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TO: Memo Distribution List

LeadingAge New York

FROM: Hinman Straub P.C.

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

DATE: December 14, 2018

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

DATE FOR RESPONSE OR IMPLEMENTATION: January 11, 2019

HINMAN STRAUB CONTACT PEOPLE: Sean M. Doolan; Kristin T. Foust; David B. Morgen; or Benjamin M. Wilkinson

THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:

Category: #4 Regulatory Process **Suggested Key Word(s):**

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On December 12, 2018, the New York State Department of Labor (“NYSDOL”) announced a [Revised Proposed Rule](#) (the “Revised Proposed Rule”) on “just in time,” “call-in,” or “on-call” scheduling. The Revised Proposed Rule significantly modifies the original Proposed Rule (the “Proposed Rule”) announced by the NYSDOL on November 10, 2017. The Revised Proposed Rule attempts to address a number of the concerns during the public comment period in response to the originally Proposed Rule.

The Revised Proposed Rule, however, does continue to require 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. The Revised Proposed Rule is intended “to protect minimum wage employees from unpredictable work schedule practices, while providing for appropriate exceptions for emergency and other unforeseen circumstances.” [NY Register, December 12, 2018, pg. 11.](#)

For a detailed explanation of all aspects of the NYSDOL Proposed Rule announced in November 2017, please refer to our “NYSDOL Proposed Rule Regarding Employee Scheduling for Call-In Pay” memorandum dated November 13, 2017, which is available [here](#).

The Revised Proposed Rule was published in the State Register on December 12, 2018 and is subject to a 30-day comment period. Comments may be submitted by emailing the DOL at hearing@labor.ny.gov. The deadline for submission of comments is January 11, 2019.

This memorandum will provide a brief overview of the amendments to the recently published Revised Proposed Rule by the NYSDOL.

Overview of the Revised Proposed Rule and Notable Changes

The Revised Proposed Rule, once finalized, 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 separate Minimum Wage Order, such as the hospitality and building service industries.

The NYSDOL received comments on the Proposed Rule that indicated employers “require flexibility and . . . a mechanism to adjust to unpredictable circumstances,” while employees find their jobs “involve schedules with little to no worker input, schedules that vary wildly day-to-day or week-to-week, and schedules that demand around-the-clock availability.” NY Register, December 12, 2018, pg. 10. Based on the comments, the NYSDOL made several notable changes in the Revised Proposed Rule protecting employees against unpredictable work schedules and giving employers flexibility. The Revised Proposed Rule also provides for certain exceptions to the “call-in” pay requirements where the employers “are subject to outside forces like weather (e.g., snow removal), [operate] at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or [are impacted] due to customer cancellations or last minute orders.” NY Register, December 12, 2018, pg. 11.

a. Requirements of the Revised Proposed Rule

Section (a) of the Revised Proposed Rule imposes five (5) requirements on covered employers. The Proposed Rule and Revised Proposed Rule contain five requirements for call-in pay. The first of the requirements is essentially a carryover from the original/current regulation that NYSDOL is now amending. The remaining four requirements are not in the original/current regulation. In the Revised Proposed Rule, NYSDOL changed two of these four new requirements from the Proposed Rule. All five requirements are listed below, with changes noted:

1) **Reporting to Work:** “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.”

- This is essentially the text of the original/current regulation, but with reporting to work changed to a shift, as opposed to on a day basis.
- This text was not changed between the Proposed Rule and the Revised Proposed Rule.

2) **Unscheduled Shift:** “An employee who by request or permission of the employer reports to work for any shift for hours that have not been scheduled at least 14 days in advance of the shift shall be paid an additional two hours of call-in pay. Where an employer provides a weekly schedule, the 14-day period referenced in this section may be measured from the last day of the schedule.”

- This is a new requirement that is not in the original/current regulation.
- In the Revised Proposed Rule, NYSDOL clarified this text from the Proposed Rule by adding the last sentence.
- This text essentially requires employers to pay two hours of call-in pay if an employee reports to work for a shift that was not scheduled at least two weeks in advance.

3) **Cancelled shift:** “An employee whose shift is cancelled by the employer shall be paid for at least two hours of call-in pay, if the shift is cancelled within 14 days, or for at least four hours of call-in pay if the shift is cancelled within 72 hours, in advance of the scheduled start of such shift.”

- This is a new requirement that is not in the original/current regulation.
- NYSDOL substantially revised this requirement from the Proposed Rule.
- This revised text essentially requires that the employer pay the employee for two hours of call-in pay if the employee’s shift is cancelled within 14 days or less. If the shift is cancelled within 72 hours or less, the amount of call-in pay increases to four hours.

