. Family Leave Act, 2008 N.J. Laws ch. 17.

105. N.J. DEP’T OF LABOR & WORKFORCE DEV., FAMILY LEAVE INSURANCE WORKLOAD IN 2015 SUMMARY REPORT 2 (2016).

106. JENNIFER BUDOFF, ECONOMIC AND POLICY STATEMENT: UNIVERSAL PAID LEAVE AMENDMENT ACT OF 2016 60 (2016).

107. *Your Guide to Family Leave Insurance in New Jersey*, N.J. DEP’T LABOR & WORKFORCE DEV., https://www.stevens.edu/sites/stevens_edu/files/files/hr/compliance/WPR-119.pdf (last visited July 1, 2017).

108. N.J. DEP’T. OF LABOR & WORKFORCE DEV., *supra* note 105, at 1.

109. *Id.*

110. *Id.* at 7.

111. See Pat Kessler, *Committee Passes Paid Family Leave Bill in Minnesota Senate*, CBS MINN. (May 10, 2016, 6:51 PM), <http://minnesota.cbslocal.com/2016/05/10/family-leave-committee/>.

112. *Id.*

it represented an unnecessary tax on employers and employees.¹¹³ Ultimately, the committee approved the bill.¹¹⁴

This idea of addressing employment issues at the state and municipal level seems to have picked up steam. For example, the city of San Francisco passed an ordinance requiring complete funding of all parental leave in 2016.¹¹⁵ It is effectively enhancing an existing benefit through employee contribution.¹¹⁶ Though in its early stages, the San Francisco program appears to be building off the same infrastructure as the state's program for family and medical leave.¹¹⁷

D. Authority Grant and the Role of Preemption

1. Challenges to Ordinances Based on Preemption

Legal challenges to city ordinances regulating worker conditions based on preemption currently appear limited. There have been two lawsuits that bear striking similarities to one another involving the neighboring states of Minnesota and Wisconsin.

In Wisconsin, Milwaukee voters considered a ballot question on an ordinance that would require paid sick leave for employees within the city; the ordinance passed.¹¹⁸ The Wisconsin Court of Appeals held that the ordinance was not preempted by the state's rights.¹¹⁹ Specifically, the court applied the Wisconsin standard for preemption:

(1) the legislature has expressly withdrawn the power of municipalities to act; (2) [the ordinance] logically conflicts

113. See, e.g., Don Davis, *Why Minnesota Business Interests Oppose Family Leave Plan*, PIONEER PRESS (Mar. 31, 2016, 8:19 AM), <http://www.twincities.com/2016/03/30/minnesota-business-interests-oppose-family-leave-plan> (quoting Cam Winton of the Minnesota Chamber of Commerce as saying that the family leave insurance program "is MNsure all over again," and Jill Larson of the Minnesota Business Partnership as saying that "[t]his would be a tax on both employers and employees").

114. See Kessler, *supra* note 111.

115. S.F., CAL., POLICE CODE art. 33H, § 3300H.2(i) (Am. Legal Publishing through 2016).

116. See Thomas Fuller, *San Francisco Approves Fully Paid Parental Leave*, N.Y. TIMES (Apr. 5, 2016), <https://www.nytimes.com/2016/04/06/us/san-francisco-approves-fully-paid-parental-leave.html>.

117. *Id.*

118. Metro. Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee, 798 N.W.2d 287, 294 (Wis. Ct. App. 2011).

119. *Id.* at 294.

with state legislation; (3) [the ordinance] defeats the purpose of state legislation; or (4) [the ordinance] violates the spirit of state legislation.¹²⁰

In applying this legal standard, the court noted that the Wisconsin minimum-wage statute “providing a living wage” was a “matter of statewide concern.”¹²¹ The court further stated that both parties acknowledged that the city ordinance in fact had a state-wide impact.¹²² But, after three long years of litigation, the Milwaukee ordinances were found to not violate the statutory or constitutional provisions proposed by the challenger, and the permanent injunction granted by the lower court was vacated.¹²³ However, soon thereafter, the Wisconsin state legislature enacted new legislation that mooted the issue in the case by prohibiting local sick leave ordinances.¹²⁴

