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New York State Department of Labor Updates Proposed Regulations on Employee Scheduling

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On December 12, 2018, the New York State Department of Labor (“NYSDOL” or “Department”) [published](#) their long-awaited revised proposed regulations, which would impose call-in pay penalties designed to curtail several scheduling practices that are common among employers, such as on-call scheduling, last-minute cancellations (or new shifts), and call-in requirements. The latest iteration of the proposed regulations will require (with some exceptions) covered employers to pay employees for a minimum number of hours if the employer (i) fails to provide employees with 14 days’ advance notice of either their scheduled work shift or the cancellation of their scheduled work shift, (ii) requires an employee to work “on-call” or to call in up to 72 hours ahead of their potential next shift, or (iii) decides to send a non-exempt employee home after the employee was instructed to report to work.

If adopted in their present form, the revised proposed regulations will require many employers to change the way in which they currently schedule and/or pay their workers (although employers subject to the Hospitality Wage Order, such as hotels and restaurants, are not covered by the revised proposed regulations).¹ The revised proposed regulations, which also include responses to comments made on the original proposed rules (discussed below), are subject to a 30-day comment period, ending January 11, 2019.

Background

As we previously [reported](#), on November 22, 2017, the NYSDOL proposed the first version of these rules on employee scheduling. The NYSDOL, however, did not finalize those regulations by November 22, 2018 (within one year), so it has now re-issued the proposed rules, with further revisions.

Overview of the Revised Proposed Regulations

The revised proposed regulations amend the 2017 proposed rulemaking, and provide definitions and explanations for the call-in pay rules, including notice requirements, exemptions, and various employer obligations. In addition, the revised proposed regulations provide several significant clarifications to the 2017 proposed regulations.

¹ The revised proposed regulations also will not apply to the building services industry and farm workers.

Forms of Call-In Pay

Call-in pay is paid at the applicable basic minimum hourly wage rate. Like the earlier version, the newly revised proposed regulations would allow for a form of call-in pay in the following five situations:

1. **Reporting to Work:** Employees who report to work for any shift, but who are sent home before working at least four hours, would be entitled to be paid at least four hours of call-in pay (unless the number of hours in the shift is less than four). If an employee works a portion of the shift, the hours worked will be at the employee's regular rate and any additional call-in pay will be at the basic minimum wage.
2. **Previously Unscheduled Shift:** Employees who must report to work for any shift that was not scheduled at least 14 days in advance would be entitled to be paid an *additional* two hours of call-in pay beyond the pay they receive for the hours worked.
3. **Cancelled Shift:** Employees whose shifts are cancelled by the employer within (i) 14 days of the scheduled start of the shift would be entitled to be paid at least two hours of call-in pay, or (ii) 72 hours of the scheduled start of the shift would be entitled to be paid at least four hours of call-in pay.²
4. **On-Call Shift:** Employees who are required to be "on call" and available to report to work for any shift would be entitled to be paid at least four hours of call-in pay.
5. **Call for Schedule:** Employees who are required to contact an employer within 72 hours of the start of their shift to find out if they are required to report to work would be entitled to be paid at least four hours of call-in pay, regardless of whether they are actually required to work that shift.

Applicability

The revised proposed regulations apply to all employees within the Miscellaneous Wage Order except:

- employees covered by a collective bargaining agreement that contains provisions addressing call-in pay;
- employees who are exempted from the Miscellaneous Wage Order, *i.e.*, those who work in an executive, administrative, or professional capacity and who meet certain requirements in terms of their duties and pay; or
- for the forms of "Call-In Pay" discussed above in bullets number 2-5 (*i.e.*, **Previously Unscheduled Shift**, **Cancelled Shift**, **On-Call Shift**, or **Call for Schedule**), employees whose total weekly wage exceeds 40 times the applicable minimum hourly wage rate during the applicable week.

² This is an update to the prior version of the regulations, which is intended to benefit employees who work shorter shifts.

Other Revisions and Clarifications

The revised proposed regulations amend and clarify various other provisions of the 2017 proposed regulations. With regard to call in pay for the four scenarios listed in bullets number 2-5 above (**Previously Unscheduled Shift, Cancelled Shift, On-Call Shift, or Call for Schedule**), these changes include the following:

