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# What To Know About NY's Proposed 'Call-In Pay' Regs

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Many employers in the retail and service industries frequently need to call in employees or cancel shifts at the last minute based upon unexpected surges or dips in consumers visiting the business. Similarly, employers in the construction industry may need to cancel an employee's shift due to weather conditions or equipment breakdowns, while other employers, like those in snow removal or other service industries, may be dependent upon the arrival of bad weather before the opportunity arises to service customers.

The New York State Department of Labor has proposed regulations that will result in challenges for employers who regularly fall into situations where employee schedules are not determined well in advance or change at the last minute, oftentimes for reasons out of the employer's control. Employers who currently rely on the flexibility of scheduling and utilizing part-time workers to supplement their full-time workforce based upon demand and last minute considerations will be particularly challenged by the proposed regulations.

As a threshold question it is important to understand the industries these proposed regulations would affect. Under New York labor law there are four minimum wage orders: (1) Part 141 (Building Service Industry); (2) Part 142 (Miscellaneous Industries and Occupations); (3) Part 143 (Nonprofitmaking Institution Which Certifies it Will Pay the Statutory Minimum Wage to Each Employee in Lieu of Being Covered Under a Minimum Wage order) and; (4) Part 146 (Hospitality Industry). The proposed regulations only would modify industries that fall under Part 142, (Miscellaneous Industries and Occupations), which applies to all New York employees, except: (a) employees who are covered by minimum wage standards in any other minimum wage order promulgated by the commissioner; and (b) employees of a nonprofit-making institution which has elected to be exempt from coverage under a minimum wage order, pursuant to Subdivision 3 of Section 652 of the Minimum Wage Act. In other words, certain not-for-profit employers and employers in the building service industry (which specifically excludes construction and building and trades) or hospitality industry would not be affected. All other employers fall under Part 142, and therefore would be affected by these proposed regulations.

The existing call-in pay regulations in New York for employers covered under Part 142 Miscellaneous Industries and Occupations require that "[a]n employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage." The proposed regulations expand the circumstances where employees are entitled to additional pay to four additional situations:

1. An employee reports to work for any shift for hours that have not been scheduled at least 14 days in advance (employee receives an additional two hours of call-in pay)

2. An employee shift is canceled within 72 hours of the scheduled start of the shift (employee receives at least four hours of call-in pay)

3. An employee is required to be available to report to work for any shift (employee receives at least four hours of call-in pay)

4. An employee is required to be in contact with the employer within 72 hours of start of the shift to confirm whether to report to work (employee receives at least four hours of call-in pay)

The proposed regulations are somewhat confusing, but do enumerate certain exceptions to certain parts of the regulations. First, the four expanded circumstances enumerated above are not applicable during weeks when the employee's weekly wages exceed 40 times the applicable basic hourly minimum wage rate. Second, the requirement that the employee's schedule be set 14 days in advance is not applicable under the following circumstances: (a) during the first two weeks of employment of a new employee; (b) for a new and additional shift during the first two weeks that the shift is worked and; (c) where a shift that had been scheduled at least 14 days in advance was to be worked by another employee. Third, an employee's shift may be canceled without 72 hours' notice if "the operations at the workplace cannot begin or continue due to an act of God or other cause not within the employer's control." Fourth, none of the regulations apply to employees who are covered by a valid collective bargaining agreement that expressly provides for call-in pay — though "expressly provides for call-in pay" is not defined.

Another important consideration under the proposed regulations is that employers are not permitted to offset their obligations to make call-in payments by forcing employees to use their leave time. Moreover, any payments an employer makes in excess of those required under the call-in pay regulations may not be used to offset payments owed for call-in pay. In other words, if an employer pays an employee a bonus, or provides an employee with paid break time that is not required by the law, those payments stand alone and may not be used to offset any call-in payments owed to the employee.

The proposed regulations also articulate how call-in payments owed are to be calculated. Specifically, payments for call-in pay are calculated at the basic minimum hourly rate with no allowances and those payments are not included in the regular rate of pay for purposes of calculating overtime pay.

The most significant impacts of these regulations are the additional cost for employers who are unable to fix schedules 14 days in advance, the cost for employers who wish to utilize variable scheduling, and the additional cost for all employers in the many industries where schedules necessarily depend upon ever-changing environmental conditions and customer needs.

The potential impact of the proposed regulations is best illustrated through examples:

- **Scenario 1:** Employee A works for a company based in Western New York (WNY). He is regularly scheduled for 35 hours per week and earns $10.40 per hour. On Feb. 7, 2017, Employee A receives notification from his supervisor that he is scheduled to work 8:30 a.m. to 4 p.m. (with a half hour unpaid break each day) on Feb. 17, Feb. 18, Feb. 19, Feb. 20, and Feb. 21.

  **Scenario 1 Response:** Employee A is owed call-in pay for Feb. 17, Feb. 18, Feb. 19, and Feb. 20, and maybe Feb. 21. It is unclear from the regulations how the 14-day notice period should be counted. Employee A does not fall within an exception to the regulations either. As of Dec. 31 2017, minimum wage in upstate New York will be $10.40 per hour. Employee A is expected to earn 35 hours times $10.40 per hour, or $364. In order to fall under the exemption in Section (c)(2), Employee A would need to make more than $416 (40 hours

times $10.40 per hour — minimum wages in WNY as of Dec. 31 2017).

- **Scenario 2:** Employee A arrives at work for her 3 p.m. to 11 p.m. shift. There was light snowfall all day, but at 4 p.m. the light snowfall turns into blizzard-like conditions. At 4:30 p.m. the local weather station states that there will be an unprecedented 30 inches of snow expected to fall by midnight. At 5 p.m. the employer makes the executive decision to send everyone home for the rest of the night. Is Employee A owed additional compensation because her shift was canceled?

  **Scenario 2 Response:** Maybe. Paragraph (3)(a) (which requires 72 hours' notice of a canceled shift) does not apply when operations at the workplace cannot begin or continue due to an act of God or other cause not within the employer's control, including, but not limited to, a state of emergency declared by federal, state or local government. It is unclear whether or not this situation is covered under the exception. Moreover, the regulations provide that under these situations, the 72 hours' notice is reduced to 24 hours' notice, which is still problematic in most weather-related situations.

- **Scenario 3:** On May 1, 2018, Company A puts out a schedule for 10 employees to reroof a house between May 20, 2018, and May 24, 2018. It rains every day of the week. Each morning Company A's manager calls the employees and cancels the day of work. Is Company A on the hook for canceling work without 72 hours notice?

  **Scenario 3 Response:** Probably. Normal days of rain would not seem to fall within the exception of an "act of God". According Company A will owe four hours of call-in pay to each employee for each day (May 20, 2018 to May 24, 2018).

If put in place, these regulations would have sweeping economic effects on certain businesses. The full version of the proposed regulations can be viewed here at labor.ny.gov. The proposed regulations are subject to a 45-day comment period after publication in the Nov. 22 State Register and are expected to take effect sometime in January of 2018. Comments may be submitted to hearing@labor.ny.gov.

These proposed regulations should not to be confused with other recent legislation, titled "Fair Workweek," which took effect on Nov. 26, 2017, and affects employers located in New York City in the fast food and retail industry. The Fair Workweek legislation consists of five bills, and includes some provisions that overlap with the proposed "call-in pay" regulations discussed above, such as providing fast-food employees with at least 14 days' notice of their actual work schedules. Another highlight includes a requirement that the employer provide fast food employees with "good faith estimates" of anticipated work schedules upon hire.

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