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**TO:** Government Affairs Committee Members

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**FROM:** Frank Kerbein

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**SUBJECT:** ALERT - DOL Releases New Revised Rules Regarding Employee Scheduling

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**DATE:** 12/12/18

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The NYS Department of Labor has released [revised proposed regulations](#) that impose additional requirements on employer use of “on-call” and “call-in” scheduling. These revised proposed rules differ significantly from the original proposed rules. The revised language, the Department’s response to public comments, and additional information was published in the December 12, 2018 State Register, [available here \(see pages 9 – 12\)](#). The overall rule, major changes, and practical compliance issues are discussed below.

**Who’s affected?** Technically, this action modifies the call-in pay requirement of the Department of Labor’s Minimum Wage Order for Miscellaneous Industries and Occupations ([12 NYCRR Part 142](#)), including non-profits. This rule does not apply to sectors covered by sector-specific wage orders for building service and hospitality workers.

**When would it take effect?** As a revised rulemaking, the Department will accept comments for 30 days after the publication date of December 12. Pursuant to statute, any revised wage order is effective 30 days after publication of the final order. As such, these new regulations can be finalized by the Commissioner of Labor without the participation of the Legislature.

**Commentary** - This revised proposal contains several improvement on the original rules published November 2017, made in response to comments submitted by The Business Council and other employer groups. They still, however, would subject employers to significant administrative burdens and potentially significant increases in payroll costs. Employers with part-time positions and/or positions paid at or near the minimum wage are the most likely to be affected. The revised rule does provide employers with an approach that could avoid most or all mandated pay premiums, i.e., provide all employees with good faith estimates of the hours they will work, schedule all shifts 14 days in advance, and provide a mechanism for employees to voluntarily take on additional, unscheduled shifts. Even so, implementing this approach will required significant additional planning and oversight of staff scheduling by employers. Further, the revised rule provides several additional exemptions for pay premiums due to the cancelling of shifts on short notice, but the revised proposal leaves significant uncertainty as to when these exemptions apply.

If you have any questions or would like to discuss further, contact Frank Kerbein, Director of the Center for Human Resources at [frank.kerbein@bcnys.org](mailto:frank.kerbein@bcnys.org) or at (800) 332-2117.

**Current Law** - New York already has provisions regarding “call-in pay,” adopted under the Department of Labor’s general authority to issue minimum wage orders. The current rule says:

*12 NYCRR § 142-2.3 Call-in pay. 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 Revised Proposed Regulations** - The Department of Labor is modifying this rule and adding additional employer obligations – primarily by requiring additional payments to employees who have shifts cancelled or are required to work shifts with limited notice. Key provisions of the revised regulations will:

- Continue the current regulatory requirement for a minimum of 4 hours of call-in pay for employees who report to work. This would, however, be applied to each *shift* as opposed to current language regarding each *day* of work.
- Impose a new requirement that employers pay workers who come to work for a shift not scheduled at least 14 days in advance an additional 2 hours of call-in pay per shift, in addition to the minimum of 4 hours of pay per shift.
- Impose a new requirement that employers pay workers who have a shift cancelled less than 14 days in advance at least 2 hours of call-in pay; and for shifts cancelled less than 72 hours prior to the start of that shift an additional 4 hours of call-in pay
- Require an employee who is required by the employer to be available to report to work for any shift shall be paid for at least 4 hours of call-in pay per shift for which they are on call.
- Require employers who ask workers to call within 72 hours of the start of the shift to confirm whether to report to work or not to pay 4 hours of call-in pay per shift for which they are required to call

“Call-in pay” is equal to the statutory minimum wage for your area and employer size. Call in pay is not considered hours worked for the purpose of calculating overtime. For example, in 2019 (when these rules are likely to be in place) if an upstate employer asks an employee to work a shift which was not scheduled at least 14 days in advance – the employer must pay that worker an addition \$22.20 (2 hours x the minimum wage of \$11.10).

**Exemptions** - Certain employees working under the Miscellaneous Industries and Occupations wage order are exempt from these regulations. They are:

- Employees during those work weeks when their weekly wages exceed 40 times the applicable minimum wage. For upstate employees in 2019 that would be in excess of \$444 per week (40 x \$11.10)
- Employees covered by a collective bargaining agreement that expressly provides for call-in pay
- New employees during their first two weeks of employment
- Employees who have shifts cancelled due to an act of God or other causes not in the employer’s control
- Regularly scheduled employees who “volunteers to cover” for a shift scheduled to be worked by another employer
- Employees whose duties are directly dependent on weather conditions
- Employees whose duties are necessary to protect the health or safety of the public or any person
- Employers who respond to weather or other travel advisories and offer employees options to reduce or increase their scheduled hours by leaving early, arriving late, etc. or any combination thereof

**“Safe Harbor”** - In addition, the revised rule contains a new *Safe Harbor* provision. In general, this would allow employers to avoid the payment of call-in pay for unscheduled shifts by creating a presumption that an employee has “volunteered to cover” an unscheduled shift. In order to take advantage of this presumption, an employer must: provide a written good faith estimate of hours to all employees upon hire (or after the effective date of these regulations for current employees), schedule shifts 14 days in advance; and request volunteers for accepting unscheduled shifts, with such requests made in writing and with a reasonable deadline for responses.

**Penalties** – Failure to comply with this regulation is subject to penalty provisions of Labor Law Article 19 regarding minimum wages. Under Labor Law §662, any employer, or officer or agent of any corporation, partnership, or limited liability company, who underpays employees can be found guilty of a misdemeanor with

finances of \$500 to \$20,000 and up to one year's imprisonment; second offenses within six years can be a felony. Underpayments are also recoverable by employees.

**Preemption** – When this rule was first proposed in November 2017, the Administration indicated that it would preempt recent New York City legislation regarding predictive scheduling in the retail and fast food industries, as well as other municipal-level statutes or rules. Recent litigation involving the NYC law is still pending. As such, the Department of Labor has indicated that the preemption question is now a matter to be determined by the courts, and preemption is not specifically addressed in this rulemaking.

**Next Steps** – The notice of revised rulemaking was published in the in the December 12<sup>th</sup> edition of the State Register. Interested parties will have 30 days to comment. **The Business Council will be submitting comments on behalf of our members and we want to know how these rules would affect your staffing practices. Please provide us with your comments and questions (submit to [frank.kerbein@bcnys.org](mailto:frank.kerbein@bcnys.org) ) as soon as possible for inclusion in our submission to the Department.**