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New York Commissioner of Labor Hearings on Employee Scheduling

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Center for Popular Democracy | Fair Workweek Initiative

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The Center for Popular Democracy (CPD) applauds the Commissioner for calling these hearings to investigate the serious problems workers face when they work in jobs with abusive or uncertain scheduling practices. CPD's Fair Workweek Initiative supports efforts across the country to restore a workweek that enables working families to thrive. We are nationally recognized for our policy, research and employer-engagement expertise on issues relating to hours and wages. CPD played an important role in the implementation of the San Francisco Retail Workers Bill of Rights and the enactment of Fair Workweek ordinances in Emeryville and San Jose CA, Seattle WA, New York City and the first state-level Fair Workweek law in Oregon. Our staff has deep expertise in the industries where work-hours issues are most prevalent and understand both the business models that have generated these practices and the negative impact on workers and their families.

The Problem: On-Call Scheduling

People working hourly jobs in the retail industry often have little to no input in their schedules, which may vary wildly week to week and demand around-the-clock availability, and learn when they are expected to work just days or hours in advance. The use of on-call scheduling is one of the most egregious practices afflicting hourly workers, especially in the retail industry. Workers scheduled for on-call shifts are required to call in, or wait to be called by their employer, hours before their shift to determine whether they will work. While on-call, workers are precluded from working at another job during those hours or pursuing education or training. They cannot travel to family gatherings out of state, buy tickets to a ball game, or attend to their own or family members' health needs. Working parents must arrange – and sometimes pay in advance for – childcare for possible work hours that often fail to materialize. Indeed, workers report that they do not actually work the majority of on-call shifts for which they are required to maintain availability. As a result, employers are reserving huge amounts of employees' valuable time without compensation.

This practice is harmful to working families and bad for New York's economy. A study by Professors Daniel Schneider and Kristen Harknett found that short notice of work schedules correlates with higher rates of serious psychological distress.¹ Working parents are particularly impacted by just-in-time scheduling because of the need to arrange childcare for shifts they may not actually work. Of the nearly one million New Yorkers in retail jobs, 290,400 (27%) are parents, and 75,000 are single parents. These families need updated job protections.

On-call scheduling is also contrary to New York's long-standing public policy. The New York Department of Labor's wage order governing retail requires call-in pay for employees who "report" for work but are not provided a full day's work:

¹ Daniel Schneider and Kristen Harknett, *Schedule Instability and Unpredictability and Worker and Family Health and Wellbeing* (Sept. 2016).

“An employee who by request of 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.”²

This provision reflects the commonsense public policy that when an employer has reserved an employee’s time and relinquishes it after the employee has already reported for work, the employee should not exclusively bear the cost of lost earnings. “Report for work” has usually been construed as *physically* reporting to the place of work, because call-in pay originated long before technology allowed employers to cancel shifts at the last minute by communicating with workers via phone, text or email. However, nothing in the wage order specifies that “reporting” for work is limited to appearing in-person at the job site. Employees scheduled for on-call shifts are also “reporting for work” telephonically or electronically when they maintain availability for a work shift at their employer’s request. When workers receive notification just a few hours before a shift that they are not needed, the impact is hardly less severe than if they had reported for work: they may have turned down opportunities for other income and incurred childcare costs; given long commute times for many retail workers, they may already be on a train or bus when they receive notice that their shift is cancelled.

In short, technology has changed the nature of work, and the regulatory framework must be updated to address today’s working conditions. We urge the Commissioner to update the wage order to specify that a worker who is required to be available for a shift, and is not given at least 24 hours’ notice that the shift is cancelled, is entitled to compensation for four hours or the length of the shift, whichever is less.

Considerations for policy design

In updating the policy to offer meaningful protections, it is critical to draft with a detailed understanding of the scheduling practices in the retail sector. It is important that the rule encompass time a worker spends waiting for a call or the requirement to call in. While in some cases employers differentiate between “regular” and “on call” shifts, both types of shifts incorporate a degree of contingency, and any time that the employer reserves should be compensated. In Fair Workweek policies passed across the country, a “shift” is typically defined as “the consecutive hours an employer requires an employee to work or to be on-call to work,” and “on-call” shifts or hours are defined to include “any time that an employer requires an employee to be available to work, and to contact the employer or the employer’s designee or wait to be contacted by the employer or its designee, to determine whether the employee must report to work at that time.” Employees should be compensated whenever a shift for which they have been scheduled is cancelled with less than 24 hours’ notice.

Furthermore, this compensation should be required regardless of the reason for the shift cancellation. New York’s existing wage order requires call-in pay “on any day” an employee reports for work, and that universal application should extend to any revisions the Commissioner implements. In many jurisdictions that have passed Fair Workweek legislation, retail industry groups have strongly advocated for exceptions such that call-in pay is not owed when a shift is cancelled for a reason that they claim is outside of their control – such as poor weather, parades or other public events. While the rule should protect employee flexibility to use sick time, swap shifts or otherwise initiate schedule changes, we strongly recommend that any shift (whether explicitly designated “on-call” or otherwise) that is cancelled by the employer be subject to call-in pay. Exceptions would only impose unfair costs on employees and increase the burden of enforcing the wage order by requiring investigators to rule out circumstances giving rise to an exception.

Conclusion

It is the public policy of this state, as codified in the wage orders, that employees who have maintained availability to work at their employers’ request but are not given work should receive some compensation for

² 12 NYCRR § 142-2.3.

their availability. Yet on-call scheduling requires the employee to incur expenses and forgo other opportunities while placing no obligation on the employer to pay for the worker's time. This imbalance represents a drain on Connecticut's economy and holds working families back.

Urgent action is needed to address the on-call scheduling practices that are common in New York's retail industry. We appreciate the Commissioner's dedication to updating the wage orders to address widening economic inequality and to build equal opportunity and prosperity for all New York families.