Across the border in Minnesota, in *Minnesota Chamber of Commerce v. City of Minneapolis*, the Minnesota Chamber of Commerce sought an injunction preventing the City of Minneapolis from enforcing an ESST ordinance against businesses with a physical presence in Minneapolis, arguing that it was preempted by state law.¹²⁵ The district court enjoined enforcement of the ordinance “against any employer resident outside the geographic boundaries of the City of Minneapolis until after the hearing on the merits of the case, or further order of the Court,” but it denied “the balance of injunctive relief requested.”¹²⁶

The Minnesota Court of Appeals affirmed, concluding that “the district court properly exercised its discretion by determining that, overall, the balance with respect to preemption tips in favor of the

120. *Id.* at 311 (quoting *DeRosso Landfill Co. v. City of Oak Creek*, 547 N.W.2d 770, 773 (1996)).

121. *Id.* (citing WIS. STAT. § 104.001(1)).

122. *Id.*

123. *Id.* at 318.

124. *Judge: State Legislation Trumps Milwaukee Sick Leave Law*, MILWAUKEE BUS. J. (July 28, 2011, 3:19 PM), <https://www.bizjournals.com/milwaukee/news/2011/07/28/milwaukee-sick-leave-meeting.html>; Georgia Pabst, *Court of Appeals Reinstates Milwaukee Sick Pay Law*, MILWAUKEE J. SENTINEL (Mar. 24, 2011), <http://archive.jsonline.com/news/wisconsin/118572089.html/> (noting that those opposed to the ordinance planned to pursue further court action and new legislation that would “nullify” the ordinance).

125. 2017 WL 4105201, at *1 (Minn. Ct. App. Sept. 18, 2017), *review denied*, (Minn. Nov. 28, 2017).

126. *Id.*

city, and therefore declining to temporarily enjoin the ordinance in its entirety,” but the appeals court similarly concluded that the district court “properly exercised its discretion by temporarily enjoining enforcement of the ordinance against nonresident employers.”¹²⁷ The Chamber of Commerce petitioned the Minnesota Supreme Court for further review, but the supreme court denied review.¹²⁸

The arguments in *City of Minneapolis* present considerable similarities to those asserted in the Wisconsin challenge; specifically, the Chamber of Commerce argued that the ordinance is preempted under the Minnesota standard for conflict and implied preemption.¹²⁹ The standard for conflict preemption under Minnesota precedent is that an ordinance is preempted (1) “when both the ordinance and the statute contain express or implied terms that are irreconcilable with each other,” (2) “where the ordinance permits what the statute forbids,” or (3) “where the ordinance forbids what the statute *expressly* permits.”¹³⁰

The Chamber of Commerce also contended that the Minneapolis ESST ordinance was preempted under the theory of implied field preemption.¹³¹ The factors for determining field preemption in Minnesota are as follows:

(1) the subject matter regulated; (2) whether the subject matter is so fully covered by state law that it has become solely a matter of state concern; (3) whether any partial legislation on the subject matter evinces an intent to treat the subject matter as being solely a state concern; and (4) whether the nature of the subject matter is such that local regulation will have an adverse effect on the general state population.¹³²

Although similar, there are nuanced differences between the Minnesota action and the Wisconsin action both in terms of the legal

127. *Id.* at *4–7.

128. *Id.* at *3.

129. Compare *City of Minneapolis*, 2017 WL 4105201, at *3, with *Metro. Milwaukee Ass’n of Commerce, Inc. v. City of Milwaukee*, 798 N.W.2d 287, 296 (Wis. Ct. App. 2011).

130. *Mangold Midwest Co. v. Vill. of Richfield*, 274 Minn. 347, 532, 143 N.W.2d 813, 816 (1966).

131. *City of Minneapolis*, 2017 WL 4105201, at *3.

