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Bill Analysis

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Primary Sponsors: Reps. Skindell and Kelly

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SUMMARY

- Limits the ability of a formula retail establishment employer (FRE employer), a food services establishment employer (FSE employer), or a property services contractor to hire new employees to perform work in a formula retail establishment (FRE) or food services establishment (FSE).
- Requires an FRE or FSE employer or a property services contractor to provide an employee with a written work schedule at least 14 days before the first day of the schedule and to post the schedule at the work site.
- Requires an FRE or FSE employer or a property services contractor to pay an employee for shift changes or cancellations and on-call shifts under certain circumstances.
- Prohibits an FRE or FSE employer or a property services contractor from considering the status of an employee as full-time or part-time for certain purposes.
- Requires a successor employer to retain certain FRE or FSE employees during a transition period after an ownership transfer.
- Prohibits an FRE or FSE employer or a property services contractor from taking adverse action against an individual in retaliation for exercising rights protected under the bill.
- Creates a rebuttable presumption that an action was taken by an FRE or FSE employer or a property services contractor in retaliation if the employer or property services contractor takes an adverse action against the individual within 90 days after the individual exercises a protected right.
- Requires the Director of Commerce to enforce the bill and to publish and make available to all employers a notice suitable for posting by FRE or FSE employers in the workplace informing employees of their rights under the bill.
- Requires an FRE or FSE employer to post the notice in a conspicuous place at any workplace or job site at which any of the employer's employees work.

- Prohibits an FRE or FSE employer or property services contractor from failing to comply with the bill.
- Creates an administrative enforcement procedure that requires the Director to make an initial administrative determination and an administrative appeals process that requires the Attorney General to appoint an impartial hearing officer to hear and decide the appeal.
- Allows an FRE or FSE employer or property services contractor to appeal a final administrative determination to the court of common pleas of the county in which the violation is alleged to have occurred.
- Allows the Director to sue in a court of competent jurisdiction on behalf of an employee against an FRE or FSE employer or a property services contractor for failing to comply with the bill's provisions.
- Creates administrative and civil penalties for violations of the bill.
- Allows the Director to adopt rules in accordance with Ohio's Administrative Procedure Act to implement the bill.

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DETAILED ANALYSIS

Overview

The bill establishes requirements for a formula retail establishment employer who employs more than 20 employees (an FRE employer), a food services establishment employer (an FSE employer), or a property services contractor regarding all of the following:

- Hiring new employees;
- Predictive scheduling;
- Compensation for shift changes or cancellations and on-call shifts;
- Use of full-time status for certain determinations.

The bill also establishes requirements for an FRE or FSE employer and successor employers regarding retention of employees.

An “employee” is an individual who is entitled to payment of minimum wage from an FRE or FSE employer or a property services contractor under the Minimum Wage Amendment to the Ohio Constitution.¹

An FRE or FSE employer includes a corporate officer or executive who, directly or indirectly, exercises control over the wages, hours, or working conditions of an individual, including through the services of a temporary agency or a professional employer organization. However, the bill does not apply to a nonprofit corporation that is exempt from federal income taxation under subsection 501(c)(3) of the Internal Revenue Code or to any public employer.

A “formula retail establishment” (FRE) is a retail sales establishment doing business in Ohio that has at least 20 other retail sales establishments in operation worldwide that maintain two or more of the following features:

- 50% or more of merchandise stocked by the business comes from a single distributor and bears uniform markings;
- A standardized facade;
- A standardized style of interior furnishings, which may include the style of furniture, wall coverings, or permanent fixtures;
- A standardized selection of colors used throughout the business, such as on the furnishings, permanent fixtures, wall coverings, and the facade;
- Standardized items of clothing worn by employees, including standardized aprons, pants, shirts, smocks, dresses, hats, and pins, and standardized colors of clothing worn by employees;

¹ Ohio Const., art. II, sec. 34a.

- Standardized business signs;
- A trademark or service mark.

A “food services establishment” (FSE) is a food services establishment doing business in Ohio that employs 500 or more employees worldwide, including a chain or franchise associated with a franchisor or network of franchises that employs 500 or more employees in the aggregate.

