



NEW YORK

October 12, 2017

Commissioner Roberta Reardon
New York State Department of Labor
Building 12, W.A. Harriman Campus
Albany, New York 12240

Dear Commissioner Reardon:

At Governor Cuomo's directive, the State Department of Labor is conducting four public hearings examining the issue of "on-call" or "predictive scheduling". The National Federation of Independent Business represents nearly 11,000 small and independent businesses across New York and respectfully requests that any new scheduling regulations protect the fragility of New York's small businesses.

Small business owners recognize that their employees are their greatest asset, and without them, the business wouldn't exist. Accordingly, small employers provide their employees with mutually beneficial scheduling arrangements that allow for consistency and reliability for both the worker and the owner. Furthermore, current New York regulations exceed federal Fair Labor Standards Act requirements as employees are paid a minimum for showing up to work at the employer's request. They are compensated even in the event that they are sent home without performing work duties.

At Governor Cuomo's request, new regulations are to be proposed and implemented with the directive stating that the new regulations are to be "sensible". While it is difficult to comment specifically on this effort as there are currently no detailed proposals under consideration, a "one-size-fits-all" approach will disproportionately impact small business.

We strongly urge the Department to take into consideration the differences between corporate American and Main Street in any potential new regulations. Many small businesses, for example, lack the formal human resource operations that big businesses use when making complex schedules for many employees. Small employers also contend with a lower market to offer their goods and services and operate with tight profit margins compared to big box stores and national brands. Similarly, small business owners that operate on tight margins must accept opportunities as they arise cannot anticipate needs weeks or even days in advance, especially those in industries like hospitality and construction.

We respectfully ask that any new scheduling regulations recognize the unique nature of small business

and provide an exemption that has been adopted in various other states and municipalities. Oregon, for example, enacted "predictive scheduling" regulations aimed at large employers and exempted businesses with fewer than 500 employees. In 2017, Seattle enacted a local ordinance that was limited to retail and food establishments that employ more than 500 employees worldwide. San Jose's ordinance exempts businesses with 35 or fewer employees, San Francisco's law applies to businesses with 20 or more employees and have more than 20 locations worldwide. In New York, proposed legislation (S.3486/A.2007) exempted small businesses with fewer than 50 employees and the sponsor's memo clearly indicated the need to be mindful of potential negative small business impact.

Other concerns with potential new scheduling regulations include:

- Timeframe that employer's must predict scheduling needs. It is extremely difficult for a small business to anticipate scheduling needs weeks in advance.
- Creation of a "duty to bargain" on employers which effectively forces employers to discuss with terms and conditions of employment with employees to discuss scheduling and location preferences. Employers without employees represented by labor unions would have to engage in "timely, good faith interactive" discussions.
- Level of financial penalties generally, but especially in unforeseen instances when an employer is forced to call in and employee to cover a shift.
- Level of payment for employees if a shift change is required, especially in an unforeseen event.
- Potential language relative to hiring new employees. Language has been discussed which would mandate on an employer that, before hiring new employees, including through a temporary services agency, an employer must offer the available hours to existing employees by posting written notice of the available hours for at least three consecutive calendar days in a conspicuous and accessible location. Only after posting the hours without acceptance by existing employees, may an employer seek help from outside its existing workforce.

Small employers in New York State have faced many challenges during the last few years from increased labor costs to navigating the paid family leave law. Any regulatory changes relative to scheduling could add additional financial and administrative costs on small business. As other states and municipalities have moved forward on this issue, they have acknowledged the complexities and impact on small business. We respectfully request that New York does the same. As always, we are happy to discuss and work the Department and administration on this issue.

Sincerely,



Michael Durant
NFIB/NY State Director

CC:
Governor Andrew Cuomo
Mario Musolino