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New York State Department of Labor Proposes Expansion to Call-In Regulations as New York City Council Weighs Passing Right to Flex-Time Law

This year, New York City and New York State advanced a series of legislative and regulatory proposals affecting New York's businesses and their employees. Following four public hearings across the state, the New York State Department of Labor (DOL) proposed regulations that would expand the current "call-in" regulations by requiring two weeks' advance notice of work schedules issued to workers in most industries, with the exception of restaurants and hotels. The proposed regulations were published on Nov. 22, 2017, just before New York City's package of "Fair Work Week" laws became effective on Nov. 26, 2017. DOL's proposed regulations are subject to a 45-day public comment period, which expires on Jan. 6. Contemporaneously, negotiations are ongoing with the New York City Council regarding broad new legislation that would give employees a right to arrange flexible schedules.

NYS DOL Proposed Regulations

On Sept. 9, 2017, Governor Cuomo directed the DOL to hold a series of public hearings regarding employee scheduling issues. Four hearings throughout the state were held between September and November 2017 to explore the challenges of "on call," "call-in," or "just-in-time" scheduling, which is when an employee is required to be available and await last-minute direction based on the needs of the employer.

As a result of the hearings, the DOL published proposed regulations amending the current Miscellaneous Industries Wage Order's "call-in" rules. The State's existing "call-in" rules, which covers an estimated two million workers in industries such as retail, food service, and construction, already exceed federal Fair Labor Standards Act requirements and mandate that employees be paid a minimum amount for showing up at a worksite at the employer's request, even if the employee is immediately sent home upon reporting to work. The current required minimum "call-in" pay is four hours or the number of hours in a *regularly scheduled* shift, whichever is fewer, at the basic minimum hourly wage. The proposed regulations set additional parameters governing worker schedules:

- Establishes a 14-day advance notice standard for setting a worker's schedule and provides two hours of extra pay for any shift assignments added within the 14-day period;
- Expands the existing "reporting pay" rule to include last-minute cancellations, assignments or "on-call" shifts requiring workers to be on stand-by and available to report to work;
- Requires that workers be compensated for at least four hours of call-in pay if they are required to contact their employer within 72 hours of their shift to confirm the need to report to work;
- Allows new shifts to be offered without a premium wage during the first two weeks of a new worker's employment;
- Permits workers to voluntarily substitute and swap shifts without penalizing employers;
- Allows for shift cancellations without penalty if there's an "act of God," or "other cause not within the employer's control"; and
- Allows for shift reductions without penalty if there's an "act of God," or "other cause not within the employer's control," if at least 24 hours' notice is provided.

The proposed regulations would apply to all employees, except those covered by a collective bargaining agreement which expressly addresses "on-call" scheduling expectations. The 14-day notice for schedules does not apply to new employees during their first two weeks, or to employees who make 40-times the applicable basic hourly minimum wage rate. Likewise, the rule requiring an employee to be paid at least four hours in situations where they are required to call their employer within 72 hours of a shift to confirm whether they are needed does not apply to employees who make over 40-times the applicable basic hourly minimum wage rate. Furthermore, the payment for shifts cancelled within 72 hours rule does not apply when an employee requests the time off.

New York City Employee-Scheduling Laws

In May 2017, the New York City Council passed a package of five local laws as part of the "Fair Work Week" legislation. The bundle of bills was signed into law by Mayor de Blasio on May 30, 2017, and went into effect on Nov. 26, 2017. The workplace laws impact the fast-food industry and retail establishments. Similar laws have been passed in Seattle and San Francisco, and many labor experts expect other large cities and some states may follow suit. The new laws are summarized below.

Summary of New Laws

1. **Voluntary paycheck deductions:** allows fast-food employees to voluntarily contribute part of their salary to a not-for-profit organization that is registered and eligible to receive contributions. When workers opt to do this, employers must deduct those contributions from paychecks and provide the funds to the registered organization of the worker's choice.