4) **On-call:** “An employee who is required by the employer to be available to report to work for any shift shall be paid for at least four hours of call-in pay.”

- This requirement is not in the original/current regulation.
- This text was substantially unchanged between the Proposed Rule and the Revised Proposed Rule.

5) **Call for schedule:** “An employee who is required by the employer to be in contact with the employer within 72 hours of start of the shift to confirm whether to report to work shall be paid for at least four hours of call-in pay.”

- This requirement is not in the original/current regulation.
- This text was substantially unchanged between the Proposed Rule and the Revised Proposed Rule.

b. Calculation of Call-in Pay under the Revised Proposed Rule

Section (b) of the Revised Proposed Rule details the calculation of call-in pay. The original/current regulation did not contain this detail. Most of this text is the same in the Proposed Rule and Revised Proposed Rule, except as noted below:

(1) **Actual attendance.** “Payments for time of actual attendance shall be calculated at the employee’s regular rate or overtime rate of pay, whichever is applicable, minus any allowances permitted under this Part.”

(2) **Minimum rate.** “Payments for other hours of call-in pay shall be calculated at the basic minimum hourly rate with no allowances. Such payments are not payments for time worked or work performed and need not be included in the regular rate for purposes of calculating overtime pay.”

(3) **Offsets.** “Call-in pay shall not be offset by the required use of leave time, or by payments in excess of those required under this Part.”

(4) **Shorter work days.** “The four hours of call-in pay for reporting to work and for cancelled shifts under paragraphs (1) and (3) of subdivision (a) of this section may be reduced to the lesser number of hours that the employee is scheduled to work and normally works, for that shift.”

- This text was changed from the Proposed Rule.
- This text permits employees who receive four hours of call-in pay for reporting to work and for cancelled shifts, to reduce their shift hours to the lesser number of hours that the employee is scheduled to work and normally works for that shift.
- The Revised Proposed Rule changes the Proposed Rule and allows reductions of call-in pay when the length of shift changes from week to week.

Exceptions to the Revised Proposed Rule

As discussed below, the Revised Proposed Rule expands the exceptions in the Proposed Rule:

a. Collective Bargaining and Income Exception

As with the Proposed Rule, the Revised Proposed Rule does not apply to employees who are covered by a valid collective bargaining agreement that expressly provides for “call-in pay.” In addition, the Revised Proposed Rule continues the income exception for employees who’s “weekly wages exceed 40 times the applicable basic hourly minimum wage rate.” Revised Proposed Rule (c) (2). These employees are not subject to the unscheduled shifts, cancelled shifts, on-call, and call for schedule requirements. These employees continue to be subject to the reporting to work provision.

b. Revised Proposed Rule (c) (3)

In response to comments on the Proposed Rule, *see* NY Register, December 12, 2018, pg. 12, the NYSDOL added a significant exception in the Revised Proposed Rule excluding certain categories of employees from receiving call-in pay with respect to unscheduled shifts, cancelled shifts, on-call and call for schedule practices. The exception applies to “employees whose duties are directly dependent on weather conditions, or to employees whose duties are necessary to protect the health or safety of the public or any person, or to employees whose assignments are subject to work orders, or cancellations.” Revised Proposed Rule (c) (3). However, this exception only applies where the employees “also receive weekly compensation that **exceeds** the number of compensable hours worked times the applicable basic minimum wage rate, with no allowances.” *Id.* The NYSDOL indicated that the exception is intended to apply to “[e]mployers that operate subject to outside forces like weather (e.g., snow removal), at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or due to customer cancellations or last-minute orders.” NY Register, December 12, 2018, pg. 12. It is important to note that for this exception to apply, the employee must be receiving weekly compensation that **exceeds** the minimum wage.¹

It appears from the NYSDOL commentary that this exception applies to the entire health care industry where the employee’s “duties are necessary to protect the health or safety of the public or any person.” The Revised Proposed Rule (c) (3) protections apply as long as the employee receives weekly compensation for “compensable hours” in excess of the minimum wage. The term “compensable hours” is not defined in the Revised Proposed Rule.

