



December 2018

The New York State Department of Labor Issues Proposed Employee Scheduling Regulations

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The New York State Department of Labor has issued proposed regulations that would change the current rules for call-in pay across the state and add new requirements that employees be paid when their shifts are cancelled, they are required to work a previously unscheduled shift, or are required to be on call or to call in to confirm whether to report to work. The full text of the proposed regulations are available [here](#). The proposed regulations are subject to a comment period until January 11. Comments on the proposed regulations may be submitted via email to hearing@labor.ny.gov.

These proposed regulations would amend the Miscellaneous Industries and Occupations Minimum Wage Order and importantly, would **not** apply to employers covered by the Hospitality Industry, Farm Workers, or Building Service Industry Minimum Wage Orders. Nevertheless, these proposed regulations would cover the vast majority of employers operating in New York. Currently the only “call-in pay” requirement under the Miscellaneous Industry Wage Order is that employers must pay any employee who reports for work the lesser of four hours, or the number of hours in the employee’s scheduled shift, at the minimum wage.

WHEN WOULD CALL-IN PAY BE REQUIRED?

The proposed regulations set forth five circumstances when “call-in pay” would be required:

- **Reporting to Work:** Call-in pay of four hours would be required for any employee who reports for any shift at the request or permission of the employer.
- **Unscheduled Shift:** If an employee comes to work at the request/permission of the employer for any shift for hours that were not scheduled at least 14 days in advance, that employee must be paid an additional two hours of call-in pay. Where there is a weekly schedule, the 14-day period may be measured from the last day of the schedule.
- **Cancelled Shift:** If an employee’s shift is cancelled prior to its start, the employee must be paid at two hours of call-in pay if the shift was cancelled within 14 days, or four hours of call-in pay if the shift was cancelled within 72 hours.
- **On-Call:** Employees who are required to be available to report to work for any shift shall be paid four hours of call-in pay.
- **Call for Schedule:** An employee who is required to be in contact with the employer within seventy-two hours of the start of a shift to confirm whether to report to work must be paid at four hours of call-in pay.

HOW WOULD CALL-IN PAY BE CALCULATED?

Call-in pay would be calculated as follows:

- Payments for “actual attendance” are calculated at the employee’s customary rate of pay or overtime rate, whichever is applicable, minus any allowances/credits

allowed under the Miscellaneous Industries Wage Order.

- Payments for other hours of call-in pay are calculated at the full minimum wage with no allowances/credits. These payments are not considered payments for time worked or work performed and do not have to be included in the regular rate of pay for overtime purposes.
- The four hours of call-in pay for reporting to work and for cancelled shifts may be reduced to the lesser number of hours that the employee is scheduled to work and normally works for that shift.

EXCEPTIONS TO CALL-IN PAY

The proposed regulations contain a number of exceptions where call-in pay would not be required:

- Call-in pay would not be required for an unscheduled shift, cancelled shift, being on-call, or for having to call for a schedule during any workweek where an employee's weekly wage would exceed 40 times the applicable minimum wage.
- Call-in pay would also not be required for an unscheduled shift, cancelled shift, being on-call, or for having to call for a schedule for employees "whose duties are directly dependent on weather conditions, or to employees whose duties are necessary to protect the health or safety of the public or any person, or to employees whose assignments are subject to work orders, or cancellations thereof" so long as those employees receive weekly compensation that exceeds the number of hours worked times the basic minimum wage with no allowances.
- Call-in pay for an unscheduled shift would not be required for:
 - Any new employee during the first two weeks of employment; or

- Any employee who volunteers to cover a new shift or a previously scheduled shift.

- A "new shift" is defined as the first two weeks of an additional shift that results in a net increase in staffing at a workplace during the time covered by the shift.
- A "previously scheduled shift" is a shift that would not have been subject to unscheduled shift call-in pay if worked by the employee who was originally assigned to work that shift.
- To be a "volunteer" the employee must be able to refuse to cover the shift.
- Call-in pay for an unscheduled or cancelled shift would not be required when the employer responds to weather or travel advisories by offering employees the option to reduce or increase hours so that employees can stay home, leave early, arrive late, etc.
- Call-in pay for a cancelled shift would not be required if the employer cancels a shift at the employee's request for time off or when operations at the workplace cannot continue due to an act of God or other cause not within the employer's control, including a declared state of emergency.
- Call-in pay is not required for employees who are properly classified as exempt from overtime under the Miscellaneous Wage Order.

SAFE HARBOR PROVISION

The proposed regulations contain a safe harbor provision for employers. There would be a rebuttable presumption created that an employee volunteered to cover a new or previously scheduled shift if:

- The employer provides a written good faith estimate of hours to all employees upon hire or to existing employees after the effective date of the regulations, with such hours estimate only being amended upon

the request of the employee or with two weeks' notice by the employer; and

- The request to cover the shift is either:
 - Made by the employee whose shift would be covered; or
 - Made by the employer in a written communication to a group of employees requesting a volunteer and identifying a reasonable deadline for responses. If no employee volunteers by the deadline, the employer may assign an employee to cover the shift without additional call-in pay required for unscheduled shifts.

NEW YORK CITY RETAIL EMPLOYERS

Retail employers in New York City are currently subject to the Fair Workweek Law which prohibits “on call scheduling” for employees in its entirety. (Our June 2017 Alert on the Fair Work Week Act may be found [here](#).) Among other things, New York City retail employers may not require an employee be “on call” for a shift, require that employees contact the employer to see whether to report to work, or cancel a shift within 72 hours of the start of a shift. The Department of Labor’s proposed regulations potentially conflict with these provisions of New York City’s Fair Workweek Law to the extent that they allow employees to take any of these actions so long as they pay the employee an appropriate amount of call-in pay.

It will remain to be seen what impact, if any, these proposed regulations would have on retail employers subject to the Fair Workweek Law. Hospitality industry organizations recently filed suit to challenge the provisions of the Fair Workweek Law that apply to the hospitality industry arguing that the City’s law is preempted by State laws and regulations that govern the scheduling and payment of wages to employees, including the Hospitality Industry

Minimum Wage Order. The results of that litigation may provide further clarity on how these proposed regulations will affect New York City retail employers.

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