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New York Proposes New "Call-In" Pay and Scheduling Requirements

Employers in New York will be subject to new "call-in" pay and scheduling requirements under recently-proposed state Regulations. Governor Andrew Cuomo recently announced these proposed Regulations, which the New York State Department of Labor ("DOL") will reportedly publish in the State Register on November 22, 2017.

New York regulators have recently focused their enforcement sights on the so-called "just-in-time" or "on-demand" scheduling of workers. According to Governor Cuomo, this practice entails the scheduling or cancelling of a worker's shift with little or no advance notice. At the Governor's direction, the DOL recently held hearings across the state on this issue, which then led to issuance of the proposed Regulations.

If enacted, the proposed Regulations would amend New York's catch-all "Miscellaneous Industries" minimum wage order, including those portions applicable to non-exempt "nonprofitmaking institutions" across the state.

Call-In Pay Under Current New York Law

Under the Miscellaneous Industries minimum wage order, non-exempt employees who report to work are currently entitled to call-in pay equal to the lesser of four hours of pay or pay for the number of hours in the regularly-scheduled shift, at the state minimum wage rate. Notably, the DOL has interpreted this provision, such that it only effectively applies to non-exempt workers who earn at or very near the state minimum wage. In this regard, the DOL previously stated in Opinion Letter No. RO-09-0133, dated December 2, 2009: "[I]f the amount paid to an employee for the workweek exceeds the minimum and overtime rate for the number of hours worked and the minimum wage rate for any call-in pay owed, no additional payment for call-in pay is required during that workweek." (emphasis added).

In other words, under DOL's interpretation, New York employers could potentially apply an "offset" — for amounts paid to workers above the state minimum wage and overtime rates during the same workweek — against any "call-in" pay otherwise due to workers.

Additionally, under current law, employers are generally free to schedule, and, when necessary, cancel shifts before employees report for work, without incurring any additional payment obligation.

Call-In Pay Under the Newly-Proposed DOL Regulations

The recently-proposed Regulations would create a number of new circumstances when non-exempt employees will be eligible to receive "call-in" pay, including the following:

- Employees who report to work for a shift that was not scheduled at least 14 days in advance will be entitled to an additional two hours of call-in pay;
- Employees whose shifts are cancelled within 72 hours of the start of that shift will be entitled to at least four hours of call-in pay;

- Employees who are required to be on-call and available to report to work for any shift will be entitled to at least four hours of call-in pay; and

- Employees who are required to be in contact with their employer, within 72 hours of the start of a shift, to confirm whether or not to report to work for that shift will be entitled to four hours of call-in pay.

Under the Regulations, the above call-in pay must be calculated at the current state minimum wage rate (which now varies by location and workforce size) without any allowances, and employees must receive their "regular rate" for their actual time of attendance. However, these new requirements will not apply to otherwise covered employees whose weekly wages exceed 40 times the applicable state minimum wage.

The proposed Regulations will also replace current "call-in" pay requirements with the following:

- Employees who report to work for any shift will be entitled to at least four hours of call-in pay.

Notably, the proposed Regulations state: "Call-in pay shall not be offset by the required use of leave time, or by payments in excess of those required under" the applicable minimum wage order. Although this provision is not entirely clear on its face, conceivably, it was drafted with the intent of curtailing application of the above-referenced weekly "offset" provided under prior DOL interpretation.

Finally, the proposed Regulations state that the above requirements will not apply to certain employees "who are covered by a valid collective bargaining agreement that expressly provides for call-in pay." Further, the requirements may not apply in certain other circumstances, such as when a business cannot begin or continue operations due to a state of emergency or other "Act of God" beyond its control.

Employers should also be mindful that New York City recently passed a similar law that will become effective on November 26, 2017. This other local law places somewhat similar requirements on retail employers, and also places additional requirements on certain fast food establishments.

According to DOL, the proposed Regulations will be subject to a 45-day comment period after official publishing. We will update this article with any further developments, and will be announcing a free webinar on the proposed Regulations in the coming days.

If you have any questions about this issue in the meantime, please contact Andrew D. Bobrek, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

Author's Note: A special thanks to Richard White, who assisted in drafting this article.

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