A “property services contractor” is a contractor or subcontractor who enters into a contract with an FRE or FSE employer to provide janitorial or security services to the employer at an FRE or FSE.²

Limitation on hiring new employees

The bill prohibits an FRE or FSE employer or a property services contractor from hiring a new employee, coemploying an employee with a professional employer organization, engaging an independent contractor, or leasing an employee from a temporary agency to perform work in an FRE or FSE unless the employer or property services contractor first offers that work in writing to any employee or contractor employee who is available to perform the additional work. The employer or property services contractor may divide the additional hours of work offered among the employer’s or property services contractor’s available employees.

An employee is available to perform additional work under the bill if all of the following apply to the employee:

- The employee is scheduled to work fewer than 35 hours in a workweek;
- The employee is qualified to do the additional work as reasonably determined by the FRE or FSE employer or property services contractor;
- The employee has performed work for the employer or property services contractor that is the same as or similar to the additional work to be performed;
- In a particular week, the employee performs at least two hours of work for an employer or a property services contractor within Ohio or is scheduled to work at least one on-call shift for the employer or property services contractor within Ohio.

The bill specifies that an FRE or FSE employer or a property services contractor is not required to offer more hours of work to an employee than is necessary for that employee’s total hours of work for that workweek to reach 35 hours. An employee who is offered additional hours of work is not required to accept the additional hours.³

² R.C. 4119.01.

³ R.C. 4119.03.

The bill requires an FRE or FSE employer or a property services contractor who offers additional work to an employee to retain a copy of the written offer for at least three years after the date of the offer was made.⁴

Written work schedule

The bill requires an FRE or FSE employer or a property services contractor to provide an employee with a written work schedule at least 14 days before the first day of the schedule. The schedule must include all regular and on-call shifts for a 14-day period. An FRE or FSE employer or a property services contractor must post the written schedule in a conspicuous and accessible location at the work site.

An FRE or FSE employer or a property services contractor may provide a newly hired employee or an employee who returns to work after a leave of absence with a written work schedule that runs through the last day of the work schedule in effect at the time the employee is hired or returns to work. The bill requires the employer or property services contractor to include such an employee on the next schedule posted.⁵

Shift changes or cancellations and on-call shifts

Shift changes or cancellations

The bill requires an FRE or FSE employer or a property services contractor to pay an employee for each scheduled shift, including on-call shifts, that the employer or property services contractor changes or cancels or for each previously unscheduled shift that the employer or property services contractor requires the employee to work or be on call as follows:

- If the employer or property services contractor gives the employee less than 14 days' notice, but more than 24 hours' notice, an amount equal to one hour of the employee's normal hourly wage rate;
- If the employer or property services contractor gives the employee less than 24 hours' notice and the changed, canceled, or required shift is four hours or less, an amount equal to two hours of the employee's normal hourly wage rate;
- If the employer or property services contractor gives the employee less than 24 hours' notice and the changed, canceled, or required shift is more than four hours, an amount equal to four hours of the employee's normal hourly wage rate.

The amounts required to be paid under this provision are in addition to, and cannot be considered part of, any wage or salary paid to the employee for time worked.⁶

⁴ R.C. 4119.11(A).

⁵ R.C. 4119.04.

⁶ R.C. 4119.05.

On-call shifts

An FRE or FSE employer or a property services contractor must, under the bill, pay an employee for each on-call shift that the employee is not called in to work as follows:

Number of hours of on-call shift	Rate of pay for not being called in
Four hours or less	An amount equal to two hours of the employee's normal hourly wage rate
More than four hours	An amount equal to four hours of the employee's normal hourly wage rate

However, an FRE or FSE employer or a property services contractor is not required to pay those amounts for an on-call shift if the employee is paid the employee's normal hourly wage rate for the on-call shift.⁷

Exceptions

The bill's requirements that an employee be paid for shift changes or cancellations and on-call shifts as described above do not apply in any of the following circumstances:

- Operations of an FRE or FSE employer or a property services contractor cannot begin or continue for any of the following reasons:
 - A threat to the safety of the employer or property services contractor's employees or property exists.
 - A government authority recommends that the operations should not begin or continue.
 - An act of God or another cause outside of the control of the employer or property services contractor prevents the operations from beginning or continuing.
- An FRE or FSE employer or property services contractor requires the employee to work a shift or be on-call under any of the following circumstances:
 - Another employee does not report to work the shift on time.
 - Another employee is unable to work the shift due to illness or the use of any leave if the employee did not give the employer or property services contractor at least seven days' notice of the absence.

