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TO: **Memo Distribution List**

LeadingAge New York

FROM: Hinman Straub P.C.

RE: NYSDOL Proposed Rule Regarding Employee Scheduling for "Call-In Pay"

DATE: November 13, 2017

NATURE OF THIS INFORMATION: This memorandum solicits your comments or responses on new proposals or pending action.

DATE FOR RESPONSE OR IMPLEMENTATION: January 8, 2018

HINMAN STRAUB CONTACT PEOPLE: Sean Doolan, Joseph Dougherty, David Morgen, Benjamin Wilkinson, and Matthew O'Neil

THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:
Category: #4 Regulatory Process Suggested Key Word(s):

On November 10, 2017, the New York State Department of Labor ("NYSDOL") announced a Proposed Rule on "just in time," "call-in," or "on-call" scheduling (the "Proposed Rule"). The Proposed Rule applies to most employees subject to the Minimum Wage Order for Miscellaneous Industries and Occupations (the "Miscellaneous Minimum Wage Order"), including, but not limited to, those in the health care industry. The Proposed Rule requires employers that are covered by the Miscellaneous Minimum Wage Order to either give significant advance notice of changes in employee schedules or pay additional amounts to employees scheduled on short notice. As described below, there are a number of exceptions to the new rule. The Proposed Rule is subject to a 45-day comment period after publication in the State Register on November 22, 2017.

The Proposed Rule comes on the heels of five new workplace laws enacted in New York City that take effect on November 26, 2017 governing fast food and retail employers. These fast food- and retail-specific laws include Voluntary Paycheck Deductions,[1] Rest between Shifts,[2] Extra Hours for Existing Employees,[3] Predictable Scheduling,[4] and On-Call Scheduling.[5] There are conflicting reports, and the Proposed Rule itself is unclear, as to whether the Proposed Rule

[1] Allows employees in the Fast Food industry to designate part of their salary to a not-for-profit organization. Employers must deduct contributions from paychecks and remit them to the applicable organization.
[2] Prohibits consecutive work shifts in the Fast Food industry without at least 11 hours in between. An employee who voluntarily agrees to work a consecutive shift must be paid an additional $100 each time.
[3] Requires employers in the Fast Food industry to offer additional hours to existing part-time employees before hiring new workers.
[4] Requires employers in the Fast Food industry to provide new hires with an estimated work schedule and existing staff their schedules 14 days in advance. Employers who fail to provide 14 days' notice must pay their employees a premium between $10 and $75 depending on the length of notice provided.
[5] Prohibits certain retail businesses from requiring workers to be on call—meaning that workers must be available for certain shifts but must either contact the business or wait to be contacted about whether they should report to work. Under the new law, retail employers cannot cancel, change or add shifts within 72 hours of a shift's start time—except in certain emergency situations. Employers must post the schedule 72 hours in advance. If requested, the employer must provide a written copy of an employee's work schedule for any week worked during the past three years and provide the most current version of the work schedule for all retail employees at the specific work location. However, employers may still approve workers' requests to switch shifts or take time off. There is also an exception for workers who are covered by a collective bargaining agreement.

will preempt local laws, including these recently enacted New York City laws. We anticipate that this issue is likely to be an important topic during the comment period.

SCOPE OF THE PROPOSED RULE

The Proposed Rule, once final, will amend the Miscellaneous Minimum Wage Order (12 NYCRR part 142), which sets the minimum wage for all employees who are not subject to a specific Minimum Wage Order.[6] The Miscellaneous Minimum Wage Order applies to most employers in New York State, including the health care industry. However, the Proposed Rule does not apply to employees who are covered by a valid collective bargaining agreement that expressly provides for "call-in pay." Proposed Rule (c) (1).

In addition, the Proposed Rule contains an income exception which limits the provisions regarding unscheduled shifts, cancelled shifts, on-call, and call for schedule practices. Specifically, these four provisions do not apply where the employee's "weekly wages exceed 40 times the applicable basic hourly minimum wage rate." Proposed Rule (c) (2). This income exception indicates that the Proposed Rule is targeted at low wage and part-time employees.

In Westchester County, for example, the income exception means that most of the Proposed Rule would not apply to an employee who earns more than 40 times the local minimum wage of $11.00 for the applicable week ($440).[7] A retail employee who works 12 hours in a week at $12.00 per hour ($144 total) would be subject to all parts of the Proposed Rule. By contrast, an employee at a long-term care facility who works 35 hours in a week at

[6] There are separate Minimum Wage Orders for the Hospitality Industry (includes fast food workers), Building Service Industry, and Farm Workers.

[7] New York State minimum wage is location-specific. The Proposed Rule will not be finalized or take effect until 2018. The weekly wage exception amount in 2018 for each location is:
New York City employers of eleven or more employees - $520;
New York City employers of ten or fewer employees - $480;
Nassau, Suffolk, and Westchester Counties - $440;
Remainder of State (outside of New York City, Nassau, Suffolk, and Westchester Counties) - $416.

$15.00 per hour earns a total of $525 and, therefore, would be subject only to the first part of the Proposed Rule (as noted below).