The New York State Court of Appeals, the State’s highest court, is currently considering the legality of the “13 Hour Rule.” *See Andryeyeva v. New York Health Care, Inc.*, 153 A.D.3d 1216 (2d Dep’t 2017); *Moreno v. Future Care Health Services, Inc.*, 153 A.D.3d 1254 (2d Dep’t 2017). State appellate courts have held that non-residential 24-Hour Employees “[are] entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were

¹ The minimum weekly wage compensation in New York State beginning 12/31/18 is as follows: (i) NYC-Large Employers: \$600; (ii) NYC-Small Employers: \$540; (iii) Long Island & Westchester: \$480; (iv) Remainder of New York State: \$444.

afforded opportunities for sleep and meals.” *Andryeyeva*, 153 A.D.3d at 1219. If the Court of Appeals agrees with appellate courts that every hour of a 24-hour shift may be compensable, then an employer in the home health care industry who pays a home health aide for only 13 hours of a 24-hour shift, may be at risk of falling below the minimum wage threshold necessary to qualify for this “call-in” pay exception.

c. Revised Proposed Rule (c) (4)

The Revised Proposed Rule also amends the exception with respect to employees who by request or permission of the employer, report to work for an unscheduled shift. The exception, as modified from the Proposed Rule, clarifies the categories of employees excluded from receiving call-in pay. The exception applies to “(i) any new employee during the first two weeks of employment; or (ii) any employee who volunteers to cover a new shift or a previously scheduled shift.” Revised Proposed Rule (c)(4). The exception defines “new shift” as “the first two weeks of an additional shift that results in a net increase in staffing at a single workplace during the period of time covered by such shift.” The exception defines “previously scheduled shift” as “a shift that would not have been subject to unscheduled shift call-in pay if worked by the employee who was originally assigned to work that shift.” Finally, the exception defines “volunteers” to mean “that the employee may refuse to cover the new or previously scheduled shift.” The Revised Proposed Rule removed reference to “regularly scheduled employees” and more concisely defined the relevant terms in this exception.

d. Revised Proposed Rule (c) (5)

The Revised Proposed Rule includes an additional exception excluding certain categories of employees from receiving call-in who are reporting to work for an unscheduled or cancelled shift. The exception applies to an employer who is “respond[ing] to weather or other travel advisories by offering employees the option to voluntarily reduce or increase their scheduled hours, so that employees may stay home, arrive early, arrive late, depart early, depart late, or any combination thereof, without call-in pay for unscheduled or cancelled shifts.” Revised Proposed Rule (c) (5).

e. Revised Proposed Rule (c) (6)

Additionally, the Revised Proposed Rule amends the Proposed Rule exception with respect to cancelled shifts. The modified exception states that an employee is not entitled to call-in pay for a cancelled shift “when an employer cancels a shift at the employee’s request for time off, or when operations at the workplace cannot begin or continue due to an act of God or other cause not within the employer’s control, including, but not limited to, a state of emergency declared by federal, state, or local government.” Revised Proposed Rule (c)(6). Further, the Revised Proposed Rule removed the caveat initially contained in the Proposed Rule requiring an employer to notify employees within 24-hours of a canceled shift.

Safe Harbor

Lastly, the Revised Proposed Rule adds a “Safe Harbor” provision, not initially included in the Proposed Rule. The Safe Harbor provision applies to employers that are claiming the exception to call-in pay with respect to employees who have volunteered to cover a new shift or a previously scheduled shift. Revised Proposed Rule (c) (4). The Safe Harbor provision of the Revised Proposed Rule provides that:

“there shall be a rebuttable presumption that an employee has volunteered to cover a new or previously scheduled shift if the employer provides a written good faith estimate of hours to all employees upon hiring, or after the effective date of this section for previously hired employees, which may be amended at the employee’s request or upon two weeks’ notice by the employer, and if the request to cover a new or previously scheduled shift is either: (i) made by the employee whose shift would be covered; or (ii) made by the employer in a written communication to a group of employees requesting a volunteer from among the group and identifying a reasonable deadline for responses. If no employee volunteers prior to the deadline, the employer may assign an employee to cover the shift without the additional call-in pay required for unscheduled shifts.”

Revised Proposed Rule (d).

The Safe Harbor provision provides protection to employers who inform employees of the approximate hours to be worked upon hiring and who make good faith efforts to secure coverage for an unscheduled shift by complying with the written communication and reasonable deadline requirements.

Hinman Straub P.C. is available to provide a more in-depth analysis of the Revised Proposed Rule and its potential impact on your existing policies and procedures. If you have any additional questions, please contact please contact Sean M. Doolan, Kristin T. Foust, David B. Morgen, or Benjamin M. Wilkinson with any questions that you have at (518) 436-0751 or sdoolan@hinmanstraub.com; kfoust@hinmanstraub.com; dmorgen@hinmanstraub.com, or bwilkinson@hinmanstraub.com.



