



## **Overview**

In the December 12, 2018 New York State Register, the Department of Labor will officially release its revised version of its Call-In Pay regulations. The revised regulations are subject to a 30-day comment period, which will expire on January 11, 2019. These amendments would only apply to those employees covered under the Miscellaneous Wage Order, meaning that those employees covered under the Hospitality Industry Wage Order are not subject to these regulations.

The most important aspect of the amended regulations for NYSH&TA are the exemptions added to the proposal. As requested by NYSH&TA, an exemption was added for employees whose duties are directly dependent on weather. Further, there is a separate exemption from call-in pay for cancelled or unscheduled shifts for employees whose shifts are altered (either added to or subtracted from) where an employer is responding to weather or travel advisories.

Please let us know if you have any questions.

## **Summary**

### **Who is entitled to Call-In Pay, and how much pay is required?**

Any employee that ***reports to work*** by the request or permission of their employer (not a regularly scheduled shift) is entitled to four hours of Call-In Pay.

An employee that reports to work for an ***unscheduled shift***, meaning one that is not scheduled ***14-days*** in advance of the shift, the employee is entitled pay for the shift worked plus an additional two hours of call-in pay.

Where an employer ***cancels a shift*** of an employee ***within 14-days***, the employee is entitled to two hours of call-in pay. Where an employer ***cancels a shift*** of an employee ***within 72 hours (3 days)***, the employee is entitled to at least four hours of call-in pay.

Any time that an employer requires an employee to be ***on-call***, the employee is entitled to at least four-hours of call-in pay.

### **How is Call-In Pay Calculated?**

1. For ***actual attendance*** at work, employees are entitled payment at their overtime rate, minus any allowances (i.e. tip or meal credits) by the Wage Order
2. In addition to payment for hours of actual attendance, other hours of call-in pay are calculated at a ***minimum rate*** of the basic minimum wage without any allowances. Payment for hours not actually worked do not need to be counted for overtime purposes.
3. Call-in pay cannot be ***offset*** by required use of leave time or other payments required under the Wage Order (i.e. overtime or split shift payments).

4. Where an employee's *workday is usually shorter* than four hours, and the employee reports to work by the request of the employer or has a shift cancelled by the employer, the employer can reduce the number of call-in pay hours to the employee's regular shift.
  - Example: Where an employee usually works a 3-hour shift, and an employer cancels the shift two-days ahead of time, the employee is only entitled to three-hours of call-in pay at the minimum wage.

#### **Are there any exceptions to the Call-In Pay regulations for individual jobs or industries?**

There are 6 exemptions to the regulations, as follows:

1. The regulations do not apply to employees covered by a collective bargaining agreement that expressly addresses call-in pay.
2. Provisions relating to *unscheduled shifts, cancelled shifts, on-call shifts, or where an employee is required to call the employer for their schedule* do not apply to employees that earn more than 40 times the applicable minimum wage in a given week.
3. Provisions relating to *unscheduled shifts, cancelled shifts, on-call shifts, or where an employee is required to call the employer for their schedule* do not apply to employees whose duties are directly dependent on weather, if the employee earns more than the minimum wage without allowances.
  - The same exception applies to:
    - Employees whose duties are necessary to protect the health and safety of the public or any person (as long as they earn the minimum wage for any hours worked);
    - Employees whose assignments are subject to work orders or cancellations of work orders; (as long as they earn the minimum wage for any hours worked).
4. Provisions relating to *unscheduled shifts* shall not apply to:
  - i. Any new employee during their first two-weeks of work;
  - ii. Any employee that volunteers to cover a new shift or previously scheduled shift
5. Provisions related to *unscheduled and cancelled shifts* do not apply when an employer responds to weather or travel advisories by offering an employee the option to reduce or increase their scheduled hours.
6. Provisions related to *cancelled shifts* do not apply where an employee cancels a shift to accommodate an employee's request for time off, or where a shift is cancelled 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.

#### **Safe Harbor for Employees that Voluntarily Cover a Shift**

Where an employer provides a good faith estimate of hours to all employees upon hiring or after the effective date of these regulations, there is a rebuttable presumption that an employee has volunteered to cover a new or previously scheduled shift, if:

1. The request for the shift was made by the employee whose shift would be covered; or

2. Made by the employer through a written request to all employees requesting volunteers and providing a reasonable deadline for response. If no employee volunteers before the deadline, the employer may assign a shift without the additional call-in pay required for unscheduled shifts.