Notably, the income exception applies on a week-to-week basis. In other words, if an employee's wages for a particular week fall below the threshold, he or she is subject to the Proposed Rule.

Finally, the "call-in pay" required below may not be offset by the required use of leave time, or by payments in excess of those required by the Miscellaneous Minimum Wage Order. Proposed Rule (b) (3).

REQUIREMENTS IN THE PROPOSED RULE

The Proposed Rule rewrites 12 NYCRR 142-2.3 ad 142-3.3. Currently, those rules state: "[a]n 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 hourly wage." This minimum payment is often referred to as "call-in pay". The Proposed Rule has five requirements for covered employees, and applies to more practices than simply calling-in an employee for work:

1. *"Call-in Pay" for Reporting to Work at the Employer's Request or Permission.*

An employee who, by request or permission of the employer, reports for work on any shift shall be paid for at least four hours of "call-in pay." Proposed Rule (a) (1). In a change from current law, "call-in pay" for hours actually worked is based on the employee's regular wage, not the minimum wage. Proposed Rule (b) (1). However, the employee may be paid for a shift that is shorter than four hours if the employee normally works fewer hours for that shift, and the employee's total hours worked, or scheduled to work, does not change from week to week. Proposed Rule (b) (4). Unlike the remaining sections of the Proposed Rule discussed below, this "call-in pay" provision applies to all miscellaneous minimum wage order employees, regardless of their weekly wage. Proposed Rule (c) (2).

2. *"Call-in pay" for Unscheduled Shifts.*

The Proposed Rule states that a shift that is not scheduled at least 14 days in advance is an "unscheduled shift." Proposed Rule (a) (2). Where an employee "by request or permission of the employer" reports to work for an unscheduled shift, the employer must pay two hours of "call-in pay". Id. Because this "call-in pay" is not tied to how long the employee attends work, it appears to be at the minimum wage rather than the employee's regular hourly rate. Proposed Rule (b) (2). Nor do these two hours count for overtime purposes. Id.

The unscheduled shift provision will not apply to new employees during their first two weeks of work. Proposed Rule (c) (3). It also does not apply to employees who volunteer to cover: (i) a new and additional shift during the first two weeks that the shift is worked; or (ii) a shift that had been scheduled at least 14 days in advance to be worked by another employee ("Shift Switching"). Id. With respect to Shift Switching, the employee's voluntary coverage of a shift must be at the request of the employee originally assigned to the shift, or at an open

request from the employer that is extended to all eligible employees, with no penalty or consequence for any employee who does not extend or accept such requests. Id. As such, the employer cannot contact only specific eligible employees with a request for a Shift Switch, even where the request is voluntary.

3. "Call-in Pay" for Shifts Cancelled on Less Than 72 Hours' Notice.

Where an employer cancels a shift within 72 hours of the start of the shift, the employee shall be paid at least four hours of "call-in pay." Proposed Rule (a) (3). If the employee normally works fewer than four hours for that shift, than the employee may be paid that lesser amount. Proposed Rule (b) (4). For cancelled shifts, "call-in pay" is at the minimum wage rate (not the employees regular rate), and does not count towards hours worked for overtime purposes. Proposed Rule (b) (2). However, the requirement to give "call-in pay" for cancelled shifts does not apply where the employer cancels the shift at the employee's request for time off, or where the operations of the workplace cannot continue because of an act of God or other cause not within the employer's control. Proposed Rule (c) (4). In these cases, no "call-in pay" is owed.

4. "Call-in Pay" for Being On-Call.

An employee who is required to be available to report for any shift must be paid for at least four hours of "call-in pay." Proposed Rule (a) (4). If the employee does not actually report for work, "call-in pay" is at the minimum wage rate, and does not count towards hours worked for overtime purposes. Proposed Rule (b) (2). Notably, the Proposed Rule, as currently drafted, does not clarify whether the employee must be paid for one time each period for which the employee was on-call, or for each shift that occurred while the employee was on-call.

5. *"Call-in Pay" When Employees Must Call to Confirm within 72 Hours before Shift Start.*

An employee who is required to be in contact with the employer within 72 hours of start of the shift to confirm whether to report to work must be paid for at least four hours of "call-in pay." Proposed Rule (a) (5). If the employee does not have to report, the rate of pay for this type of "call-in pay" is the minimum wage and such hours do not count for overtime purposes. Proposed Rule (b) (2). If the employee reports to work after calling in, he or she must be paid at his or her regular rate of pay for hours actually worked. If the employee works for less than four hours, the "call-in pay" for the hours not actually worked may be at the minimum wage. "Call-in pay" hours not actually worked do not count towards overtime.

EFFECTIVE DATES AND NEXT STEPS

The Proposed Rule is subject to a 45-day comment period after publication in the State Register on November 22, 2017. As such, the deadline for submitting comments on the Proposed Rule is January 8, 2018. The Proposed Rule will then be subject to either modification or a Notice of Adoption.

Hinman Straub P.C. is available to provide a more in-depth analysis of the Proposed Rule and its potential impact on your existing policies and procedures. If you have any additional questions, please contact Joseph M. Dougherty at (518) 436-0751 or jdougherty@hinmanstraub.com.

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