132. *Haumant v. Griffin*, 699 N.W.2d 774, 778 (Minn. Ct. App. 2005) (citing *Mangold*, 274 Minn. at 358, 143 N.W.2d at 820).

standards for preemption and the parties' arguments.¹³³ Moreover, there is no authority that directly addresses the question of preemption in the state of Minnesota. Thus, *City of Minneapolis* was a question of first impression in Minnesota, the precise question being whether cities' labor- or employment-related ordinances are preempted.¹³⁴

Another factor that may distinguish the two challenges is the role of a "home rule" charter city. In the Minnesota challenge, Minneapolis contended that this specific grant of authority, home rule, meant that more deference is to be given to Minneapolis where the state has not acted.¹³⁵ Home rule of Milwaukee was seemingly not at issue in the Wisconsin lawsuit. Home rule could have played a role in differentiating the outcome of the Minneapolis litigation.¹³⁶ However, whether this distinction will actually play a role in the outcome of similar litigation remains to be seen.¹³⁷

2. *Role of Preemption Beyond the Existing Legal Challenges*

The limited number of challenges to ESST laws raises the question of why other cities have not experienced legal challenges to their ordinances for ESST, predictable scheduling, or similar regulations. The answer is likely more political than legal. However, the decision to commence a lawsuit should involve the initial assessment of its success, and success would likely depend on the specific grant of authority for the city as well as the applicable legal standard for preemption.

133. Compare *City of Minneapolis*, 2017 WL 4105201, at *3, with *City of Milwaukee*, 798 N.W.2d at 296.

134. *City of Minneapolis*, 2017 WL 4105201, at *3. Interestingly, at the time of this article, the City of Minneapolis is proceeding with a minimum-wage ordinance modeled on the ESST ordinance but ignoring the geographic restrictions of the injunction. The threshold triggering the employer's duty to comply is that the employee works merely two hours in the city, and the employer must maintain records of time worked in the city for three years regardless of where the employer is physically located. See MINIMUM WAGE, *Fast Facts for Employers and Employees*, <http://minimumwage.minneapolismn.gov/> (last visited July 1, 2017).

135. *City of Minneapolis*, 2017 WL 4105201, at *3.

136. *City of Milwaukee*, 798 N.W. 2d at 312.

137. See *Mangold*, 274 Minn. at 357, 143 N.W.2d at 820 ("Municipalities have no inherent powers and possess only such powers as are expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred.").

California presents a conflicting juxtaposition of authority and preemption challenges. For example, the state of California has a statute that establishes the floor for ESST benefits.¹³⁸ However, as noted in greater detail above, there are numerous cities that have passed ESST ordinances in excess, diverging from the primary tenets of the statewide ESST law.¹³⁹

There is also California authority for and against a preemption challenge like that in Milwaukee or Minneapolis. Undermining the likelihood of success of a preemption challenge, the California Supreme Court has held that neither state law nor the National Labor Relations Act preempted a Los Angeles ordinance requiring grocery stores to retain their former staff for ninety days after a change in ownership.¹⁴⁰ But as an example of precedent that could support a preemption challenge, the California Court of Appeals found that a housing law passed by the County of San Francisco was impliedly preempted because it created a substantive defense in eviction proceedings that was not contemplated by state law.¹⁴¹

At the same time, not all cities have risk for a legal challenge to their employee scheduling ordinances. For example, regarding the City of Chicago, which is also a home rule charter municipality,¹⁴² the Illinois Court of Appeals rejected a challenge to a city ordinance based on home rule, stating, “[U]nless a state law specifically states that a home rule unit’s power is limited, the authority of a home rule unit to act concurrently with the state cannot be considered restricted.”¹⁴³ Accordingly, state laws must explicitly preempt the authority of home charter-ruled municipalities in Illinois in order to prohibit deviation from the statewide law.

The question of why more cities have not seen legal challenges remains. The answer is likely highly nuanced, requiring an assessment of the political landscape, the economics of litigation, and the bench that would consider the legal challenge. At the same

138. See Healthy Workplace Healthy Family Act of 2014 (AB 1522), CAL. LAB. CODE §§ 245–249 (West 2016).

139. See LOS ANGELES, CAL., MUN. CODE ch. XVIII art. 7, §§ 187.00–187.12 (June 2, 2016); EMERYVILLE, CAL., MUN. CODE § 5-37.03; S.F., Cal., Ordinance Motion M16-019 (approved Feb. 23, 2016).