- These four call-in pay scenarios do not apply to employees who earn more than 40 times the applicable basic hourly minimum wage rate.
- These four call-in pay scenarios do not apply to employees: (i) whose duties are directly dependent on weather conditions; (ii) who are necessary for protecting the health or safety of any person; or (iii) whose assignments are subject to work orders or cancellations thereof;³ provided, however, that all such employees also receive weekly compensation that exceeds the number of compensable hours worked multiplied by the applicable minimum wage, with no allowances.
- The 2017 proposed regulations specified that the “Unscheduled Shifts” provision does *not* apply to new employees in their first two weeks of work, or to an employee who volunteers to cover a new or previously scheduled shift. The revised proposed regulations define “new shift” as the first two weeks of an additional shift that increases the net staffing at a single workplace during the period of time covered by that shift. Further, “previously scheduled” is defined as a shift that would not have been subject to call-in pay if it had been worked by the originally-assigned employee. Finally, “volunteers” means that the employee may refuse to cover the new or previously covered shift.
- For On-Call shifts, the 2017 proposed regulations required employers to provide call-in pay if the employee, *by request or permission* of the employer, was required to be available to report to work. The newly revised proposed regulations modified this language to clarify that the employee is only eligible for call-in pay if the employer *requires* that availability.
- Likewise, the current proposed regulations now provide that an employee is only eligible for Call for Schedule call-in pay if the employer *requires* the employee to call for his or her schedule.
- The revised proposed regulations clarify that the Unscheduled Shift and Cancelled Shift scenarios *do not* apply to situations when an employer, responding to a weather or travel advisory, offers employees the opportunity to volunteer to reduce or increase their scheduled hours (so that, for example, the employees can stay home, arrive early, leave early, or leave late) without call-in pay for unscheduled or cancelled shifts.
- The current proposed regulations also clarify that a Cancelled Shift does not include the situation where an employer cancels a shift at the employee’s request for time off, or

³ The revised exception relating to assignments subject to work orders or the cancellations of such orders is based on the NYSDOL’s intention to provide “greater flexibility to employers who operate ... at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or due to customer cancellations or last-minute orders, [as employers] should not be required to pay employees additional money under such circumstances.”

when workplace operations cannot take place, because of a variety of issues outside of the employer's control, including an act of God or an emergency declared by federal, state, or local government.

- Under the 2017 proposed regulations, the Safe Harbor provision provided that employees who were required to be on-call and available to show up to work for a shift would be entitled to call-in pay. The revised proposed regulations clarify that for the purposes of the On-Call scenario, there is a rebuttable presumption that the employee has volunteered to cover a new or previously scheduled shift if the employer provides a written good faith estimate of hours. Further, if the request to cover is either (i) made by the employee whose shift would be covered, or (ii) made by the employer to the employees in a writing seeking a volunteer and identifying a reasonable deadline to volunteer, and no one does volunteer, the employer can then assign an employee to cover the shift, without being obligated to pay the additional call-in pay.

NYSDOL Responses to Original Comment Period

The current proposed regulations also include responses to 20 comments received by the NYSDOL during the prior comment period. These responses provide a number of clarifications, including:

- The NYSDOL revised the 2017 proposed regulations in order to provide more flexibility for employers, as well as in response to concerns about the costs involved in implementing the regulations.
- Although there is no affirmative requirement in the newly revised rulemaking that employers maintain records that can help demonstrate their compliance, employers are encouraged to do so.
- The responses to the comments reiterate that students working for non-profits are exempt from the Miscellaneous Wage Order, provided the organization is organized as, and operates solely for, charitable, educational, or religious purposes, and that the student is attending the institution in pursuit of a degree or certificate.
- In response to a comment asking whether the rulemaking preempts local laws, such as [New York City's Fair Workweek Law](#), the NYSDOL responded that "[t]he preemptive effect of the rulemaking is a matter for the courts, not the Department." Thus, it is still unclear whether the State's position is that the revised proposed regulations preempt any conflicting provisions in the New York City scheduling law.
- In response to a complaint about inadequate time to comply with the proposed regulations before their effective date, the NYSDOL stated that "any future adoption will provide businesses with sufficient time to comply with the rulemaking."

What Employers Should Do Now

- Consider submitting comments to the NYSDOL on the newly revised proposed regulations with respect to potential hardships, unanswered questions, or scheduling scenarios that have not yet been addressed.

- Review employee scheduling practices to make sure that employee shifts are scheduled at least 14 days in advance, based on the last day of the workweek.
- Train managers regarding scheduling requirements, consistent with the revised proposed regulations.
- When possible, provide employees with at least 72 hours' notice for any cancelled shifts or call-in requirements.
- Review procedures and policies, and train payroll managers regarding call-in entitlements and carve outs/ exemptions.
- Ensure relevant personnel are familiar with all applicable minimum wage rates.
- Review payroll procedures to avoid inclusion of call-in pay in employee overtime calculations.
- Consider implementing a recordkeeping system that will help demonstrate compliance.

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