2. **Rest between shifts:** prohibits fast-food employers from scheduling workers for a closing and the next day's opening, or a "clopening," when fewer than 11 hours separate the shifts. Employees may consent to work clopenings, but they must be paid an extra $100 each time.

3. **Extra hours:** directs fast-food employers to offer additional hours to existing part-time staff before hiring new workers. Beginning Nov. 26, 2017, fast-food employers must post notices at the work place and send notices electronically to employees when new shifts become available. Employers are only required to offer available hours to existing employees up until the point at which overtime pay would be required or until all current employees have rejected the available time, whichever comes first.

4. **Predictable scheduling:** requires fast-food employers to provide new hires with an estimate of their work schedule at the start of their employment. The law also mandates that employers provide existing staff with their schedules at least 14 days in advance. If employees receive schedule changes with fewer than 14 days of notice, they must be paid a premium between $10 and $75, depending on how little notice they receive. This is similar to the requirements that NYS DOL is seeking to impose by regulation, as discussed above.

5. **On-call scheduling:** prohibits certain retail businesses from requiring workers to be on "call," or available for shifts if they are contacted. Under the new law, retail employers are prohibited from canceling, changing, or adding new shifts to a workers' schedule within 72 hours of a shift's start time, except in certain emergency situations. Retail employers must also post the schedule 72 hours in advance. Employees may require, and employers must provide, written copies of individual work schedules for the last three years. The law does not apply to workers covered by a collective bargaining agreement and employees may still request to switch shifts or take time off.

NYC Intro 1399 - Employees' Right to Request a Flexible Schedule

City Council Intro 1399, a bill that would establish a right to request flexible work schedules for all employees, is considered by some as a natural next step, following the enactment of the Fair Work Week laws. This bill would establish a process for all employees to seek flexible work arrangements and a right to that flexibility in certain emergency situations. Specifically, if enacted, the law would entitle employees to request modifications in their work arrangement in writing to their employer, without retaliation. The bill would mandate that employers grant, twice per calendar year, a request for a temporary change in schedule for up to one day (or one request for two days) for a personal event (defined as caregiver care need, attendance at a legal proceeding or hearing involving subsistence benefits or safe or sick time under the NYC statute granting such leave) , and further allows employees to request other changes to work schedules, without retaliation. In each case the initial request and initial response need not be in writing, but each party must thereafter put the request and response in writing. The bill exempts employees who are covered by a collective bargaining agreement, employees who have been employed by an employer for fewer than 120 days, those employees who work fewer than 80 hours in the City, and those employees in the theater, film, or television industries. The bill is expected to pass by the end of the year.

Conclusion

New York State and New York City are both imposing a myriad of new requirements regarding worker pay and work scheduling. It is possible further guidance on the new City laws and State regulation will be provided by the DOL and/or New York City Department of Consumer Affairs. A legal question remains as to whether the DOL's proposed regulations preempt New York City's local law pertaining to on-call scheduling for retail employees, or whether employers need to be prepared to comply with both the State and the City requirements. It is clear that although there was some confusion over how the State was going to apply the proposed regulation, the Governor's office is taking the position that "the newly released state regulations . . . work in concert with the City's ordinance."

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Greenberg Traurig's Global Labor & Employment Practice serves clients from offices throughout the United States, Latin America, Europe, and Asia. Members of the practice have had numerous trial wins and are frequently called upon to handle complex, bet-the-company, and large high-stake cases, including class and collective actions. On the labor side, a leading group of lawyers regularly represents management with labor-relations matters. Labor & Employment team members assist clients with complex employment issues, and design practical, proactive strategies that can be readily implemented by today's human resources professionals. The practice has been recognized by *Law360* as "Practice Group of the Year" for Labor & Employment (2011 and 2013). In addition, the practice is recognized by *The Legal 500 United States* in the areas of Labor and Employment Litigation, Labor-Management Relations, ERISA Litigation, and Trade Secrets Litigation. Visit Greenberg Traurig's Labor & Employment Blog for insights and analysis of the latest labor and employment developments, including legislation, regulations, cases, policies, and trends.

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