

Home Care Association of New York State

Proposed NYSDOL “Call-In” Pay Regulations

Presented by: Joseph M. Dougherty, Esq.
Sean M. Doolan, Esq.
Benjamin M. Wilkinson, Esq.



NYSDOL “Call-In” Pay Regulations

- Proposed on November 10, 2017
- Published on November 22, 2017
- Open for 45-day comment period
- **Comments due January 8, 2018**
- Effective date TBD

Where Did This Come From?

- NY Attorney General “Inquiry”
 - April 2015
- Multi-State Attorney General (Including NY) “Joint Inquiries”
 - April 2016
- Public Hearings in NY
 - September and October 2017
- Draft Regulations Published
 - November 2017
- NYC Fast Food and Retail Laws Effective 11/26/17

Who Will Be Impacted?

- Private-sector for-profit and non-profit entities covered under the “Miscellaneous Industries” wage order
 - Regulations reach a broad spectrum of employers including health care.
 - Limited exceptions
- NYSSL Section 652(3)(b) “Non-Profit Exception”
 - Very limited exception to Wage Orders that only applies to true “charities”.
 - NYNPL Section 101. Not for pecuniary profit or financial gain. No part of assets, income, or profit of which is distributable to, or ensures to the benefit of, its members, directors or officers.

Note: Employers with low paid workers, part time employees, on-call practices, or frequent call-outs requiring replacement will be particularly impacted.

Current NYS Call-In Pay Rule

- For non-exempt employees (hourly and salaried non-exempt) who report to work for any shift not scheduled.
 - Entitled to call-in pay equal to the lesser of four (4) hours of pay or pay for the number of hours in regularly-scheduled shift, at the state minimum wage rate.
- Employers otherwise free to schedule and, when necessary, cancel shifts without restriction or penalty.
- NYS and FLSA on-call rules.
 - No compensation required where “employee is free to use the time as he or she pleases”.

Proposed Changes

- Change to Call-In Pay Requirement:
- For non-exempt employees (hourly and salaried non-exempt) who report to work for any day.
 - Entitled to call-in pay equal to four (4) hours of pay or pay for the number of hours in regularly-scheduled shift, at the Employee's regular rate of pay without allowances.

Proposed Changes

- Four (4) Entirely New “Call-In Pay” Scenarios:
 1. Unscheduled Shift
 2. Cancelled Shift
 3. On-Call Pay
 4. Schedule Confirmation Pay

Note: All four (4) new “Call-In Pay” scenarios subject to income exemption where the employee’s weekly wage exceeds forty (40) times the applicable basic hourly minimum wage rate.

Weekly Wage Exemptions

- 2018 Weekly Wage Exemption (“WWE”) Thresholds:
 - NYC with eleven (11) or more employees \$13hr WWE = < \$520
 - NYC ten (10) or fewer employees \$12hr WWE = < \$480
 - Nassau, Suffolk & Westchester Counties \$10.40hr WWE = < \$416
 - Remainder of NYS \$10.40hr WWE = < \$416

Note: Exemption is calculated on a week by week basis and cannot be averaged.

Unscheduled Shift

- If employee asked or permitted to report to work for shift not scheduled fourteen (14) days in advance, then must receive two (2) additional hours of “call-in pay”.
- Hours actually worked are paid at an Employee’s regular rate of pay and hours not actually worked may be paid at the minimum wage.

Note: Unscheduled Shift pay is calculated at applicable state minimum wage rate, not including allowances and is not included for overtime purposes.

Unscheduled Shift Exceptions

- Does not apply to new employees during their first two (2) weeks
- Regularly scheduled employees who volunteer to cover a:
 - New and additional shift, during the first two (2) weeks; or
 - A shift scheduled for another worker fourteen (14) days in advance at the request of the original employee or in response to an open request from the employer extended to all employees without penalty.

Cancelled Shift

- If employee's shift is cancelled within seventy-two (72) hours of start, then they must receive at least four (4) hours of "call-in pay".
- Hours actually worked are paid at an Employee's regular rate of pay and hours not actually worked may be paid at the minimum wage.

Note: Cancelled Shift pay is calculated at applicable state minimum wage rate, not including allowances and is not included for overtime purposes.

Exception: any "act of God" or "other cause not within the employer's control" (i.e. employee request).

On-Call Pay

- If employee required to be “available to report to work for any shift,” then must receive at least four (4) hours of “call in pay”.
- Hours actually worked are paid at an Employee’s regular rate of pay and hours not actually worked may be paid at the minimum wage.

Note: On-Call Pay calculated at applicable state minimum wage rate, not including allowances and is not included for overtime purposes.

Schedule Confirmation Pay

- If employee required “to be in contact...within seventy-two (72) hours of start of shift to confirm whether to report,” then they must receive at least four (4) hours of “call-in pay”.
- Hours actually worked are paid at an Employee’s regular rate of pay and hours not actually worked may be paid at the minimum wage.

Note: Schedule Confirmation Pay calculated at applicable state minimum wage rate, not including allowances and is not included for overtime purposes.

Call-In Pay Calculation (Cont.)

- Additional calculation considerations for Call-In Pay scenarios:
 - In certain circumstances, may be reduced if employee normally works a shift of less than four (4) hours (and other requirements are met).
 - Does not constitute hours worked.
 - Need to be included in calculation of regular rate.
 - Shall not be offset by the required use of leave time or “by payments in excess of those required” under the Wage Order-No more offset calculations.

Additional Exemptions

- Additional Exemptions/Exceptions:
 - Employees who are exempt under the Wage Order.
 - Employees covered by a labor contract “that expressly provides for call-in pay”.
 - Employees covered by a separate Wage Order.

Unanswered Questions

- Labor Contract Exemption?
- Offsets?
- What is a Shift?
- On-Call pay periods?
- Voluntary Employee Exchanges?
- Scheduling Notice Obligation?
- Preemption of NYC Laws?

What Should You Do Now?

- Know the new proposed requirements.
- Review potential impact on operations and scheduling and submit comments.
 - Remember: Non-exempt employees must receive two (2) hours of additional call-in pay if their respective shift is not scheduled fourteen (14) days in advance.
- Monitor the proposed Regulations for any further developments.

What Should You Do Now?

- Consider submitting a public comment, by January 8, 2018.



Questions?

CONTACT US

121 STATE STREET, ALBANY, NY 12207

518.436.0751

WWW.HINMANSTRAUB.COM

TWITTER: @HINMANSTRAUB

LINKEDIN: WWW.LINKEDIN.COM/COMPANY/HINMAN-STRAUB-P.C.

