NYS DOL RE-ISSUES PROPOSED REGULATIONS GOVERNING SCHEDULING PRACTICES

Labor & Employment Alert
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As we had previously reported in November of 2017, the New York State Department of Labor ("DOL") proposed regulations that would require employers to start paying non-exempt employees for on-call time, cancelled shifts, or shifts that were scheduled on short notice ("Proposed Regulations"). After conducting public hearings and reviewing comments concerning the Proposed Regulations, the DOL issued revised Proposed Regulations on December 12, 2018.

By way of background, the DOL's regulations currently require that non-exempt employees who report to work be paid for at least 4 hours or the number of hours in the employee's regularly scheduled shift, whichever is less, at the State minimum wage rate. This "call-in pay" obligation typically arises where an employee reports to work but his/her shift is cancelled due to factors beyond the employee's control or the employer's workplace is closed (e.g., electricity goes out and all employees are sent home for the day). Importantly, the current DOL rules relieve employers of this call-in pay obligation if the employee's regular wages for the week are sufficiently above the minimum wage to "cover" any call-in pay that may be due to the employee. The DOL's Proposed Regulations, however, would retain the call-in pay obligation but they would eliminate this "offset" mechanism under the current call-in pay regulations so that covered employees, regardless of their wage rates, will be entitled to receive call-in pay.

In addition, the Proposed Regulations would require employers to pay employees for: (1) unscheduled shifts, (2) cancelled shifts, (3) on-call time, and (4) call for schedule shifts. These 4 newly-created pay obligations would apply in the following situations:

- **Unscheduled Shifts:** The Proposed Regulations provide pay 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 2 hours of call-in pay.
  - This requirement would not apply to new employees during the first 2 weeks of his/her employment or any employee who volunteers to cover a new shift or previously scheduled shift.
  - This requirement also would not apply if the employer offers employees the option to volunteer to reduce or increase their scheduled hours due to a weather

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or travel advisory.

- **Cancelled Shifts:** The Proposed Regulations require that an employer pay an employee for a shift cancellation without advance notice. Specifically, an employee would be entitled to at least 2 hours of call-in pay for a shift cancelled with less than 14 days' notice, or at least 4 hours of call-in pay paid at the minimum wage when a shift is cancelled within 72 hours of the start of the shift.
  - This requirement would not apply if a shift is cancelled due to issues outside of the employer's control, including an act of God or an emergency declared by the government.
  - This requirement does not apply where the employer cancels a shift due to weather or travel advisories.
- **On-Call Shifts:** The Proposed Regulations require employers to pay employees for 4 hours of "on-call" time, which is the time that an employee is required to be available to report to work if needed.
- **Call For Schedule Shifts:** Under the Proposed Regulations, an employee who is required to contact the employer within 72 hours of the start of their shift to confirm whether to report to work or not would be entitled to at least 4 hours of call-in pay.

Calculation of Call-in Pay

Each of the above categories of call-in pay may be paid at the minimum wage rate in effect for the employee. For any periods of actual work, the employee's regular rate of pay or overtime would be required.

Call-in pay payments would not be considered pay for time worked and, thus, do not need to be included in the regular rate for purposes of calculating overtime pay. Call-in pay cannot be offset by the "required use of leave time" or by "payments in excess of those required" by the proposed regulation. It is not clear whether call-in pay may be offset by PTO pay for non-required leave time (e.g., vacation or holiday pay).

Exclusions from Coverage

The following employees will not be covered by the Regulations:

1. Employees covered by a collective bargaining agreement that provides for call-in pay;
2. Employees who are exempt under the professional, administrative or executive exemptions;
3. Employees whose weekly wages exceed 40 times the applicable basic hourly minimum wage rate (e.g., more than $600 a week for those employed by "large" employers in New York City in 2019). However, pay for call-in situations would still be due, irrespective of the employee's total weekly earnings.

In addition, pay for Cancelled Shift, On-Call, Call for Schedule, and Unscheduled Shift **would not** apply to employees whose weekly compensation exceeds the number of hours worked, multiplied by the applicable minimum wage rate, and:

1. Whose duties are directly dependent on weather conditions

2. Whose duties are necessary to protect the health or safety of the public or any person
3. Whose assignments are subject to work orders, or cancellations thereof

The Proposed Regulations do not apply to public employers, employers who are subject to the Hospitality Industry Wage Order, employers covered by the Building Service Industry wage order, and certain nonprofit institutions.

The DOL's Proposed Regulations Leave Many Questions Unanswered

The Proposed Regulations do not address critical issues, such as:

1. Does the exception that applies to workers whose duties are necessary to "protect the health or safety of any person" always apply to workers whose duties might involve the health of others (e.g., nurses) or are employers required to apply the exception on a case-by-case basis?
2. For on-call shifts, if the employee who is on-call resides in one geographic area (e.g., Suffolk County) and the business is in a different geographic area (e.g., NYC), what minimum wage rate applies to that employee's on-call time pay?
3. What types of provisions do collective bargaining agreements have to have concerning on-call pay in order to avoid the Proposed Regulations?
4. Does PTO or holiday pay paid in the same week as a cancelled shift, unscheduled shift, on-call shift, or call-for-schedule shift count as compensation that can offset an employee's entitlement to pay call-for-schedule pay, on-call pay, cancelled shift pay, or unscheduled shift pay?
5. Can employers avoid paying for cancelled shifts, unscheduled shifts, on-call shifts, or call-for-schedule shifts by simply paying some nominal amount (such as 1 cent) to employees on top of and in addition to their earned wages? The Proposed Regulations suggest that, so long as the employee's total weekly compensation is just above minimum wage for every hour worked, the employee is not entitled to pay for cancelled shifts, unscheduled shifts, on-call shifts, or call-for-schedule shifts.

What's Next?

The Proposed Regulations are subject to public review and comment through January 11, 2019. Employers who wish to submit comments with respect to the proposed Regulations may contact any one of our Labor and Employment attorneys. We will be submitting comments to the New York Department of Labor on behalf of employers. In addition, since some form of these Proposed Regulations is likely to become law, employers are encouraged to begin considering how these requirements will affect their operations and overall overhead.

We will update our readers of any developments in this area as they become available.