

# New York proposes rules on paying for unpredictable schedules

Employers in New York will be subject to new “call-in” pay and scheduling requirements under recently proposed state regulations. The issue is “just-in-time” or “on-demand” scheduling of workers. According to Gov. Andrew Cuomo, this practice entails the scheduling or cancelling of a worker’s shift with little or no advance notice.

New York regulators have focused their enforcement sights on unpredictable schedules, and Cuomo recently announced new proposed regulations.

Read the proposed regulations at [labor.ny.gov/workerprotection/laborstandards/pdfs/employee-scheduling-proposed-rule.pdf](https://labor.ny.gov/workerprotection/laborstandards/pdfs/employee-scheduling-proposed-rule.pdf).

At the governor’s direction, the New York State Department of Labor recently held hearings across the state on this issue, which led to issuance of the proposed regulations.

If enacted, the proposed regulations would amend New York’s catch-all “Miscellaneous Industries” minimum wage order, including those portions applicable to nonexempt “nonprofitmaking institutions” across the state.

## Current state call-in rules

Under the Miscellaneous Industries minimum wage order, nonexempt employees who report to work are currently entitled to call-in pay equal to the lesser of four hours of pay or pay for the number of hours in the regularly-scheduled shift, at the state minimum wage rate.

Notably, NYSDOL has interpreted this provision such that it only effectively applies to nonexempt workers who earn at or very near the state minimum wage.

NYSDOL issued Opinion Letter No. RO-09-0133 back in 2009. It noted that if “the amount paid to an employee for the workweek exceeds the minimum and overtime rate for the number of hours worked and the minimum wage rate for any call-in pay owed, no additional payment for call-in pay is required during that workweek.”

In other words, under NYSDOL’s interpretation, New York employers could potentially apply an “offset”—for amounts paid to workers above the state minimum wage and overtime rates during the same workweek—against any “call-in” pay otherwise due to workers.

Additionally, under current law, employers are generally free to schedule and, when necessary, cancel shifts before employees report for work, without incurring any additional payment obligation.

## Proposed call-in pay changes

The recently-proposed regulations would create a number of new circumstances when nonexempt employees will be eligible to receive “call-in” pay, including the following scenarios:

- Employees who report to work for a shift that was not scheduled at least 14 days in advance will be entitled to an additional two hours of call-in pay.
- Employees whose shifts are cancelled within 72 hours of the start of that shift will be entitled to at least four hours of call-in pay.
- Employees who are required to be on-call and available to report to work for any shift will be entitled to at least four hours of call-in pay.
- Employees who are required to be in contact with their employer, within 72 hours of the start of a shift, to confirm whether or not to report to work for that shift will be entitled to four hours of call-in pay.

Under the proposed regulations, the above call-in pay must be calculated at the current state minimum wage rate (which now varies by location and workforce size) without any allowances, and employees must receive their “regular rate” for their actual time of attendance. However, these new requirements will not apply to otherwise covered employees whose weekly wages exceed 40 times the applicable state minimum wage.

Significantly, under the proposed regulations, employees who report to work for any shift will be entitled to at least four hours of call-in pay.

The proposed regulations state, “Call-in pay shall not be offset by the required use of leave time, or by payments in excess of those required under” the applicable minimum wage order.

Although this provision is not entirely clear on its face, conceivably, regulators drafted it with the intent of curtailing application of the above-referenced weekly “offset” provided under prior NYSDOL interpretation.

Finally, the proposed regulations state that the above requirements will not apply to certain employees “who are covered by a valid collective bargaining agreement that expressly provides for call-in pay.” The requirements may not apply in certain other circumstances, such as when a business cannot begin or continue operations due to a state of emergency or other “Act of God” beyond its control.

**Note:** Employers should also be mindful that New York City recently passed a similar law that will become effective Nov. 26, 2017.

This local law places somewhat similar requirements on New York City retail employers, and also places additional requirements on certain fast-food establishments.

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*Andrew D. Bobrek is a labor and employment law attorney in Bond, Schoeneck & King’s Syracuse office.*