

March 8, 2019

New York State Department of Labor Withdraws Proposed “Call-In Pay” Regulations

By [Susan Gross Sholinsky](#), [Nancy Gunzenhauser Popper](#), [Jillian de Chavez-Lau](#),
and [Marc-Joseph Gansah](#)

The New York State Department of Labor (“NYSDOL”) recently [announced](#) that it would no longer pursue employee scheduling regulations concerning “call-in” (or “on-call”) pay and other so-called predictive scheduling matters. As we previously [reported](#), the proposed regulations, if adopted, would have required most employers in New York State to provide call-in pay under various circumstances, even though the employee had not actually worked or, in some situations, had not even reported to work.

Proposed Regulations

The NYSDOL’s proposed regulations had been in the works for several years. As recently as December 2018, the NYSDOL published revised proposed regulations for which they sought the public’s comments. Among other measures, the revised proposed rules would have required covered employers to provide “call-in pay” ranging from two to four hours at the minimum wage rate if the employer (i) failed to provide employees with 14 days’ notice of either their scheduled work shift or the cancellation of their scheduled work shift, (ii) required an employee to work “on-call” or to call in up to 72 hours ahead of their potential next shift, or (iii) decided to send a non-exempt employee home after the employee was instructed to report to work.

Withdrawal of the Proposed Regulations

In its statement announcing the withdrawal of the proposed regulations, the NYSDOL acknowledged that its decision to step away from the rulemaking was “[b]ased on extensive feedback in the subsequent comment period.” The NYSDOL said that it was “clear” from the feedback that “the Department’s initial intent to support workers while being fair to businesses was viewed as a one-size-fits-all approach that was not appropriate for every industry.”

Although the NYSDOL has withdrawn the proposed regulations, it also expressly left open the possibility of re-evaluating predictive scheduling laws in the future, likely in conjunction with the New York State Legislature. Indeed, now that the Legislature and the governorship are in the Democrats’ control, the introduction and potential enactment of such legislation are a distinct prospect.

Complying with Existing State and City Scheduling Obligations

Although the NYSDOL decided to scrap the proposed regulations, employers are still subject to the [Hospitality Industry Wage Order](#), as well as the call-in pay requirements of the Miscellaneous Wage Order. Additionally, covered employers (certain retailers and fast food employers) in New York City are also subject to the [Fair Workweek Laws](#).

What New York State Employers Should Do Now

- Ensure compliance with the New York State Miscellaneous Wage Order, and where applicable, the Hospitality Industry Wage Order and New York City's Fair Workweek Laws.
- Consider voicing opinions and concerns the next time a governmental agency proposes rules or regulations that are potentially adverse to business interests or objectives. By the NYSDOL's own admission, the public's response to the proposed call-in pay regulations was key to its decision to withdraw them.

* * * *

For more information about this Advisory, please contact:

Susan Gross Sholinsky

New York
212-351-4789
sgross@ebglaw.com

Nancy Gunzenhauser Popper

New York
212-351-3758
npopper@ebglaw.com

Jillian de Chavez-Lau

New York
212-351-4735
jdechavezlau@ebglaw.com

Marc-Joseph Gansah

New York
212-351-4618
mgansah@ebglaw.com

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in locations throughout the United States and supporting domestic and multinational clients, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.