

**Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not required because changes made to the last published rules do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The NYS Justice Center for the Protection of People with Special Needs (the Justice Center) received two comments from the public in response to the Notice of Proposed Rulemaking that appeared in the August 8, 2018 edition of the State Register regarding proposed regulations governing the process by which service recipients may be interviewed when they are victims or witnesses to abuse or neglect.

One comment received by the Justice Center raised concerns that both the language allowing for an interview to proceed when it would be clinically contraindicated as well as the involvement of a personal representative lacked clarity. While the Justice Center does not believe the language has or will lead to confusion in practice, the language has been amended to more clearly specify the protocols in both of these provisions.

Another comment received by the Justice Center was that the use of the term "existing standards" when reviewing a service recipient's objection to personal representative notification could be made clearer due there being multiple standards regarding individual capacity in decision making. The language has been amended to refer to the standards utilized by the relevant state oversight agency of the program in which the individual is served.

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## Department of Labor

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### REVISED RULE MAKING NO HEARING(S) SCHEDULED

**Employee Scheduling (Call-In Pay)**

I.D. No. LAB-47-17-00011-RP

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following revised rule:

**Proposed Action:** Amendment of sections 142-2.3 and 142-3.3 of Title 12 NYCRR.

**Statutory authority:** Labor Law, sections 21(11) and 659(2)

**Subject:** Employee Scheduling (Call-In Pay).

**Purpose:** To strengthen existing call-in pay protections involving employee scheduling.

**Text of revised rule:** Sections 142-2.3 and 142-3.3 of 12 NYCRR are amended to read as follows:

§ 142-2.3 Call-in pay.

(a) *Call-in pay shall be provided as set forth below.*

(1) *Reporting to work.* An employee who by request or permission of the employer reports for work on any [day] shift 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] of call-in pay.

(2) *Unscheduled shift.* An employee who by request or permission of the employer reports to work for any shift for hours that have not been scheduled at least 14 days in advance of the shift shall be paid an additional two hours of call-in pay. Where an employer provides a weekly schedule, 14-day period referenced in this section may be measured from the last day of the schedule.

(3) *Cancelled shift.* An employee whose shift is cancelled by the employer shall be paid for at least two hours of call-in pay, if the shift is cancelled within 14 days, or for at least four hours of call-in pay if the shift is cancelled within 72 hours, in advance of the scheduled start of such shift.

(4) *On-call.* An employee who is required by the employer to be available to report to work for any shift shall be paid for at least four hours of call-in pay.

(5) *Call for schedule.* An employee who is required by the employer

to be in contact with the employer within 72 hours of start of the shift to confirm whether to report to work shall be paid for at least four hours of call-in pay.

(b) *Calculation of call-in pay.* Call-in pay shall be calculated as follows.

(1) *Actual attendance.* Payments for time of actual attendance shall be calculated at the employee's regular rate or overtime rate of pay, whichever is applicable, minus any allowances permitted under this Part.

(2) *Minimum rate.* Payments for other hours of call-in pay shall be calculated at the basic minimum hourly rate with no allowances. Such payments are not payments for time worked or work performed and need not be included in the regular rate for purposes of calculating overtime pay.

(3) *Offsets.* Call-in pay shall not be offset by the required use of leave time, or by payments in excess of those required under this Part.

(4) *Shorter work days.* The four hours of call-in pay for reporting to work and for cancelled shifts under paragraphs (1) and (3) of subdivision (a) of this section may be reduced to the lesser number of hours that the employee is scheduled to work and normally works, for that shift.

(c) *Applicability.* This section applies to all employees, except as provided below.

(1) *This section shall not apply to employees who are covered by a valid collective bargaining agreement that expressly provides for call-in pay.*

(2) *Paragraphs (2) through (5) of subdivision (a) of this section shall not apply to employees during work weeks when their weekly wages exceed 40 times the applicable basic hourly minimum wage rate.*

(3) *In addition, paragraphs (2) through (5) of subdivision (a) of this section shall also not apply to employees whose duties are directly dependent on weather conditions, or to employees whose duties are necessary to protect the health or safety of the public or any person, or to employees whose assignments are subject to work orders, or cancellations thereof; provided, however, that such employees also receive weekly compensation that exceeds the number of compensable hours worked times the applicable basic minimum wage rate, with no allowances.*