140. Cal. Grocers Ass’n. v. City of L.A., 254 P.3d 1019, 1026, 1037 (Cal. 2011).

141. Johnson v. City & Cty. of S.F., 137 Cal. App. 4th 7, 18 (2006).

142. ILL CONST. art. VII, § 6(a).

143. City of Chi. v. Haworth, 708 N.E.2d 425, 428 (Ill. App. Ct. 1999).

time, there appears to be some basis for legal challenges beyond Minneapolis and Milwaukee, should someone be looking.

V. THINK LIKE A LAWYER, ACT LIKE A MOGUL

The wave of laws dictating the terms for scheduling employees is representative of a complex problem for businesses of all sizes. From the perspective of a lawyer, segments of government are acting (or reacting in some cases) to create a fractured and complex regulatory system surrounding the scheduling of employees. These ordinances are grounded in the admirable goal of improving the health and safety of residents. The fundamental problem is that the current mobile economy powered by the contingent worker means that in many cases, the jobs are performed by people who are not residents of the city. Moreover, all of these laws require extensive reporting, tracking, and administration, which has nothing to do with the direct health, safety, or welfare of residents.

Lawyers must stop struggling with inaction. Clients expect that their lawyer will not only understand the law but advise them in a way that allows action to be taken. The lawyer who stops at analysis misses the opportunity to build a relationship with her client or to otherwise truly improve a situation. Sometimes, lawyers must act when even the best analysis fails their clients.

From the perspective of a business mogul, this business problem of disparate laws affecting workers presents tremendous risk and opportunity, both of which require action. This is a clear problem that could be solved by people with the right background who truly understand the nuances of implementing compliance with such ordinances. In this case, those people are lawyers. Those who are able to think like a lawyer and act like a business mogul by identifying and capitalizing on opportunity will succeed, and so too will the businesses they advise.

APPENDIX I: SUMMARY OF APPLICATION OF AND EXCLUSION FROM ESST LAWS

Location	Definition of Employee	Summary of Exclusions	Ordinance
Los Angeles, CA	Person working 2 hours in the city and entitled to receive at least minimum wage	<ul style="list-style-type: none"> • Qualifying non-profit/transitional employers • Non-profits with <26 employees seeking deferral 	L.A., CAL., MUN. CODE ch. 18, art. 7, § 187.01(c) (Am. Legal Publishing through Ordinance No. 184,692, effective Dec. 30, 2016)
Emeryville, CA	Person working 2 hours in the city and entitled to receive at least minimum wage	N/A	EMERYVILLE, CAL., MUN. CODE § 5-37.01(c) (Code Publishing through Ordinance No. 16-012, passed Dec. 6, 2016)
Oakland, CA	Person working 2 hours in the city and entitled to receive at least minimum wage	N/A	OAKLAND, CAL., MUN. CODE § 5.92.010 (Am. Legal Publishing through Ordinance No. 13396, passed Nov. 1, 2016)

Location	Definition of Employee	Summary of Exclusions	Ordinance
San Francisco, CA	Any person employed within the city boundaries, includes those that are undocumented	N/A	S.F., CAL., ADMIN. CODE § 12W.2(c) (Am. Legal Publishing through Ordinance No. 6-17, effective Feb. 19, 2017)
Santa Monica, CA	Person working 2 hours in the city and entitled to receive at least minimum wage	N/A	SANTA MONICA, CAL., MUN. CODE § 4.62.010(c) (Am. Legal Publishing through Nov. 1, 2016)
Washington, DC	Anyone employed by an employer that is not in one of the excluded categories	<ul style="list-style-type: none"> • 1099 employees • Casual babysitters • Students • Health care workers electing to pay a premium 	D.C., MUN. REG. §§ 7-3200–7-3299 (Am. Legal Publishing through 2016)

Location	Definition of Employee	Summary of Exclusions	Ordinance
Chicago, IL	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> Employed by employers with less than 4 domestic workers 	CHI., ILL., MUN. CODE § 1-24-010 (Am. Legal Publishing through 2016); Chi., Ill., Ordinance No. O2016-2678 (June 22, 2016) (to be codified at CHI., ILL., MUN. CODE § 2-25, ch. 1-24) (providing general paid sick time)

