January 5, 2018

Michael Paglialonga
NYS Department of Labor
State Office Campus
Building 12, Room 509
Albany, NY 12240

Via Email: regulations@labor.com

Employee Scheduling (Call-In Pay)
I.D. No. LAB-47-17-00011-P

On the behalf of The Business Council of New York State, the largest state-wide association of employers in New York, representing over 2,300 businesses, we are writing to express our concerns regarding proposed rules developed by the Department of Labor regarding *Employee Scheduling (Call-In Pay)*. Our concerns are outlined below.

While we can appreciate the public policy concerns that this rule is attempting to address, this rule would impose challenging administrative compliance burdens on many employers, and would prove near impossible to deal with for some sectors.

Our primary concern is related to the continued use of Wage Orders to promulgate regulations of major importance affecting large sections of the New York State economy. These major policy actions are repeatedly done without specific statutory directive and outside of the legislative process. It is our opinion that such important policy decisions should be addressed through the legislative process with input from all stakeholders. We urge the Department to withdraw the proposed regulations in favor of a legislative approach. Importantly, we believe a statutory program would also address the key issue of state preemption, to avoid subjecting employers to multiple, inconsistent municipal mandates.

As for the text of the proposed regulations themselves, we have several major concerns. Because of these concerns and in light of the devastating effect these rules would have on specific industries that rely on scheduling flexibility (car washes, health care, transportation, manufacturing, etc.) we ask the Department to halt implementation of the proposed rules.

Our concerns include:

(a)(1) Reporting to work. The current call-in pay language in 12 NYCRR 142-2.3 reads as follows:

> *An 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 change “day” to “shift.” This will lead to questions regarding whether an employee who may have completed a scheduled shift and is asked to stay to work another (scheduled or unscheduled) shift would be entitled to the four hours call-in pay. In addition to the potential additional financial burden on employers, the unintended consequence of this could be the employer denying the opportunity to work additional shifts (often at overtime rates) to willing employees. We recommend the current wage order language remain as is.

(a)(2) Unscheduled shift. The proposed regulations place a 14-day window as the standard for advance scheduling of shifts. This is not possible for most employers and is beyond what any other state is considering. The only other state-wide law (Oregon) requires a 7-day advance notice (and only applies to employers of 500 or more worldwide). In fact, Attorney General Schneiderman recently entered into agreements with several large retailers to curtail the use of on-call scheduling that included only 7-day windows. We strongly recommend that any state statute or regulation require no more than 7 day advance scheduling.

(a)(3**) Cancelled shift**. The 72-hour window for employers to cancel without penalty is arbitrary and has no factual significance. Industries impacted by weather cancellations simply cannot manage this 72-hour standard. For employees, how is the perceived "burden" of cancelled shifts somehow alleviated at the magical 72-hour threshold? Both employers and employees value flexibility in working arrangements. This arbitrary number undermines the needs of both parties, and should not be included in any statutory or regulatory regime.

(a)(4) On-Call. Perhaps most concerning is the requirement of the payment of four hours of call-in pay for each shift for which an employee is on-call. Again, the reliance on the term "shift" as opposed to "day" is concerning. Would an employee on-call for the weekend be entitled to 6 shifts (two days of three 8-hour shifts) of call-in pay? That would be a payment due of 24 hours call-in pay, including in instances where an employee performed no work. The definition of shift will be significant in determining the financial impact of this rule. We recommend that any such regulatory requirement be based on days, not shifts.

(a)(5) Call for schedule. Again we question the significance of the 72-hour rule. In addition, many larger employers have progressed beyond the phone call to determine working schedules. The use of "big data," algorithms, apps, etc. make the "contact with the employer" concept far more fluid than in the past. The vagueness of "contact with the employer" and the substantial penalty of four hours of call-in pay could cause unintentional noncompliance with significant financial penalties. We recommend that employers be left to continue to develop and use technologies that meet the need of both the employee and employer.

(b)(2) Minimum Rate. This section does not allow for allowances. Current Wage Order interpretations regarding "reporting to work" call-in pay have allowed for certain allowances related to total compensation at week end. This would be significant change from current practices.

(c)(2) Provides that certain of these provisions would not apply to employees during work weeks when their weekly wages exceed 40 times the applicable basic hourly minimum wage. The real world consequence of this is that employers of all sizes will bear the additional administrative burden of keeping a real-time running tally of hours and wages worked for the purpose of "settling up" at the end of the week those owed additional payments or finding those whose income exceeded the threshold. Keep in mind we currently have no less than 16 different minimum wages in New York State making this calculation exceedingly difficult for employers with multiple locations and job titles – some of which may be covered by 12 NYCRR 142 and others who are not. This burden falls disproportionally onto small employers. We recommend that any such regulatory requirement exclude employers of less than 100 employees.

(c)(3) This section provides an out for some employers who can identify a “regularly scheduled employee” willing to “volunteer to cover” an unscheduled shift as defined in (a)(2). Those quotations are not added by The Business Council. They are written as such in the proposed regulations. Without significant expansion of what those terms mean, employers are left to guess whether that “regularly scheduled employee” exists and whether they truly “volunteered to cover” said shift. Publication of a final rule without specific criteria for those terms would certainly lead to employer confusion and unintentional noncompliance.

(c)(4) This section provides a scenario in which the arbitrary 72-hour window in which to cancel a shift without penalty can be reduced to an arbitrary 24-hour window without penalty. The Department describes acts of God or other causes not within the employer’s control as acceptable reasons. The Business Council does not find an applicable definition of “act of God” in New York State labor law. Healthcare facilities may find patient census fluctuating by death or unexpected discharge of patients. Are these to be considered acts of God? Equally concerning is the subjective nature of “not within the employer’s control.” The exercise of determining what these terms actually mean underscores the futility of attempting to develop a one size fits all policy for a problem we are not sure actually exists.

For these reasons, we urge the Department halt publication of a final rule. Instead, if there is a legitimate need for additional employee protections in this area, let the legislative process take its course.

Sincerely,

Frank Kerbein
Director
Center for Human Resources