

December 20, 2017

New York State Planning to Expand Call-In Pay Requirements for Most Employers

On November 22, 2017, the New York State Department of Labor (“NYDOL”) issued proposed regulations seeking to impose new pay obligations on employers who change employee work schedules on short notice or schedule shifts less than two weeks in advance, and expanding current requirements for additional pay when an employee subject to call reports for work. The NYDOL’s proposal is subject to a 45-day period of public comment before the rules are finalized.

The proposal would not affect employers operating under the Minimum Wage Orders for the Building Services Industry or Hospitality Industry (the latter of which has unique call-in pay requirements), or certain nonprofit organizations that have formally elected to be exempt from coverage under a Minimum Wage Order. Workers who are not subject to the wage and hour requirements of the New York Labor Law, including exempt executive, administrative, and professional employees, would also not receive additional compensation under the proposed regulations. In light of these newly-proposed pay entitlements, employers should also be particularly mindful that New York’s minimum wages – as well as its minimum salary requirements for employees to qualify for the executive and administrative exemptions – are scheduled to increase on December 31, 2017. Those increases are summarized later in this advisory.

Changes to Current Call-In Pay Requirements

Many New York employers are already required under existing regulations to pay an employee at least four hours of “call-in pay” at the minimum wage for any day on which the employee reports for work with the employer’s permission, even if the employee is immediately sent home or works a shortened shift due to lack of work. The proposed rules clarify existing NYDOL guidance and provide that call-in pay for reporting to work may be reduced from four hours to the number of hours that an employee normally works for the shift, if the employee’s actual or scheduled hours for the shift do not change from week to week.

*747 Third Avenue
New York, N. Y. 10017
Tel: 212-758-7600
www.cfk-law.com*

Premiums for call-in pay are currently calculated on a daily basis. The NYDOL's proposal would expand employers' pay obligations by calculating an employee's call-in pay entitlement on a per-shift basis. The term "shift," however, is undefined in the NYDOL's proposal. Further, although employers can currently offset an employee's call-in pay entitlement when he or she is paid more than the applicable minimum wage, the proposed regulations, as written, expressly prohibit employers from using such offsets. The proposal also prohibits employers from offsetting their call-in pay obligations by requiring employees to use paid leave.

New Call-In Pay Requirements for Covered Employees

The draft regulations would also require employers to provide additional call-in pay when they do not schedule employees for work at least two weeks in advance, or when they change employees' work schedules on short notice. Specifically, the amendments would require employers to pay:

- Four hours of call-in pay at the minimum wage when an employee's shift is cancelled within 72 hours of the shift start time ("cancelled shifts"), which can be reduced if the employee actually works or is scheduled to work the shift for less than four hours on a weekly basis;
- Four hours of call-in pay at the minimum wage when an employee must be available to report to work for any shift ("on call" time);
- Four hours of call-in pay at the minimum wage whenever an employee is required to be in contact with the employer to determine whether to report for work within 72 hours of the shift start time ("call for schedule" requirements); and
- Two additional hours of call-in pay at the employee's regular rate or the minimum wage, as applicable, when an employee reports to work for any shift, if the hours were not scheduled at least 14 days in advance (an "unscheduled shift").

Exceptions to Call-In Pay Requirements

The NYDOL's proposed regulations would not apply to any employees who are covered by a valid collective bargaining agreement that expressly provides for call-in pay. The NYDOL's formal rulemaking package also indicates that the regulations "will exclude ... workers whose weekly wages exceed 40 times the applicable minimum wage." However, under the regulations as written, even when an employee earns more than 40 times the applicable hourly minimum wage in a given week, he or she would still be entitled to call-in pay when reporting for a shift (but would not be eligible for additional pay for canceled, on-call, or "call for schedule" shifts, or the two hours of

additional pay for unscheduled shifts). In light of this conflict between the draft regulations and the NYDOL's commentary, it is currently unclear whether the proposal's failure to include reporting pay in the exception for these workers is simply a drafting error.

If the regulations are adopted as proposed, employers will not be required to provide additional call-in pay for unscheduled shifts when employees volunteer to cover shifts that were assigned to other workers at least two weeks in advance, or to fill newly-created shifts. However, these exceptions will only apply to "regularly scheduled employees" who receive a written estimate of their work hours upon hire (or at the time the regulations take effect), and who are scheduled for shifts at least two weeks in advance and consistent with that estimate, which can subsequently be amended at the employee's request. An employee's acceptance of a shift will be deemed voluntary if there is no penalty for employees who do not arrange contingent coverage or accept shifts, and if employers offer open shifts to all eligible employees. The requirement that employers provide unscheduled shift pay would also not apply during an employee's first two weeks of employment.

Finally, employers will not be liable for cancelled shift pay when an employee requests time off, or if the employer cannot begin or continue operations due to circumstances not within its control (such as a legal state of emergency). If staffing needs are reduced due to circumstances not within the employer's control, but the employer's operations continue, the notice period to avoid cancelled shift pay will be reduced to 24 hours for regularly scheduled employees.

Minimum Wage and Exemption Salary Minimums to Increase on December 31, 2017

Employers will recall that increases to the minimum wage – varying by the region of the state where an employee works – will take effect on December 31, 2017. In addition, the minimum weekly salary required for employees to qualify for the executive and administrative exemptions under New York's wage and hour laws will increase proportionally with the minimum wage.

The regional minimum wages as of December 31, 2017 will be:

- \$13.00 per hour for employees when working in New York City for employers with 11 or more employees;
- \$12.00 per hour for employees when working in New York City for employers with 10 or fewer employees;
- \$11.00 per hour for employees when working in Nassau, Suffolk and Westchester counties; and
- \$10.40 per hour for employees when working outside of New York City, Nassau, Suffolk, and Westchester counties.

Effective December 31, 2017, the weekly salary minimums for administrative and executive employees to qualify for exemption under the New York Labor Law will be:

- \$975.00 per week (\$50,700 annually) for employees working in New York City for employers with eleven or more employees;
- \$900.00 per week (\$46,800 annually) for employees working in New York City for employers with ten or fewer employees;
- \$825.00 per week (\$42,900 annually) for employees working in Nassau, Suffolk and Westchester counties; and
- \$780.00 per week (\$40,560 annually) for employees working outside of New York City, Nassau, Suffolk, and Westchester counties.

Although the NYDOL's proposed requirements for call-in pay would take effect no sooner than January 2018, employers would be well-served to evaluate the potential costs associated with the proposed regulations and their potential effect on their worker scheduling practices. Although the proposed regulations would not prohibit employers from changing employee schedules on short notice or imposing on-call requirements, the costs associated with doing so may be substantial. The NYDOL also recently issued commentary regarding its proposal, which appears to be at variance with the text of the proposed rules. It remains to be seen whether this reflects a change in policy that will be recorded in the finalized regulations.

If you have any questions about the proposed regulations or would like additional information, please contact Nick Bauer at (212) 758-7793, or any other attorney at the Firm.

This Advisory is intended for informational purposes only and should not be considered legal advice. If you have any questions about anything contained in this Advisory, please contact Collazo Florentino & Keil LLP. All rights reserved. Attorney Advertising.