Location	Definition of Employee	Summary of Exclusions	Ordinance
Minneapolis, MN	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • 1099 contractors • “Employees classified as extended employment program workers as defined in Minnesota Rules part 3300.2005, subpart 18 and participating in the Minnesota Statutes, Section 268A.15 extended employment program” 	Minneapolis, Minn., Ordinance No. 2017-001 (Jan. 13, 2017) (to be codified at MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 40)
Saint Paul, MN	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • 1099 contractors 	SAINT PAUL, MINN., CODE OF ORDINANCES § 233.02 (Am. Legal Publishing through Ordinance No. 16-49, adopted Dec. 14, 2016)

Location	Definition of Employee	Summary of Exclusions	Ordinance
Bloomfield, NJ	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Government employees • Teachers • Construction union members covered by CBA 	BLOOMFIELD, N.J., MUN. CODE § 160.2 (Am. Legal Publishing through Dec. 12, 2016)
East Orange, NJ	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Government employees • Teachers • Construction union members covered by CBA 	EAST ORANGE, N.J., MUN. CODE § 140.2 (Am. Legal Publishing through Aug. 8, 2016)
Elizabeth, NJ	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Government employees • Teachers • Construction union members covered by CBA 	ELIZABETH, N.J., MUN. CODE § 8.65.010 (Am. Legal Publishing through Dec. 22, 2015)
Irvington, NJ	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Government employees • Teachers 	Irvington, N.J., Ordinance No. 3513 (Am. Legal Publishing through Sept. 10, 2014)

Location	Definition of Employee	Summary of Exclusions	Ordinance
Montclair, NJ	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Government employees • Teachers • Construction union members covered by CBA 	MONTCLAIR, N.J., MUN. CODE. § 132.1 (Am. Legal Publishing through Aug. 23, 2016)
New Brunswick, NJ	All persons working in the city	<ul style="list-style-type: none"> • Individuals working <20 hours/week • Government employees • Construction union members covered by CBA • Casual health-care workers 	NEW BRUNSWICK, N.J., MUN. CODE § 8.56.010 (Am. Legal Publishing through Ordinance No. O-121603, passed Dec. 21, 2016)
Newark, NJ	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Government employees • Teachers • Construction union members covered by CBA 	NEWARK, N.J., MUN. CODE § 16:18-2 (Am. Legal Publishing through June 30, 2016)
Passaic, NJ	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Government employees • Teachers • Construction union members covered by CBA 	PASSAIC, N.J., MUN. CODE § 128-2 (Am. Legal Publishing through Jan. 23, 2017)

Location	Definition of Employee	Summary of Exclusions	Ordinance
Paterson, NJ	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Government employees • Teachers • Construction union members covered by CBA 	PATERSON, N.J., MUN. CODE § 412-2 (Am. Legal Publishing through Mar. 24, 2015)
Plainfield, NJ	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Government employees • Teachers • Construction union members covered by CBA 	PLAINFIELD, N.J., MUN. CODE § 8:5-1 (4) (Am. Legal Publishing through July 31, 2016)
Trenton, NJ	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Government employees • Teachers • Construction union members covered by CBA 	TRENTON, N.J., MUN. CODE. § 230-1 (Am. Legal Publishing through Oct. 20, 2016)
New York, NY	Person working 80 hours in the city during the year	<ul style="list-style-type: none"> • Domestic workers • Some employees subject to CBA 	N.Y.C., N.Y., ADMIN. CODE § 20-912(f) (Am. Legal Publishing through Feb. 15, 2017)

