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January 4, 2018

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

Re: Draft Regulation Pertaining to Call In Pay and Employee Scheduling (12 NYCRR Part 142 at §§ 142-2.3 & 3.3)

Dear Commissioner Reardon:

I am writing to express my opposition to the Department of Labor's draft regulations pertaining to employee scheduling also known as "call-in" scheduling. The proposed regulations, if adopted, would revise the current call-in pay regulations set forth in the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR Part 142 at §§ 142-2.3 & 3.3).

I appreciate the Department's efforts to address the challenges some workers face with erratic work schedules. Unfortunately, the proposed regulations fail to take a reasonable approach that balances the interest of the employee and the employer. Instead, the Department is proposing to use government power to insert itself into the employee/employer relationship in an arbitrary manner that is wholly disconnected from market realities. As a result, as we have seen with so many other policies instituted by the state of New York, businesses, particularly small businesses, will suffer damage in an already challenged NYS economy.

I represent the 120th Assembly District which encompasses parts of Oswego, Jefferson, and Onondaga counties. Small businesses are the backbone of our economy as they are throughout New York state. These businesses, which range from small retail shops, contractors, and manufacturers, often have 10 employees or less. The owners, in a very competitive marketplace, work side-by-side with their employees in attempt to serve their customers and make a living for themselves and their employees. The employers recognize the importance of a dedicated workforce and are willing to accommodate employees in terms of work schedule if the need arises. If they don't, the employers understand that they can lose a valuable employee that will be difficult to replace. Likewise, employees understand the challenges of operating a business and are often willing to remain flexible in terms of scheduling especially when the nature of the business requires such – (e.g., weather-dependent businesses). The collaborative relationships between employer and employee as described is likely the reason I have not had any complaints about work scheduling in all my time in elective office.

14-day Advance Scheduling is Arbitrary

Mandating that work schedules must be in place 14 days in advance or additional wages will need to be paid, is a one-size-fits-all solution to employee scheduling that fails to take into account the realities of the workplace. First, it is unclear why the Department has settled on 14 days as opposed to some shorter period. In today's business world, circumstances can change quickly. Orders can come in, be filled and be out the door to customers in less than a day. On the other hand, customers have more options and years of loyalty to a supplier is no longer the reality. Penalizing an employer for his or her inability to predict work flow 14 days in advance, illustrates that the Department does not understand how modern business works. A more balanced workable approach would be a shorter time-period.

The Department of Labor's November 10th press release announcing the proposed regulations states that current call-in scheduling "often leave workers scrambling to find child care and force[s] them to miss appointments, classes or important family commitments." Wouldn't work schedules put in place 2 or 3 days in advance allow workers the ability to address the issues the Department claims workers are concerned about?

No Exemption for Weather-Dependent Businesses

Further, the proposed regulations fail to provide an exemption for weather-dependent businesses. Under the proposed regulations a business would have set their employees' schedules 14 days in advance and if they change the employee's work schedule within that 14 days they will be required to pay call-in pay. What happens if, within that 14-day period for instance, weather plays a role in the employer's ability to provide a service. For example, what if there is no snow for a snow removal company to plow. Would the company still have to provide call-in pay for the employees whose work schedule was canceled? While admittedly, the proposed regulations provide an exemption for rescheduling due to an "act of God," the term "act of God" is not defined and therefore open to interpretation. If the Department believes that weather-dependent businesses should be exempt from the new regulations, such should be clearly stated within the regulations.

No Exemption for Small Businesses

While this mandate will have substantial impact on all businesses, it will have a significant negative impact on small businesses. While national chains and big box stores have thousands of employees, most small businesses operate with far less employees. An employee calling in sick for a national retail store will cause less disruption and scheduling issues than an employee calling in at a small business that employs less than 10 individuals. Presumably, in this type of situation, the small business owner would either have to cover the shift themselves, or call in another employee to fill the shift. Under the proposed regulations, if an employee was called in to cover the shift as described above, the employer would have to pay the employee the additional call-in rate along with their regular wage. Penalizing a business for scheduling issues beyond their control is excessively punitive. Moreover, the regulation could inadvertently create a hostile work environment that makes it harder for an employee to take time off, call in sick or ask for time to take care of a sick child. An exception should be made for small businesses. Even in areas that have adopted laws pertaining to call-in pay -- (e.g., New York City) there have been exemptions and it only applies to certain business sectors.

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Lack of Public Awareness of Proposed Regulation

I am concerned that many business owners are unaware of the potential changes being considered by the Department. Given the fact that they employ a significant amount of New York State's workforce, it is essential that small businesses are (i) aware of these potential changes and, (ii) given the opportunity to provide input on how these regulations will impact their business. Likewise, consumers should have an opportunity to review this proposal. Businesses can only make so many efficiencies in their operations and implementation of this regulation will increase the cost of consumer goods and services.

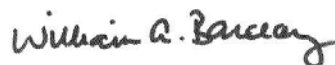
To illustrate this point, currently, in my district, we are dealing with record high snowfall. Many residents and businesses depend on companies for snow removal. If these regulations were in effect and snow removal companies were subject to the call-in pay rates and the other provisions under this regulation, it would be safe to assume that the cost to provide snow removal would be dramatically more for the consumer.

It is for these reasons that I urge the department to extend the 45 day public comment period on these draft regulations and to not act on them until more public hearings and public input is received.

Conclusion

Recent national reports indicate that New Yorkers are leaving the state at an alarming rate. The migration can be attributed to a poor economy in Upstate New York. High taxes and overregulation have stagnated the economy. Unlike other areas of the state, the rebound from the recession has been at a much slower pace. I am concerned that the proposed regulation will only further stress a region that is already in desperate need of good paying jobs, increase the cost of consumer goods and services and will be overly burdensome for businesses. I urge the department to not implement the regulation as currently written.

Very truly yours,



William A. Barclay
Member of Assembly

WAB/jc