⁷ R.C. 4119.06.

- Another employee is unable to work the shift because the employee's employment was terminated or the employee was prohibited from working the shift as a disciplinary action.
- An employee who would otherwise be entitled to be paid for a shift change or cancellation or an on-call shift under the bill requested the schedule change or on-call shift or such a change or shift is the result of a shift trade between the employee and another employee.⁸

Status of an employee as full-time or part-time

The bill prohibits an FRE or FSE employer or a property services contractor from considering the status of an employee as full-time or part-time in determining the starting normal hourly wage rate of an employee. This provision does not prohibit an FRE or FSE employer or a property services contractor from considering either of the following:

- Reasons other than part-time or full-time status in determining starting normal hourly wage rates of employees, including the use of a seniority system, merit system, or other system that determines earnings by quantity or quality of production, performance, or responsibility;
- Full-time or part-time status in determining requirements for the receipt of employee benefits, including health care benefits.

The bill requires an FRE or FSE employer or a property services contractor to provide part-time and full-time employees in the same job classification with access to the same types of paid and unpaid leave. An FRE or FSE employer or a property services contractor may prorate the amount of any time off an employee may receive based on hours worked.

An FRE or FSE employer or a property services contractor cannot consider an employee's status as full-time or part-time in determining eligibility for a promotion. However, an FRE or FSE employer or a property services contractor may do either of the following:

- Condition eligibility for a promotion on an employee's availability for full-time employment in the new position;
- Consider reasons other than full-time status in determining eligibility for a promotion, including the nature and amount of work experience.⁹

Ownership transfer

On the day an FRE or FSE employer executes documents to transfer ownership of a FRE or FSE to a successor employer, the bill requires the employer to provide to the successor employer a list that includes all of the following information for each employee, excluding any

⁸ R.C. 4119.07.

⁹ R.C. 4119.08.

managerial employee, supervisory employee, or confidential employee, who has been employed by the employer for at least 90 days before the date the employer executes documents to transfer ownership:

- The employee's name;
- The employee's contact information;
- The employee's date of hire and rate of pay at the time of transfer;
- The average number of hours worked by the employee each week during the six months immediately before the transfer of ownership;
- The employee's position or title.¹⁰

The employer must post public notice of the transfer of ownership in a conspicuous place at the FRE or FSE within 24 hours after the transfer document is fully executed. The successor employer must ensure that the notice remains posted for at least 30 days after the transfer. The employer is required to include all of the following information on the notice:

- The employer's name and contact information;
- The successor employer's name and contact information;
- The postal address and electronic mail address that an employee may use to update the employee's contact information;
- The effective date of the transfer from the employer to the successor employer.¹¹

During a specified transition period discussed below, the bill requires a successor employer to employ each employee identified on the list under the same terms of employment with respect to position or title, compensation, and number of work hours that applied to the employee immediately before the date of the transfer. A successor employer cannot discharge an employee identified on the list without just cause during the transition period. The bill requires a successor employer offering employment to an employee included on the list to make the offer in writing. If an employee declines to accept the offer of employment, the successor employer who made the written offer is deemed to have complied with the bill's requirement regarding employing each employee identified on the list as described above. The first time a successor employer pays wages to an employee retained under the bill, the successor employer is required to provide with that employee's paycheck a notice of the rights of retained employees under the bill.¹²

The transition period under the bill is the earlier of three years after the date that the employer executes documents to transfer ownership to the successor employer or 90 days

¹⁰ R.C. 4119.09(A), (E), and (F).

¹¹ R.C. 4119.09(B).

¹² R.C. 4119.09(C), (D), and (G).

after the successor employer takes control of the establishment. The 90-day period does not include any period of time during which the FRE or FSE is not open to the public during regular business hours.