Location	Definition of Employee	Summary of Exclusions	Ordinance
Philadelphia, PA	Person working 40 hours in the city during the year	<ul style="list-style-type: none"> • 1099 employees • Seasonal workers • Adjunct professors • Employees hired for <6 months • Interns 	PHILA., PA., MUN. CODE § 9-4103(3) (Am. Legal Publishing through Mar. 6, 2017)
Seattle, WA	All employees, part-time and full-time	<ul style="list-style-type: none"> • Work-study agreement • Individuals in business for themselves rather than employees 	SEATTLE, WASH., MUN. CODE § 14.16.010 (Am. Legal Publishing through Feb. 16, 2017)
Spokane, WA	Persons working >240 hours in the city	<ul style="list-style-type: none"> • 1099 employees • Seasonal workers • Domestic workers 	SPOKANE, WASH., MUN. CODE § 09.01.010(H) (Am. Legal Publishing through 2016)
Tacoma, WA	Persons working 80 hours in the city during the year	<ul style="list-style-type: none"> • 1099 employees • Seasonal workers • Domestic workers 	TACOMA, WASH., MUN. CODE § 18.10.010(J) (Am. Legal Publishing through 2015)

APPENDIX II: SUMMARY OF ACCRUAL AND USAGE WAITING PERIODS IN ESST LAWS

Location	Rate	Annual Caps	Wait to Use	Ordinance
Los Angeles, CA	1 hr/30 hrs worked	48 hrs/72 hrs rollover	90 days from start	L.A., CAL., MUN. CODE ch. 18, art. 7, § 187.04 (Am. Legal Publishing through Ordinance No. 184,692, effective Dec. 30, 2016)
Emeryville, CA	1 hr/30 hrs worked	48 hrs/72 hrs (large)	30 days from start	EMERYVILLE, CAL., MUN. CODE § 5-37.03 (Code Publishing through Ordinance No. 16-012, passed Dec. 6, 2016)
Oakland, CA	1 hr/30 hrs worked	40 hrs/72 hrs (large)	30 days from start	OAKLAND, CAL., MUN. CODE § 5.92.030(A) (Am. Legal Publishing through Ordinance No. 13396, passed Nov. 1, 2016)
San Francisco, CA	1 hr/30 hrs worked	40 hrs/72 hrs (large)	90 days from start	S.F., CAL., ADMIN. CODE § 12W.3 (Am. Legal Publishing through Ordinance No. 6-17, effective Feb. 19, 2017)
Santa Monica, CA	1 hr/30 hrs worked	32 hrs/40 hrs (large)	90 days from start	SANTA MONICA, CAL., MUN. CODE § 4.62.025 (Am. Legal Publishing through Nov. 1, 2016)

Location	Rate	Annual Caps	Wait to Use	Ordinance
Chicago, IL	1 hr/40 hrs worked	40 hrs/40 hrs rollover	180 days from start	Chi., Ill., Ordinance No. O2016-2678 (Am. Legal Publishing through June 22, 2016) (to be codified at CHI., ILL., MUN. CODE § 1-2-045)
Minneapolis, MN	1 hr/30 hrs worked	48 hrs/80 hrs rollover	90 days from start	Minneapolis, Minn., Ordinance No. 2017-001 (Am. Legal Publishing through Jan. 13, 2017) (to be codified at MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 40)
Saint Paul, MN	1 hr/30 hrs worked	48 hrs/80 hrs rollover	90 days from start	SAINT PAUL, MINN., CODE OF ORDINANCES § 233.03 (Am. Legal Publishing through Ordinance No. 16-49, adopted Dec. 14, 2016)
Bloomfield, NJ	1 hr/30 hrs worked	24 hrs/40 hrs (large)	90 days from start	BLOOMFIELD, N.J., MUN. CODE § 160.4 (Am. Legal Publishing through Dec. 12, 2016)

Location	Rate	Annual Caps	Wait to Use	Ordinance
East Orange, NJ	1 hr/30 hrs worked	24 hrs/40 hrs (large)	90 days from start	EAST ORANGE, N.J., MUN. CODE § 140.2 (Am. Legal Publishing through Aug. 8, 2016)
Elizabeth, NJ	1 hr/30 hrs worked	24 hrs/40 hrs (large)	90 days from start	ELIZABETH, N.J., MUN. CODE § 140.4 (Am. Legal Publishing through Dec. 22, 2015)
Irvington, NJ	1 hr/30 hrs worked	24 hrs/40 hrs (large)	90 days from start	Irvington, N.J., Ordinance No. 3513 (Am. Legal Publishing through Sept. 10, 2014)
Montclair, NJ	1 hr/30 hrs worked	40 hrs/40 hrs rollover	90 days from start	MONTCLAIR, N.J., MUN. CODE. § 132.1 (Am. Legal Publishing through Aug. 23, 2016)
New Brunswick, NJ	1 hr/35 hrs worked	24 hrs/40 hrs (large)	120 days from start	NEW BRUNSWICK, N.J., MUN. CODE § 8.56.030 (Am. Legal Publishing through Ordinance No. O-121603, passed Dec. 21, 2016)
Newark, NJ	1 hr/30 hrs worked	24 hrs/40 hrs (large)	90 days from start	NEWARK, N.J., MUN. CODE § 16:18-4 (Am. Legal Publishing through June 30, 2016)