(4) *Paragraph (2) of subdivision (a) of this section (unscheduled shift) shall not apply to: (i) any new employee during the first two weeks of employment; or (ii) any employee who volunteers to cover a new shift or a previously scheduled shift. For purposes of this section, the term "new shift" shall mean the first two weeks of an additional shift that results in a net increase in staffing at a single workplace during the period of time covered by such shift; the term "previously scheduled shift" shall mean a shift that would not have been subject to unscheduled shift call-in pay if worked by the employee who was originally assigned to work that shift; and the term "volunteers" shall mean that the employee may refuse to cover the new or previously scheduled shift.*

(5) *Paragraphs (2) and (3) of subdivision (a) of this section (unscheduled shift and cancelled shift) shall not apply when an employer responds to weather or other travel advisories by offering employees the option to voluntarily reduce or increase their scheduled hours, so that employees may stay home, arrive early, arrive late, depart early, depart late, or any combination thereof, without call-in pay for unscheduled or cancelled shifts.*

(6) *In addition, paragraph (3) of subdivision (a) of this section (cancelled shift) shall also 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.*

(d) *Safe Harbor.* For purposes of paragraph (4) of subdivision (c) of this section, there shall be a rebuttable presumption that an employee has volunteered to cover a new or previously scheduled shift if the employer provides a written good faith estimate of hours to all employees upon hiring, or after the effective date of this section for previously hired employees, which may be amended at the employee's request or upon two weeks' notice by the employer, and if the request to cover a new or previously scheduled shift is either: (i) made by the employee whose shift would be covered; or (ii) made by the employer in a written communication to a group of employees requesting a volunteer from among the group and identifying a reasonable deadline for responses. If no employee volunteers prior to the deadline, the employer may assign an employee to cover the shift without the additional call-in pay required for unscheduled shifts.

§ 142-3.3 Call-in pay.

(a) *Call-in pay shall be provided as set forth below.*

(1) *Reporting to work.* An employee who by request or permission of the employer reports for work on any [day] shift 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] of call-in pay.

(2) *Unscheduled shift.* An employee who by request or permission of the employer reports to work for any shift for hours that have not been scheduled at least 14 days in advance of the shift shall be paid an ad-

ditional two hours of call-in pay. Where an employer provides a weekly schedule, 14-day period referenced in this section may be measured from the last day of the schedule.

(3) **Cancelled shift.** An employee whose shift is cancelled by the employer shall be paid for at least two hours of call-in pay, if the shift is cancelled within 14 days, or for at least four hours of call-in pay if the shift is cancelled within 72 hours, in advance of the scheduled start of such shift.

(4) **On-call.** An employee who is required by the employer to be available to report to work for any shift shall be paid for at least four hours of call-in pay.

(5) **Call for schedule.** An employee who is required by the employer to be in contact with the employer within 72 hours of start of the shift to confirm whether to report to work shall be paid for at least four hours of call-in pay.

(b) **Calculation of call-in pay.** Call-in pay shall be calculated as follows.

(1) **Actual attendance.** Payments for time of actual attendance shall be calculated at the employee's regular rate or overtime rate of pay, whichever is applicable, minus any allowances permitted under this Part.

(2) **Minimum rate.** Payments for other hours of call-in pay shall be calculated at the basic minimum hourly rate with no allowances. Such payments are not payments for time worked or work performed and need not be included in the regular rate for purposes of calculating overtime pay.

(3) **Offsets.** Call-in pay shall not be offset by the required use of leave time, or by payments in excess of those required under this Part.

(4) **Shorter work days.** The four hours of call-in pay for reporting to work and for cancelled shifts under paragraphs (1) and (3) of subdivision (a) of this section may be reduced to the lesser number of hours that the employee is scheduled to work and normally works, for that shift.

(c) **Applicability.** This section applies to all employees, except as provided below.

(1) This section shall not apply to employees who are covered by a valid collective bargaining agreement that expressly provides for call-in pay.

(2) Paragraphs (2) through (5) of subdivision (a) of this section shall not apply to employees during work weeks when their weekly wages exceed 40 times the applicable basic hourly minimum wage rate.

(3) In addition, paragraphs (2) through (5) of subdivision (a) of this section shall also not apply to employees whose duties are directly dependent on weather conditions, or to employees whose duties are necessary to protect the health or safety of the public or any person, or to employees whose assignments are subject to work orders, or cancellations thereof; provided, however, that such employees also receive weekly compensation that exceeds the number of compensable hours worked times the applicable basic minimum wage rate, with no allowances.

