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ALERT
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# Call-In Pay for New York Hospitality Employers

By Carolyn D. Richmond & Glenn S. Grindlinger

On April 13, 2015, there were a series of news articles noting that New York Attorney General Eric Schneiderman is launching an investigation into 13 large retailers. According to the articles, the investigation is to focus on such retailers' employee on-call schedules to determine whether they violate New York law. The Attorney General's office claims that many hourly workers are required to call-in a few hours before their shifts to see if they are needed and if they are not needed they are not paid for the day. The media coverage of the launching of the Attorney General's investigation has caused much consternation in the hospitality industry.

New York's Hospitality Wage Order states that "an employee who . . . reports for duty on any day . . . shall be paid at the applicable wage rate:

1. for at least three hours for one shift, or the number of hours in the regularly scheduled shift, whichever is less;
2. for at least six hours for two shifts totaling six hours or less, or the number of hours in the regularly scheduled shift, whichever is less; and
3. for at least eight hours for three shifts totaling eight hours or less, or the number of hours in the regularly scheduled shift, whichever is less."

An employee's "regularly scheduled shift" is defined as "a fixed, repeating shift that an employee normally works on the same day each week [and] if an employee's [shift changes] from week to week, there is no regularly scheduled shift." Thus, by the plain language of the Wage Order, call-in pay is only applicable when an employee actually arrives and reports to work. This is supported by the New York Department of Labor's Hospitality Wage Order Frequently Asked Questions, which notes that "call-in pay is wages owed to employees for **reporting to work** on a given day even if they are sent home early" (emphasis added). Therefore, if an employee calls in hours before the start of his/her shift and is told not to report to work, call-in pay is not required.

If call-in pay is required, it must be paid at the "applicable wage rate," which is:

- payment for time of actual attendance calculated at the employee's regular or overtime rate of pay, whichever is applicable, minus any customary and usual tip credit; and
- payment for the balance of the period calculated at the basic minimum hourly rate with no tip credit subtracted.

For example, if an employee works one hour at $10.00 per hour and then is sent home, the employee would be paid for one hour at $10.00 per hour and two additional hours at $8.75 per hour (the current basic minimum hourly rate) for a total daily payment of $27.50.

While it is always a concern when the government launches an investigation into an employment practice that permeates the industry, this particular investigation should not alarm the hospitality-employer community. As long as hospitality employers pay call-in pay as required under the Wage Order, they can continue their practice of having employees contact them hours before their shift to see if they are needed without incurring additional expense or exposure; that is, until the state changes the law.

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