Location	Rate	Annual Caps	Wait to Use	Ordinance
Passaic, NJ	1 hr/30 hrs worked	24 hrs/40 hrs (large)	90 days from start	PASSAIC, N.J., MUN. CODE § 128-4 (Am. Legal Publishing through Jan. 23, 2017)
Paterson, NJ	1 hr/30 hrs worked	24 hrs/40 hrs (large)	90 days from start	PATERSON, N.J., MUN. CODE § 412-4 (Am. Legal Publishing through Mar. 24, 2015)
Plainfield, NJ	1 hr/30 hrs worked	24 hrs/40 hrs (large)	90 days from start	PLAINFIELD, N.J., MUN. CODE § 8:5-3 (Am. Legal Publishing through July 31, 2016)
Trenton, NJ	1 hr/30 hrs worked	24 hrs/40 hrs (large)	90 days from start	TRENTON, N.J., MUN. CODE. § 230-3 (Am. Legal Publishing through Oct. 20, 2016)
New York, NY	1 hr/30 hrs worked	40 hrs/payout option	90 days from start	N.Y.C., N.Y., ADMIN. CODE § 20-913 (Am. Legal Publishing through Feb. 15, 2017)
Philadelphia, PA	1 hr/40 hrs worked	Unpaid/40 hrs (large)	90 days from start	PHILA., PA., MUN. CODE § 9-4104 (Am. Legal Publishing through Mar. 6, 2017)

Location	Rate	Annual Caps	Wait to Use	Ordinance
Seattle, WA	1 hr/30 hrs worked	40 hrs/56 hrs/72 hrs	180 days from start	SEATTLE, WASH., MUN. CODE § 14.16.0125 (Am. Legal Publishing through Feb. 16, 2017)
Spokane, WA	1 hr/30 hrs worked	24 hrs/40 hrs	90 days from start	SPOKANE, WASH., MUN. CODE § 09.01.030 (Am. Legal Publishing through 2016)
Tacoma, WA	1 hr/40 hrs worked	24 hrs/24 hrs rollover	180 days from start	TACOMA, WASH., MUN. CODE § 18.10.020 (Am. Legal Publishing through 2015)

APPENDIX III: SUMMARY OF REMEDIES UNDER ESST LAWS

Private Cause of Action	Ordinance
Emeryville, CA	EMERYVILLE, CAL., MUN. CODE § 5-37.07 (Am. Legal Publishing through Ordinance No. 16-012, passed Dec. 6, 2016)
Oakland, CA	OAKLAND, CAL., MUN. CODE § 5.92.050 (Am. Legal Publishing through Ordinance No. 13396, passed Nov. 1, 2016)
Santa Monica, CA	SANTA MONICA, CAL., MUN. CODE § 4.62.110 (Am. Legal Publishing through Nov. 1, 2016)
Washington, DC	D.C., MUN. REGS. § 32-131.12 (Am. Legal Publishing through 2016)
Newark, NJ	NEWARK, N.J., MUN. CODE § 16:18-10 (Am. Legal Publishing through June 30, 2016)
Saint Paul, MN	SAINT PAUL, MINN., CODE OF ORDINANCES § 233.15 (Am. Legal Publishing through Ordinance No. 16-49, adopted Dec. 14, 2016)