The bill applies regardless of whether the successor employer elects to operate the FRE or FSE in the same location or elects to relocate to another location in Ohio.¹³

The bill requires a successor employer to keep a record of the list until the transition period has elapsed. The successor employer also must keep a record of a written retention offer to any employee on the list for at least three years after the date the offer is made.¹⁴

Exception

A successor employer may retain fewer employees than those included in the list if the successor employer determines that the successor employer requires fewer employees than the former employer to operate the establishment. If a successor employer chooses to retain fewer employees under this exception, the successor employer must retain employees by seniority, based on the date of hire by the former employer or, if an applicable collective bargaining agreement exists, pursuant to that agreement. During the transition period, the bill prohibits a successor employer from employing an individual who is not included on the list in a position at the FRE or FSE that was held by an individual who the successor employer did not retain pursuant to this exception.¹⁵

Prohibition against retaliation

The bill prohibits an FRE or FSE employer or property services contractor from taking adverse action against an individual in retaliation for exercising rights protected under the bill. The bill specifies that this protection also applies to any individual who mistakenly, but in good faith, alleges noncompliance with the bill. Additionally, the bill creates a rebuttable presumption that an action was taken by an FRE or FSE employer or a property services contractor in retaliation if the employer or property services contractor takes an adverse action against the individual within 90 days after the individual exercises a right protected under the bill.¹⁶

Notice of rights

The bill requires the Director of Commerce, who is tasked with enforcing the bill and who may delegate that task to the Superintendent of Industrial Compliance,¹⁷ to publish and make available to all employers, not later than 90 days after the bill's effective date, a notice

¹³ R.C. 4119.09(H).

¹⁴ R.C. 4119.11(B) and (C).

¹⁵ R.C. 4119.09(I), (J), and (K).

¹⁶ R.C. 4119.17.

¹⁷ R.C. 4119.13(A), with a conforming change in R.C. 121.083.

suitable for posting by employers in the workplace informing employees of their rights under the bill. The Director must publish the notice in English and Spanish.

The bill requires every FRE or FSE employer to post the notice in a conspicuous place at any workplace or job site at which any of the employer's employees work.¹⁸

Enforcement

The bill prohibits an FRE or FSE employer or property services contractor from failing to comply with the bill.¹⁹

Complaints and investigations

If an individual believes that a violation has occurred, the individual may file a complaint with the Director. The Director must keep confidential, to the maximum extent possible, any information that identifies an individual who files a complaint unless the individual has consented to disclosure of that information as necessary for the bill's enforcement or for other appropriate purposes. The bill requires the Director to proceed with an investigation if the Director has reason to believe that a violation has occurred. In cases where the Director has reason to believe that a violation has occurred, the Director must order any appropriate temporary or interim relief to mitigate the alleged violation or to maintain the status quo pending completion of a full investigation.²⁰

Administrative determinations

If after an investigation the Director determines that a violation has occurred, the Director must issue a determination. The determination must identify the violation and the factual basis for the determination and order any appropriate relief, including any of the following:

- Requiring an employer or property services contractor to offer additional hours of work to an employee as required by the bill;
- Requiring an employer or property services contractor to pay an amount required to be paid to an employee under the bill;
- Reinstatement;
- Payment of lost wages;
- Assessment of an administrative penalty not to exceed the amount of lost wages included in the determination;

¹⁸ R.C. 4119.10.

¹⁹ R.C. 4119.02.

²⁰ R.C. 4119.12 and 4119.13(B).

- Requiring the violator to pay to the Department of Commerce any costs of the enforcement action.

The bill requires the Director to impose an administrative fine on an FRE or FSE employer or a property services contractor as follows:

- Up to \$500 for each of the following offenses:
 - An employer's failure to post the notice of an employee's rights under the bill in a conspicuous place at any workplace or job site;
 - An employer's failure to retain a copy of the written offer of additional work to an employee for at least three years after the date of the offer was made.
- Up to \$500 for each employee who was eligible for retention for either of the following violations:
 - A successor employer's failure to keep a record of the list of employees eligible for retention until the transition period has elapsed;
 - A successor employer's failure to keep a record of a written retention offer to any employee on the list for at least three years after the date the offer is made.

