

# Management Alert



## Shifty Business III: NYS Proposes Rules Requiring Pay for On-Call Scheduling Practices

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**Seyfarth Synopsis:** Proposed rules released by the NYS DOL would require employees to be paid for time not worked due to on-call scheduling practices.

The New York State Department of Labor has [proposed rules](#) that would significantly expand entitlement to call-in pay for employees in New York State. Currently, the call-in pay provisions only require any employee who reports for a shift to be paid for that shift. The proposed rules would require call-in pay when an employee reports to work, works an unscheduled shift, has a shift cancelled, is on-call, or has to call to confirm a shift. The proposed rules will be subject to a 45-day comment period after publication in the State Registrar on November 22.

The rules followed Governor Cuomo's [September directive](#) that the DOL hold hearings on the issue of employee scheduling. The DOL held [four hearings](#) across the state and solicited written testimony in September and October. On November 10, [Governor Cuomo announced](#) the proposed rules, quoting Commissioner Roberta Reardon: "I'm proud to announce these regulations that I believe will incentivize fairness in scheduling practices throughout New York."

This announcement comes only weeks before implementation of the [New York City Fair Workweek Law](#), imposing strict scheduling requirements on New York City retail and fast food employers. The rules proposed by the DOL will apply to employees other than those covered by an industry-specific minimum wage order. Governor Cuomo's office has indicated that these proposed rules are meant to supplement the Fair Workweek Law.

### Coverage

The proposed rules apply to *all employees* subject to the Miscellaneous Industries and Occupations minimum wage order. Employers subject to the [DOL's Hospitality Industry Wage Order](#) remain subject to the call-in pay requirements set forth therein. The proposed rules would not apply to employees covered by a collective bargaining agreement that expressly provides for call-in pay. Call-in pay requirements, other than for reporting to work, also would not apply in weeks where an employee earns more than 40 times the hourly minimum wage.

### Situations Requiring Call-in Pay

The proposed rules would mandate call-in pay in the situations set forth below.

- *Reporting to work:* at least 4 hours of call-in pay.
- *Unscheduled shift:* 2 additional hours of call-in pay for any shift with hours not scheduled at least 14 days in advance.
- *Cancelled shift:* 4 hours of call-in pay for any shift cancelled less than 72 hours in advance.

- *On-call*: 4 hours of call-in pay if the employee has to be available for work.
- *Call for schedule*: 4 hours of call-in pay if the employee has to contact the employer up to 72 hours in advance to confirm whether to report for a shift.

## Rate of Call-in Pay

The proposed rules calculate call-in pay as set forth below.

- *Actual attendance*: the employee's regular rate of pay or overtime rate of pay, whichever applies.
- *Minimum rate*: any hours, other than those for actual attendance, are paid at the basic hourly minimum wage, with no allowances. Because this is not payment for work, it is not included in the employee's regular rate of pay for calculating overtime.
- *Offsets*: call-in pay cannot be offset by requiring the use of leave or by payments exceeding those required by this law.
- *Shorter work days*: if an employee normally works a shift shorter than four hours, call-in pay for reporting to work or cancelled shifts is only required for the number of hours the employee normally works. This only applies if the employee's total hours worked or scheduled for the shift do not change weekly.

## Exceptions

A new employee or regularly scheduled employee is not entitled to call-in pay for volunteering to cover: (i) a new and additional shift during the first two weeks it is worked; or (ii) a shift that was scheduled 14 days in advance to be worked by another employee.

- *New employee*: one who has been employed for less than two weeks.
- *Regularly scheduled employee*: one who is scheduled at least 14 days in advance for shifts, consistent with a written good faith estimate of hours provided at the time the employee was hired, and which can be amended at the employee's request.
- *Volunteering to cover a shift*: accepting a request from another regularly scheduled employee or an open request from an employer, provided there are no consequences for employees who do not extend or accept these requests.

Employees are not entitled to call-in pay when an shift is cancelled due to:

- the employee's request for time off; or
- an act of God or other cause not within the employer's control, because of which the operations at the workplace cannot begin or continue. If operations can begin but staffing needs are reduced in this situation, the employer can cancel shifts of regularly scheduled employees 24 hours in advance without call-in pay.

## Implications for Employers

Given the Governor's support, employers should prepare to revise their written policies in accordance with the proposed rules on call-in pay. We will continue to track implementation of the legislation, and advise of any updates.

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Seyfarth Shaw LLP Management Alert | November 13, 2017

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