

# Retail Detail



## New York AG Investigates Retailers' Call-in Practices

*By Robert Whitman and Caitlin Ladd*

New York Attorney General Eric Schneiderman has sent investigative letters to at least 13 nationwide retailers requesting information about their scheduling practices for non-exempt employees. The effort is part of an inquiry conducted in response to reports about widespread use in the retail industry of unpredictable on-call shifts, which are subject to strict regulation under the New York Labor Law.

The letters, sent last week by the AG's Labor Bureau, ask the retailers whether they use on-call shifts that require non-exempt workers to make themselves available on short notice. In addition to inquiring about the use of on-call shifts generally, the AG is interested in learning about computerized scheduling systems that allow retailers to forecast staffing needs.

While the investigative letters express concern about the overall negative impact of unpredictable schedules on employees, particularly low-wage workers, the AG cited only one applicable regulation: section 142.23 of the Minimum Wage Order for Miscellaneous Industries and Occupations (12 N.Y.C.R.R. § 142.23), which provides that "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 wage." The New York Department of Labor has interpreted this provision to require call-in pay whenever an employer sends an employee home or otherwise directs an employee to cease working before the end of his or her regularly scheduled shift. Call-in pay may be warranted where an employee is required to work a shift of fewer than four hours or to attend a meeting or training that is not held during the regularly scheduled shift. (Although the rule requires call-in pay at the applicable minimum wage rate, the DOL has stated that an additional payment is required only where an employee's wages for the workweek are less than the minimum wage and overtime rate for all hours worked plus any call-in pay owed.)

Schneiderman's intentions and future actions remain to be seen. The AG has broad authority under the New York Executive Law to investigate potential violations of State law, and the Labor Bureau (according to its website) "is principally charged with, and has been nationally recognized for, defending labor standards in low-wage industries by aggressively enforcing the laws protecting low-wage workers." In the past, the AG's office has sent similar letters with respect to the use of payroll debit cards to investigate potential violations of the Labor Law, and has followed up with subpoenas and settlement efforts. Likewise, the AG has published informative reports and corresponding proposed legislation based on its findings.

Here, despite the initial [publicity blitz](#) regarding the investigation, the AG may find that the retailers being investigated are fully compliant with the call-in pay regulations and take no further action at all. Unfortunately for the affected employers, the office does not always notify them when they are "in the clear," and they may remain uncertain whether the AG ever intends to take follow-up action or has simply closed its file.

In the meantime, this investigation serves as a good reminder for employers to review their on-call practices to ensure compliance with the laws of the particular states in which they operate. New York is not alone in requiring call-in pay. Other such jurisdictions include California, Connecticut, D.C., Massachusetts, New Hampshire, New Jersey, Oregon, and Rhode Island, all of which have wage-payment requirements for instances in which an employee reports to work per the employer's instruction and works fewer than the expected hours of work or statutory minimum.

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