



New York Once Again Takes Aim At Employee Scheduling Practices

Insights

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The New York State Department of Labor recently issued proposed regulations seeking to curb on-call scheduling, “call-in” shifts, and last-minute shift changes. The proposed regulations endeavor to provide employees with more predictable schedules, or compensate them for last-minute schedule changes. If implemented, the regulations will severely impact scheduling practices of New York employers. What do you need to know about these proposals?

Background

Last November, the state’s Department of Labor (DOL) released proposed statewide regulations targeting “on-call” scheduling of employees, seeking to curb employers’ ability to schedule or cancel workers’ shifts just hours before or even after those shifts began. After conducting four hearings and reviewing comments from the public, the DOL ultimately declined to adopt the proposed regulations.

The DOL, however, did not abandon this issue. On December 7, over a year after the release of the initial proposal, the agency released a revised version. Like the first proposal, the revised draft regulations would restrict “on-call” scheduling practices and require employers to pay their employees “call-in” pay in certain situations. The DOL’s proposed regulations would apply to all employers subject to the Minimum Wage Order for Miscellaneous Industries and Occupations, which covers all industries except for the hospitality, building services, and agricultural industries.

The proposed regulations are now subject to a public review and comment period through January 11, 2019. We expect that the final regulations to be issued during the first quarter of 2019. If adopted, the proposed regulations would affect most employers in the state.

What Do These New “Call-in” Regulations Entail?

Currently, non-exempt employees who report to work are entitled to “call-in” pay that is the lesser of either four hours of pay, or the hours of pay in the employee’s regularly scheduled shift, at the state minimum wage rate. Accordingly, if an employee reports to work and is then sent home, New York law requires that employee to receive “call-in” pay to provide them with a minimum level of compensation.

The DOL’s proposed regulations would significantly expand employers’ responsibility to pay their employees call-in pay. In addition to paying employees when they report to work, if the proposed

regulations are adopted, employers would be required to pay their employees for: (1) unscheduled shifts, (2) cancelled shifts, (3) on-call time, and (4) call for schedule shifts.

- **Reporting to Work:** Under the proposed regulations, an employee who reports to work for any shift would need be paid at least four hours at minimum wage, or, in the event the regularly scheduled shift was less than four hours, the employee would need be paid minimum wage for the number of hours in the employee's regularly scheduled shift.
- **Unscheduled Shifts:** The proposed regulations provide compensation to employees who are not given at least 14 days' advance notice of a shift. In the event an employee is required to work a shift on less than 14 days' notice, the employer would have to pay the employee an additional two hours of call-in pay paid at the minimum wage.
- **Cancelled Shifts:** The proposed regulations require that an employer compensate an employee for a shift cancellation without advance notice. Specifically, an employee would be entitled to at least two hours of call-in pay paid at the minimum wage for a shift cancelled with less than 14 days' notice, or at least four hours of call-in pay paid at the minimum wage when a shift is cancelled within 72 hours of the start of the shift. Accordingly, instructing employees not to come to work because business is slow or they are overstaffed would come at a cost for employers.
- **On-Call Shifts:** If the regulations are implemented, employers would have to pay employees for time an employee is required to be "on call"—that is, the employee is required to be available to report to work if needed. Under the proposed regulations, an employee who is required to be "on-call" to report for a shift at work would be entitled to at least four hours of call-in pay at the minimum wage. If this proposed regulation is adopted, employers would need to carefully evaluate whether their existing on-call practices are essential to their business objectives.
- **Call For Schedule Shifts:** Under the proposed regulations, an employee who is required by the employer to contact the employer within 72 hours of the start of the shift to confirm whether to report to work or not would be entitled to at least four hours of call-in pay paid at the minimum wage.

Are There Any Exceptions To The Proposed Regulations?

The proposed regulations include a number of exceptions to the call-in pay requirement:

1. **Valid Collective Bargaining Agreement:** An employee who is covered by a collective bargaining agreement that expressly provides for call-in pay would not be entitled to call-in pay under these proposed regulations.
2. **Wages 40 Times The Minimum Wage:** An employee would not be entitled to call-in pay during any work week where an employee's weekly wages exceed 40 times the applicable basic hourly minimum wage rate. This exception does not apply to call-in pay for reporting to work.
3. **Job Dependent On Weather Conditions/Protecting The Public/Work Orders:** Employees whose duties are directly dependent on weather conditions or are necessary to protect the health or safety of the public or any person, or whose assignments are subject to work orders or

cancellation thereof, would be exempt from the call-in pay requirements, so long as the employee receives weekly compensation that exceeds the number of compensable hours worked times the basic minimum wage rate. This exception would not apply to call-in pay for reporting to work.

4. **New Employment/Volunteering:** Employers would not be required to provide call-in pay for an unscheduled shift for any new employee during the first two weeks of employment. Separately, any employee who volunteers to cover a new or previously scheduled shift would not be entitled to call-in pay. A shift is considered “voluntary” only if the employee may refuse to cover the new or previously-scheduled shift.

The proposed regulations include a “safe harbor” provision applicable to employers that provide a written good faith estimate of hours to all employees. In this circumstance, there would be a rebuttable presumption that an employee has volunteered to cover the new or previously scheduled shift if either (1) the request to cover the new or previously scheduled shift is made by the employee whose shift would be covered, or (2) the request is made by the employer in a written communication to a group of employees requesting a volunteer from among the group and providing a reasonable deadline for responses. If no employee volunteers prior to the deadline, the employer may assign an employee to cover the shift without paying the employee additional call-in pay required for unscheduled shifts.

5. **Employer Response To Weather/Travel Advisory:** An employer would not have to provide call-in pay for an unscheduled or cancelled shift if the employer offers employees the option to reduce or increase their hours (i.e. to stay home, arrive early, arrive late, depart early, depart late, or any combination) due to weather or other travel advisory warnings.
6. **Employee’s Request For Time Off/Emergency:** An employee would not be entitled to call-in pay when an employer cancels a shift at the employee’s request for time off. Nor would an employee be entitled to call-in pay if the employee’s shift or shifts are cancelled due to an act of god or other cause outside of the employer’s control.

Interaction With NYC Fair Workweek Law

Retail and fast food employers in New York City are already subject to the New York City Fair Workweek Laws, which took effect in November 2017. The proposed statewide regulations do not discuss the impact the state wide regulations will have on the already-implemented city law, even though there are some conflicting terms.

Next Steps

New York employers must monitor these impending regulations closely and prepare to implement them if finalized. Comments to the proposed regulations can be submitted to the State by email to hearing@labor.ny.gov.

If implemented, the regulations will greatly impact employer scheduling practices. You should conduct a comprehensive review of your scheduling practices to determine the impact these

proposed regulations may have on your operations, including the potential costs that may stem from these regulations if scheduling practices are not changed.

We will continue to monitor further developments both city and statewide, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. For help with compliance steps or to answer questions, please contact your Fisher Phillips attorney or any attorney in our [New York City office](#).

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