Private Cause of Action	Ordinance
Bloomfield, NJ	BLOOMFIELD, N.J., MUN. CODE § 160.10 (Am. Legal Publishing through Dec. 12, 2016)
East Orange, NJ	EAST ORANGE, N.J., MUN. CODE § 140.10 (Am. Legal Publishing through Aug. 8, 2016)

Administrative Only Remedies	Ordinance
Chicago, IL	Chi., Ill., Ordinance No. O2016-2678 (Am. Legal Publishing through June 22, 2016) (to be codified at CHI., ILL., MUN. CODE § 1-24-110)
Elizabeth, NJ	ELIZABETH, N.J., MUN. CODE § 8.65.090 (Am. Legal Publishing through Dec. 22, 2015)
Irvington, NJ	Irvington, N.J., Ordinance No. 3513 (Am. Legal Publishing through Sept. 10, 2014)
Montclair, NJ	MONTCLAIR, N.J., MUN. CODE. § 132.1 (Am. Legal Publishing through Aug. 23, 2016)
New Brunswick, NJ	NEW BRUNSWICK, N.J., MUN. CODE § 8.56.090 (Am. Legal Publishing through Ordinance No. O-121603, passed Dec. 21, 2016)
Paterson, NJ	PATERSON, N.J., MUN. CODE § 412-10(E) (Am. Legal Publishing through Mar. 24, 2015)
Trenton, NJ	TRENTON, N.J., MUN. CODE. § 230-9(E) (Am. Legal Publishing through Oct. 20, 2016)
New York, NY	N.Y.C., N.Y., ADMIN. CODE § 20-924 (Am. Legal Publishing through Feb. 15, 2017)
Philadelphia, PA	PHILA., PA., MUN. CODE § 9-4110 (Am. Legal Publishing through Mar. 6, 2017)
Minneapolis, MN	Minneapolis, Minn., Ordinance No. 2017-001 (Am. Legal Publishing through Jan. 13, 2017) (to be codified at MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, ch. 40)
Seattle, WA	SEATTLE, WASH., MUN. CODE § 14.16.110 (Am. Legal Publishing through Feb. 16, 2017)
Spokane, WA	SPOKANE, WASH., MUN. CODE § 09.01.080 (Am. Legal Publishing through 2016)
Tacoma, WA	TACOMA, WASH., MUN. CODE § 18.10.070 (Am. Legal Publishing through 2015)

APPENDIX IV: SUMMARY OF REPORTING PAY LAWS

State	Compensation	Trigger	Law
California	50% of shift but not less than 2 hours and not more than 4 hours	Relieved from shift or comes back from shift after being relieved early	CAL. DEP'T OF INDUS. RELATIONS, INDUSTRIAL WELFARE COMMISSION WAGE ORDERS 1-16 (2014)
Connecticut	Paid at least 4 hours; restaurant/hotel industry minimum 2 hours	Industry specific	CONN. AGENCIES REGS. §§ 31-62-A2(b), 31-62-B2(c) (2017)
District of Columbia	Paid greater of scheduled shift or 4 hours	Payable at minimum wage	D.C., MUN. REGS. tit. 7, § 907 (1994)
Massachusetts	Guaranteed payment of at least 3 hours of shift	Shift at least 3 hours in length not scheduled at a non-profit	455 C.M.R. § 2.03(1) (2017)
New Hampshire	Paid 2 hours of shift	Only non-exempt employees	N.H. REV. STAT. ANN. § 275:43-a; N.H. CODE ADMIN. R. ANN. LAB. 803.03(i) (2016)

State	Compensation	Trigger	Law
New Jersey	Minimum of 1 hour	Worker has not already worked scheduled hours for the week	N.J. ADMIN. CODE § 12:56-5.5 (2016)
New York	Maximum of 4 hours at minimum wage	Applies to non-exempt employees only	N.Y. COMP. CODES R. & REGS. tit. 12. § 142-2.3 (2015)
Oregon	Greater of 50% of scheduled shift or 1 hour	Employee is a minor	OR. ADMIN. R. 839-020-0041 (2002)
Rhode Island	Minimum of 3 hours when reporting to work	Applies to all shifts (even if only scheduled for 2 hours)	28 R.I. GEN. LAWS § 12-3-2 (2016)

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