

## New York State Department of Labor Proposes Regulations on Employee Scheduling

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On November 22, 2017, the New York State Department of Labor (“NYSDOL”) published proposed call-in pay [regulations](#) (“Proposed Regulations”) in the *New York State Register*. The Proposed Regulations are subject to a 45-day comment period.<sup>1</sup>

The Proposed Regulations would revise and expand the provisions of New York State’s Labor Law relating to “call-in pay.” These provisions are included in the [Minimum Wage Order for Miscellaneous Industries and Occupations](#) (12 NYCRR Part 142 at §§ 142-2.3, 3.3) (“Miscellaneous Wage Order”). The Proposed Regulations 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 Proposed Regulations would also amend the definition of “call-in pay” to (i) require employers to provide call-in pay in more situations than required under the law as currently written and (ii) clarify the calculation of call-in pay.

Under existing law, New York employers are only required to provide call-in pay to employees who report to work at an employer’s request and then are instructed not to work an entire shift. Call-in pay is currently calculated as follows: the *lesser of* (i) four hours’ pay or (ii) payment for the number of hours of the shift in question. Call-in pay is currently to be paid at the applicable basic minimum hourly wage rate.

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<sup>1</sup> Earlier this year, New York City enacted several “fair workweek” laws to regulate certain scheduling practices in the fast food and retail industries. Those laws became effective on November 26, 2017. The City recently proposed rules to provide additional information regarding the implementation of those laws. It is unclear whether the Proposed Regulations are intended to preempt any conflicting provisions between the New York State and City scheduling laws.

## Who Is Covered by the Proposed Regulations?

The Proposed Regulations cover employees subject to the Miscellaneous Wage Order, meaning that they would affect all New York employees, except those in the hospitality industry, the building services industry, and farm workers. There are several notable exceptions:

- The entitlement to call-in pay in the four new scenarios in the Proposed Regulations (see (2) through (5) below) would *not* apply to employees whose total weekly wage exceeds 40 times the applicable minimum hourly wage rate during the applicable week.
- The Proposed Regulations would not apply to any employees covered by a collective bargaining agreement that contains provisions addressing call-in pay.
- The Miscellaneous Wage Order does not apply to employees who work in an executive, administrative, or professional capacity and who meet certain requirements in terms of their duties and pay.<sup>2</sup>

## Entitlement to Call-In Pay

The Proposed Regulations would expand the number of scenarios in which employers would be required to provide call-in pay, as follows:

- (1) **Reporting to Work:** Employees who report to work for any shift, but who are sent home sooner than four hours later, 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).
- (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 within 72 hours of the scheduled start of the shift would be entitled to be paid at least four hours of call-in pay.
- (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

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<sup>2</sup> The Miscellaneous Wage Order also does not apply to certain employees of nonprofit organizations; employees of the federal, state, or municipal governments; or certain care companions, among other specific workers.

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.

### **Calculation of Call-In Pay**

Any actual time worked, for an employee who reports to work in one of the five scenarios above, would be calculated at the employee's regular rate of pay or overtime rate of pay, whichever is applicable. The additional call-in pay would be calculated at the basic minimum wage rate. Employers may not take allowances (deductions) for call-in pay, nor may they use offsets, such as leave time, to provide call-in pay. Importantly, however, employers would not be required to include hours of call-in pay for purposes of calculating overtime pay.

For employees whose shifts are ordinarily less than four hours, and who would be entitled to call-in pay for reporting to work or for a cancelled shift, the Proposed Regulations would preserve an employer's ability to pay call-in pay equal to the number of hours in the regularly scheduled shift, even if fewer than four hours. This exception *would not apply* if an employee's total hours worked or hours scheduled to work for that shift do not change from week to week.

### **Exceptions and Modification**

The Proposed Regulations provide the following exceptions and modification:

- The call-in pay entitlement for **previously unscheduled shifts** would not apply to:
  - new employees during the first two weeks of their employment, or
  - any regularly scheduled employee<sup>3</sup> who volunteers to cover<sup>4</sup>:
    - a new and additional shift during the first two weeks that the shift is worked, or
    - a shift that had been scheduled at least 14 days in advance to be worked by another employee.
- The call-in pay entitlement for **cancelled shifts** would not apply in the following situations:

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<sup>3</sup> "Regularly scheduled employee" means an employee who is scheduled at least 14 days in advance for a shift, consistent with a written good faith estimate of hours provided by the employer at the time of hiring (or at the time this section of the Proposed Regulations takes effect, whichever is later).

<sup>4</sup> "Volunteers to cover" is defined to mean "acceptance of any request from another regularly scheduled employee or of an open request from the employer that is extended to all eligible employees, with no penalty or consequence for any employee who does not extend or accept such requests."

- if an employer cancels a shift at the employee's request for time off, or
- when operations at the workplace cannot begin or continue due to an act of God or another cause not within the employer's control (i.e., a state of emergency declared by federal, state, or local government).
- The call-in pay entitlement for **cancelled shifts** would be modified where operations can begin or continue, but staffing needs are reduced due to an act of God or another cause not within the employer's control. In such case, call-in pay would be required for shifts cancelled within *24 hours* of the beginning of the shift, instead of 72 hours.

### **Impact for Unionized Workforces**

The Proposed Regulations would specifically exempt from their coverage any employees covered by a collective bargaining agreement that contains provisions addressing call-in pay. It appears, however, that the Proposed Regulations are intended to apply to otherwise-eligible employees who are represented by a union and covered by a collective bargaining agreement if that agreement does not provide for payment of call-in or on-call pay. At this time, it is not clear when the provisions of the Proposed Regulations would become applicable during the term of a collective bargaining agreement that is in effect on the date the final call-in pay regulations take effect, or following the expiration of a contract in effect at that time. Another question that remains is whether, in fact, the NYSDOL's attempt to impose such additional terms, which are commonly addressed between employers and unions in negotiations, may actually be preempted by the National Labor Relations Act, which governs the duty to bargain, because the Proposed Regulations would, in effect, create obligations that the employer and union agreed not to include in their contract.

### **What Employers Should Do Now**

- Consider [submitting comments](#) to the NYSDOL regarding the Proposed Regulations.
- Review employee scheduling practices to make sure that employee shifts are scheduled at least 14 days in advance, and, if they are not, make preparations to begin to do so.
- Train managers regarding scheduling requirements to comply with the Proposed Regulations.
- Where possible, provide employees with at least a 72-hour notice period for any cancelled shifts or call-in requirements.
- Review procedures and train payroll managers regarding call-in pay entitlements.
- Familiarize yourself with the applicable minimum wage rates.

- For those employers with employees represented by unions and covered by collective bargaining agreements, review relevant provisions and consider addressing call-in pay and related matters in negotiations going forward.
- Review payroll procedures so as not to include call-in pay in employee overtime calculations.

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