

DOL PROPOSES ON-CALL AND CALL-IN PAY REQUIREMENTS

Labor and Employment Alert
November 28, 2017

The New York State Department of Labor has released proposed regulations that would revise the on-call and call-in pay requirements specified in the Wage Order for Miscellaneous Industries and Occupations. The proposed regulations impose new requirements on employers who schedule employees for on-call shifts and cancel or assign shifts within certain time periods of the scheduled start time of the shift.

The proposed regulations would require employers to:

1. Pay employees who report to work by request or permission of the employer and for whom no work is available a minimum of 4 hours pay
2. Pay employees who come to work for a shift not scheduled at least 14 days in advance an additional 2 hours of call-in pay
3. Pay employees who have a shift cancelled less than 72 hours prior to the scheduled start of that shift at least 4 hours of call-in pay
4. Pay employees who are required to be available to report to work at least 4 hours of call-in pay
5. Pay workers who are asked to call the employer within 72 hours of the start of the shift to confirm whether to report to work at least 4 hours of call-in pay

The proposed regulations also set out how call-in pay shall be calculated. An employee must be paid his or her regular rate or overtime rate of pay, whichever is applicable, minus any allowances, for time of “actual attendance.” For other hours of call-in pay, payment is calculated at the basic minimum hourly rate with no allowances. These payments need not be included in the regular rate for calculating overtime pay.

If an employee reports to work for a regularly scheduled shift but no work is available or the regularly scheduled shift is cancelled less than 72 hours prior to the shift, the employer will only be required to pay the employee for the number of hours the employee normally works during that regularly scheduled shift, if less than 4 hours, instead of the required 4 hours of call-in pay.

Further, the proposed regulations sets out four exceptions.

Attorneys

John Godwin

Practices & Industries

Wage & Hour

DOL PROPOSES ON-CALL AND CALL-IN PAY REQUIREMENTS

- The proposed regulations do not apply to employees covered by a collective bargaining agreement that provides for call-in pay.
- The proposed regulations do not apply to employees during work weeks when their weekly wages exceed 40 times the applicable basic hourly minimum wage rate. Thus, an employer is not required to pay call-in pay premium to any covered employee who works more than 40 hours in a workweek but the employer would still have to pay four hours of call-in pay premium to any employee who reports to work by request or permission of the employer and for whom no work is available (or less than 4 hours if the employee's regularly scheduled shift is less than 4 hours.)
- The proposed regulation requiring call-in pay for a shift not scheduled 14 days in advance does not apply to any new employee during the first two weeks of employment or to any regularly scheduled employee who volunteers to cover a new and additional shift during the first two weeks that the shift is worked or a shift that had been scheduled at least fourteen days in advance to be worked by another employee.
- The proposed regulations requiring call-in pay for shift cancellations less than 72 hours prior to the scheduled start do not apply when the employer cancels a shift at the employee's request for time off, or when operations at the workplace cannot begin or continue due to a cause, not within the employer's control. However, where operations can begin or continue but staffing needs are reduced due to a cause not within the employer's control, the 72-hour shift cancellations period shall be reduced to 24-hours for regularly scheduled employees.

It is unclear if these regulations are intended to preempt the New York City predictive scheduling laws set to go into effect November 26, 2017. The New York City predictive scheduling laws severely impact the ability of fast food and retail employers to create and modify their employees' schedules and impose harsh penalties for changes. Additional guidance regarding this question may be issued by the New York State Department of Labor or other state or city agencies. In the absence of additional guidance, affected employers should prepare for compliance with both the predictive scheduling laws and New York State regulations. However, the proposed regulations do not appear to affect the fast food industry, and thus, fast food industry employers must only prepare for compliance with the New York City predictive scheduling laws.

The proposed regulations will appear in the November 22, 2017, issue of the State Register, and will be subject to a comment period for 45 days from the publication date.