A property services contractor and an FRE or FSE employer who contracts with the property services contractor are jointly and severally liable for any determination against a property services contractor under the bill. The Director must deposit all moneys received from administrative penalties and costs paid as a result of enforcement of the bill into the Industrial Compliance Operating Fund created under current law.²¹

Administrative appeals

The Director must serve a determination on an FRE or FSE employer or a property services contractor by regular mail. The employer or property services contractor may appeal a determination within 15 days after the date the determination is mailed. Appeals must be filed in writing with the Director. A determination is considered final when the 15-day period expires if a party fails to submit a timely written appeal.

Within 30 days after an appeal is filed, the Director is required to make an effort to meet and confer in good faith with the employer or property services contractor regarding possible resolution of the determination in advance of further proceedings under the appeals process. Beginning on the 31st day after an appeal is filed, the employer or property services contractor may request the Attorney General to appoint a hearing officer to hear and decide the appeal. If the employer or property services contractor does not request a hearing officer, the determination is considered final upon the 60th day following the date the appeal was filed.

Within 15 days after the Attorney General receives a request for the appointment of a hearing officer, the bill requires the Attorney General to appoint an impartial hearing officer

²¹ R.C. 4119.13(C), (D), and (E), 4119.15, and 121.084.

who is not part of the Department and to immediately notify the Director and the employer or property services contractor of the appointment. The appointed hearing officer must be an administrative law judge or attorney with at least five years of experience in labor and employment law or wage and hour matters.

The hearing officer must promptly set a date for a hearing that is not later than 45 days after the date the Attorney General provides the notice of the hearing officer's appointment. The hearing must conclude within 75 days after the date that notice is provided. The hearing officer must conduct a fair and impartial hearing in accordance with the time limitations set forth for the hearing by the bill, except that the hearing officer has the discretion to extend the time limitations on a determination of good cause. An employer or property services contractor who appeals has the burden of proving, by a preponderance of the evidence, that the basis for a determination, or any calculation of lost wages, interest, or penalty payments at issue in the appeal, is incorrect. Within 30 days after the hearing, the hearing officer must issue a written decision affirming, modifying, or dismissing the determination. The decision must consist of findings and a determination and constitutes the final administrative determination.²²

Appeals to the court of common pleas

The bill allows an FRE or FSE employer or property services contractor to appeal a final administrative decision issued by a hearing officer to the court of common pleas of the county in which the violation is alleged to have occurred. Failure to appeal a determination as provided under the bill constitutes a failure to exhaust administrative remedies, which serves as a complete defense to any petition or claim brought by an employer or property services contractor against the state regarding the determination.

If an employer or property services contractor fails to comply with a final order of the Director or hearing officer, the bill requires the Director to petition the court of common pleas of the county in which the underlying violation occurred for enforcement of the order.²³

Civil action

The bill allows the Director to sue in a court of competent jurisdiction on behalf of an employee against an employer or property services contractor for failing to comply with the bill. If the court determines that a violation has occurred, the bill requires the court to make the following awards:

- To the employee on behalf of whom the action was brought, any legal or equitable relief as may be appropriate to remedy the violation, including lost wages, a civil penalty not to exceed the amount awarded for lost wages, and reinstatement of employment or other injunctive relief;
- To the Director, reasonable attorney's fees and costs.²⁴

²² R.C. 4119.14(A) through (H).

²³ R.C. 4119.14(I) through (K).

Administrative rules related to enforcement

The bill allows the Director to adopt rules in accordance with Ohio's Administrative Procedure Act to implement the bill. The rules may include procedures for ensuring fair, efficient, and cost-effective bill implementation and enforcement, including supplementary procedures for notifying employees of their rights under the bill and for monitoring compliance.

The bill specifies that nothing in the bill limits the rights and remedies otherwise available to an employee, including any right the employee may have to remedies for unlawful discriminatory practice or unlawful discharge.²⁵

Effective date

The bill takes effect six months after its effective date.²⁶

HISTORY

Action	Date
Introduced	04-24-19

H02016-I-133/ec

²⁴ R.C. 4119.16.

²⁵ R.C. 4119.18.

²⁶ Section 3.