

December 20, 2018

New York State Proposes New Predictable Scheduling Regulations for Most Employers

On December 12, 2018, the New York State Department of Labor (“NYDOL”) proposed changes to existing regulations that impose new pay obligations on employers who change employees’ work schedules on short notice or schedule their shifts less than two weeks in advance, and expanding current requirements for additional pay when an employee on standby is called to report for work. The NYDOL’s proposal is subject to a 30-day period of public comment before the rules are finalized.

The proposed changes affect many employees who may have not noticed any effect from the preceding version of the regulations, such as certain part-time or per diem employees and hourly employees who earn substantially more than minimum wage. The current proposal does 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 exempt from the New York Labor Law’s wage and hour requirements, including overtime-exempt executive, administrative, and professional employees, also do not receive additional compensation under the proposed regulations. In light of these proposed additional 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, 2018. 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 guidance and provide that call-in pay for reporting to work

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may be reduced to the number of hours the employee is scheduled to work and normally works for that shift.

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, remains undefined in the NYDOL's amended proposal. Further, the NYDOL's position on employees' current call-in pay entitlement requires additional pay only when the employee's pay for that workweek is less than the sum of pay required for straight time, overtime, and four additional hours at minimum wage (per day that the employee reported for call). Under the new regulations, such "offsets" will no longer be permitted: each *shift* for which the employee reports to work will require a minimum of four hours of call-in pay, which is computed at the employee's regular rate for all hours worked, and which is computed at minimum wage for the remaining hours (up to four). 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 also require employers to provide additional pay when they fail to schedule employees for work at least two weeks in advance, or when they change employees' work schedules on short notice. Specifically, for any employee whose weekly wages are less than 40 times the applicable minimum wage, the amendments require employers to pay:

- At least two hours of call-in pay at the minimum wage when an employee's shift is cancelled within 14 days of the shift's start time, or four hours of call-in pay if the shift is cancelled within 72 hours of the shift's start time ("cancelled shifts"), which can be reduced to the number of hours the employee is scheduled to work and normally works for that shift;
- At least 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);
- At least 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 do not apply to any employees who are covered by a valid collective bargaining agreement that expressly provides for call-in

pay. The regulations' accompanying commentary also indicates that the regulations "will exclude ... workers whose weekly wages exceed 40 times the applicable minimum wage." However, as written, even when an employee earns more than 40 times the applicable hourly minimum wage in a given week, he or she will 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 unclear whether the proposal's failure to include reporting pay in the exception for these workers is intentional.

If the regulations are adopted as proposed, employers will not be required to provide additional call-in pay for unscheduled, canceled, on-call, or "call for schedule" shifts to:

- (1) Employees whose duties are directly dependent on weather conditions;
- (2) Employees whose duties are necessary to protect the health or safety of the public or any person; or
- (3) Employees whose assignments are subject to work orders or work order cancellations.

However, such employees must receive weekly compensation that exceeds the minimum wage for all hours worked, with no allowances, to be eligible for this exclusion.

In addition, employers will not be required to provide 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 when an employer increases workplace staffing (for the first two weeks of the newly-created shift's existence). The regulations create a rebuttable presumption that an employee's decision to cover a new or previously-assigned shift was "voluntary" if:

- (1) All employees receive a written good-faith estimate of their hours upon hire (or after the effective date of the regulations, for current employees), which may be amended at the employee's request or upon two weeks' notice by the employer; and
- (2) The request for coverage of the new or previously-scheduled shift was either:
 - (a) made by the employee who was scheduled to work the shift; or
 - (b) made by the employer to a group of employees, in writing, requesting a volunteer to cover the shift and providing a "reasonable" deadline for responses.

Where the employer issues a written request for volunteers and no employee volunteers prior to the deadline, the employer may assign an employee to cover the shift without paying the additional two hours of call-in pay for unscheduled shifts.

Employers will also not be liable for cancelled shift pay when an employee requests time off, or when the employer cannot begin or continue operations due to circumstances not within its control (such as a legal state of emergency). Similarly, employers need not provide pay for cancelled or unscheduled shifts if they offer employees the opportunity to voluntarily reduce or increase their scheduled hours (for example, by arriving or departing before or after their scheduled hours, or choosing not to report for work) in response to weather or travel advisories.

Minimum Wage and Exemption Salary Minimums to Increase on December 31, 2018

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, 2018. 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 in proportion with the minimum wage.

The regional minimum wages as of December 31, 2018 will be:

- \$15.00 per hour for employees when working in New York City for employers with 11 or more employees;
- \$13.50 per hour for employees when working in New York City for employers with 10 or fewer employees;
- \$12.00 per hour for employees when working in Nassau, Suffolk and Westchester counties; and
- \$11.10 per hour for employees when working outside of New York City, Nassau, Suffolk, and Westchester counties.

Effective December 31, 2018, the weekly salary minimums for administrative and executive employees to qualify for exemption under the New York Labor Law will be:

- \$1125.00 per week (\$58,500 annually) for employees working in New York City for employers with eleven or more employees;
- \$1012.50 per week (\$52,650 annually) for employees working in New York City for employers with ten or fewer employees;
- \$900.00 per week (\$46,800 annually) for employees working in Nassau, Suffolk and Westchester counties; and
- \$832.00 per week (\$43,264 annually) for employees working outside of New York City, Nassau, Suffolk, and Westchester counties.

Although the NYDOL’s proposed requirements for call-in pay are expected to take effect no sooner than January 2019, and the agency’s rulemaking further indicates that it will give businesses “sufficient” time to prepare for any changes should it adopt the proposed rules, 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.

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.

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