



New York State  
**HOSPITALITY  
& TOURISM**  
Association

1 Computer Drive South  
O. 518.465.2300

Albany, NY 12205  
F. 518.465.4025

www.nyshta.org  
800.642.5313

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## **Comments on the New York State Department of Labor Call-In Pay Proposed Regulations – January 5, 2018**

**Submitted by:**  
**Mark Dorr**  
**President**  
**NYS Hospitality & Tourism Association (NYSH&TA)**

The New York State Hospitality & Tourism Association (NYSH&TA) is the oldest lodging Association in the country - founded in Saratoga Springs in 1887. We have nearly 1,300 member businesses in the lodging and attractions industry, and we currently represent 70% of the total lodging room inventory in the State.

The tourism industry in New York State is unparalleled; it's a combination of creating and maintaining jobs, as well as providing the State with a return on its investment that no other industry can offer. Tourism is a part of each region of the State, providing employment at all levels, from management to entry level.

While many of our members are lodging locations with employees that are generally covered under the Hospitality Wage Order, we also represent 50 parks and attractions in our Parks and Attractions Council, as well as uniquely situated ski resorts that will be negatively affected by the proposed call-in pay regulations.

The following comments are submitted with the input and guidance of NYSH&TA's Parks and Attractions Council, which is comprised of seasonal businesses that will be negatively affected by the Department of Labor's proposed regulations.

### **SPECIFIC COMMENTS RELATED TO THE PROPOSED CALL-IN PAY REGULATION:**

#### **14-DAY NOTICE**

#### **DOL PROPOSAL:**

**§142-2.3(a)(2) *Unscheduled shift. An employee who by request or permission of the employer reports for any shift for hours that have not been scheduled at least 14 7 days in advance of the shift shall be paid for at least four hours of call-in pay.***

#### **NYSH&TA RECOMMENDATION:**

The employees of the parks and attractions in New York is largely represented by high school and college aged students with needed flexibility in scheduling. These employees often have events, like practices for sports, or review classes for exams, that they are not aware of 14-days in advance. Therefore, fourteen days of advanced scheduling places a significant burden on the parks and attractions businesses. We believe that a seven-day advanced schedule is sufficient to provide employees with enough notice of their work week, but also sufficient to provide them the flexibility to attend to the needs of their day-to-day lives.

### **CANCELED SHIFTS:**

#### **DOL PROPOSAL:**

**§142-2.3(A)(3) Cancelled shift. An employee whose shift is cancelled within 72 24 hours of the scheduled start of the shift shall be paid for at least four hours of call-in pay.**

#### **NYSH&TA RECOMMENDATION:**

Due to the frequent scheduling changes, particularly due to weather occurrences and changing forecasts, a 24-hour notice to employees for a shift cancellation is the appropriate amount of time for a seasonal employer to notify an employee of a shift-cancellation without triggering call-in pay. For NYSH&TA's parks and attractions members, projected attendance varies greatly from day-to-day, and therefore staffing needs change as well. We believe that a 24-hour notice is sufficient to both meet the needs of employees, and to not cause significant additional labor costs to employers.

### **WEATHER PROVISIONS**

#### **DOL PROPOSAL:**

**§142.3(c)(4) Paragraph (c) 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 an 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.**

#### **NYSH&TA RECOMMENDATION:**

NYSH&TA believes that weather events, such as rain, thunderstorms, or even severe weather warnings should be considered in the drafting of these regulations. It is unclear in the proposal whether a "cause not within the employer's control" or an "act of God" includes weather events that may or may not occur, but cause a business not to open or to close early. It is critical for outdoor businesses, such as parks and attractions, that these weather events are considered a "cause not within an employer's control.

### **Good Faith Estimate of Hours:**

**DOL Proposal:**

**§142.3(c)(3)(ii) . . . 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. . .**

**NYSH&TA RECOMMENDATION:**

NYSH&TA believes that the proposal should clarify the definition of a “good faith estimate of hours” under the Department of Labor’s proposal. Parks and attractions have days and weeks in which they know at the beginning of a season are their most popular times or the year, and other days or weeks which are typically less busy during the season. Therefore, staffing needs are different from week to week, and the hours that employees work may vary significantly during the season. The Parks and Attractions Council believes that a clarification of how wide a range our hours satisfies the “good faith estimate of hours” standard set in the regulation is necessary for employers to understand and implement the regulations.

**SEASONAL BUSINESS EXEMPTION**

Seasonal businesses have unique needs in scheduling that are not accounted for under the proposed regulation. These businesses are extremely weather dependent. Severe weather events often require the businesses to continuously adjust employee schedules, and add or remove staff throughout a given work week. While we understand that the Department of Labor may not want to exempt any specific industries from the proposed regulations, we believe that seasonal businesses are uniquely situated, and their needs should be considered in the drafting of these regulations. Further, there is precedent for unique treatment of seasonal businesses under the Miscellaneous Wage Order, as applied to overtime pay (in that situation, seasonal business are required to pay overtime rates defined under the FLSA, which are lesser than the overtime rates for other businesses under the Wage Order).

**SUPPORT OF SKI ASSOCIATION COMMENTS**

NYSH&TA is supportive of the comments submitted by the Ski Association of New York, whose members are uniquely affected by the proposed regulations.

NYSH&TA and its member organizations believe that the proposed comments will have significant costly effects on seasonal businesses. The Parks and Attractions Council estimates that the proposed regulation would increase their labor costs by at least 4-5%, on top of the minimum wage increases that are already costly for employers. We request that the Department consider an exemption for seasonal business, or at minimum, to implement the changes requested in these comments.

Thank you,

Mark Dorr