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TO: Client
FROM: Hinman Straub P.C.
RE: NYSDOL Proposed Rule Regarding Employee Scheduling for “Call-In Pay”
DATE: November 13, 2017

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,²² Rest between Shifts,²³

²² 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.

²³ 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.

Extra Hours for Existing Employees,²⁴ Predictable Scheduling,²⁵ and On-Call Scheduling.²⁶

There are conflicting reports, and the Proposed Rule itself is unclear, as to whether the Proposed Rule 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.²⁷ 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.

²⁴ Requires employers in the Fast Food industry to offer additional hours to existing part-time employees before hiring new workers.

²⁵ 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.

²⁶ 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.

²⁷ There are separate Minimum Wage Orders for the Hospitality Industry (includes fast food workers), Building Service Industry, and Farm Workers.

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).²⁸ 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 \$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:

²⁸ 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.

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 Sean M. Doolan, Kristin T. Foust, David B. Morgen, or Benjamin M. Wilkinson with any questions that you have at (518) 436-0751 or sdoolan@hinmanstraub.com; kfoust@hinmanstraub.com; dmorgen@hinmanstraub.com, or bwilkinson@hinmanstraub.com.

Employee Scheduling (Call-in Pay)

The proposed rule would revise the call-in pay requirements of the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR Part 142 at §§ 142-2.3 & 3.3) to read, in their final form, as follows:

Call-in pay.

(a) Call-in pay shall be provided as set forth below.

(1) **Reporting to work.** 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.

(2) **Unscheduled shift.** An employee who by request or permission of the employer reports to work for any shift for hours that have not been scheduled at least 14 days in advance of the shift shall be paid an additional two hours of call-in pay.

(3) **Cancelled shift.** An employee whose shift is cancelled within 72 hours of the scheduled start of such shift shall be paid for at least four hours of call-in pay.

(4) **On-call.** An employee who by request or permission of the employer is required to be available to report to work for any shift shall be paid for at least four hours of call-in pay.

(5) **Call for schedule.** An employee who by request or permission of the employer is required to be in contact with the employer within 72 hours of start of the shift to confirm whether to report to work shall be paid for at least four hours of call-in pay.

(b) **Calculation of call-in pay.** Call-in pay shall be calculated as follows.

(1) **Actual attendance.** Payments for time of actual attendance shall be calculated at the employee's regular rate or overtime rate of pay, whichever is applicable, minus any allowances permitted under this Part.

(2) **Minimum rate.** Payments for other hours of call-in pay shall be calculated at the basic minimum hourly rate with no allowances. Such payments are not payments for time worked or work performed and need not be included in the regular rate for purposes of calculating overtime pay.

(3) **Offsets.** Call-in pay shall not be offset by the required use of leave time, or by payments in excess of those required under this Part.

(4) **Shorter work days.** The four hours of call-in pay for reporting to work and for cancelled shifts under paragraphs (1) and (3) of subdivision (a) of this section may be reduced to the lesser number of hours that the employee normally works for that shift, as

long as the employee's total hours worked, or scheduled to work, for that shift do not change from week to week.

(c) **Applicability.** This section applies to all employees, except as provided below.

(1) This section shall not apply to employees who are covered by a valid collective bargaining agreement that expressly provides for call-in pay.

(2) Paragraphs (2) through (5) of subdivision (a) of this section shall not apply to employees during work weeks when their weekly wages exceed 40 times the applicable basic hourly minimum wage rate.

(3) Paragraph (2) of subdivision (a) of this section shall not apply to any new employee during the first two weeks of employment or to any regularly scheduled employee who volunteers 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 fourteen days in advance to be worked by another employee. For purposes of this and the following paragraph, "regularly scheduled employee" means an employee who is scheduled at least fourteen days in advance for shifts consistent with a written good faith estimate of hours provided by the employer at the time of hiring (or at the time this section takes effect, whichever is later), which may be amended at the employee's request. In addition, as used in this paragraph, "volunteers to cover" means acceptance of any request from another regularly scheduled employee or of 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.

(4) Paragraph (3) of subdivision (a) of this section shall not apply when an employer cancels a shift at the employee's request for time off, or when operations at the workplace cannot begin or continue due to an act of God or other cause not within the employer's control, including, but not limited to, a state of emergency declared by federal, state, or local government, provided, however, that where operations can begin or continue but staffing needs are reduced due to act of God or other cause not within the employer's control, the 72-hour period of paragraph (3) of subdivision (a) of this section shall be reduced to 24-hours for regularly scheduled employees.