(4) Paragraph (2) of subdivision (a) of this section (unscheduled shift) shall not apply to: (i) any new employee during the first two weeks of employment; or (ii) any employee who volunteers to cover a new shift or a previously scheduled shift. For purposes of this section, the term "new shift" shall mean the first two weeks of an additional shift that results in a net increase in staffing at a single workplace during the period of time covered by such shift; the term "previously scheduled shift" shall mean a shift that would not have been subject to unscheduled shift call-in pay if worked by the employee who was originally assigned to work that shift; and the term "volunteers" shall mean that the employee may refuse to cover the new or previously scheduled shift.

(5) Paragraphs (2) and (3) of subdivision (a) of this section (unscheduled shift and cancelled shift) shall not apply when an employer responds to weather or other travel advisories by offering employees the option to voluntarily reduce or increase their scheduled hours, so that employees may stay home, arrive early, arrive late, depart early, depart late, or any combination thereof, without call-in pay for unscheduled or cancelled shifts.

(6) In addition, paragraph (3) of subdivision (a) of this section (cancelled shift) shall also 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.

(d) **Safe Harbor.** For purposes of paragraph (4) of subdivision (c) of this section, there shall be a rebuttable presumption that an employee has volunteered to cover a new or previously scheduled shift if the employer provides a written good faith estimate of hours to all employees upon hiring, or after the effective date of this section for previously hired employees, which may be amended at the employee's request or upon two weeks' notice by the employer, and if the request to cover a new or previously scheduled shift is either: (i) made by the employee whose shift would be covered; or (ii) made by the employer in a written communication to a group of employees requesting a volunteer from among the group and

identifying a reasonable deadline for responses. If no employee volunteers prior to the deadline, the employer may assign an employee to cover the shift without the additional call-in pay required for unscheduled shifts.

**Revised rule compared with proposed rule:** Substantive revisions were made in sections 142-2.3 and 142-3.3.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Michael Paglialonga, Department of Labor, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: regulations@labor.ny.gov

**Data, views or arguments may be submitted to:** Same as above.

**Public comment will be received until:** 30 days after publication of this notice.

#### Revised Regulatory Impact Statement

STATUTORY AUTHORITY:

Labor Law §§ 21(11) and 659(2).

LEGISLATIVE OBJECTIVES:

The Legislature, in adopting the New York State Minimum Wage Act, empowered the Commissioner of Labor to promulgate regulations as she "deems necessary or appropriate to carry out the purposes of this article and to safeguard the minimum wage" (L. 1960, Ch. 619, § 2, at Labor Law § 652(2) & (4)), to order "such modifications of or additions to any regulations as he may deem appropriate to effectuate the purposes of this article" (Labor Law § 659(2)), and to investigate hours worked (Labor Law §§ 660(b)(1) & 661).

The regulations to be amended. In 1960, based on the Legislature's delegation of authority, the Commissioner promulgated a new Minimum Wage Order for Miscellaneous Industries and Occupations (currently codified at 12 NYCRR Part 142) (hereinafter "the Wage Order"). The Wage Order contains "Call-in pay" regulations (12 NYCRR §§ 142-2.3 & 142-3.3) that require employers to pay employees who report to work for four hours of work or the amount of their regularly scheduled shift, whichever is less, at the applicable minimum wage rate.

Public hearings. In 2017, the Commissioner published notices of hearings pursuant to Labor Law § 659(2) soliciting public testimony regarding employer scheduling practices including "just-in-time," "call-in," or "on-call" scheduling for employees subject to the Wage Order. The Commissioner held those hearings on September 28, October 3, October 11, and October 17, 2017, in Albany, Binghamton, Buffalo, and New York City, respectively. Recordings of those hearings, and copies of written testimony received in connection with those hearings, are available online at [www.labor.ny.gov/scheduling](http://www.labor.ny.gov/scheduling).

The proposed rule. The proposed regulation amends the Wage Order's Call-in pay regulations (12 NYCRR §§ 142-2.3 & 142-3.3) to strengthen the protections for employees who report to work, who report for unscheduled shifts, who have shifts cancelled at the last minute, who are required to be on-call, and who are required to call-in to be scheduled for work. The proposed regulation includes provisions addressing the calculation and applicability of call-in pay under various circumstances.

NEEDS AND BENEFITS:

Testimony received through the four public hearings referenced above demonstrated that work schedule unpredictability has a detrimental impact both employees and employers.

Employers. Business and industry advocates agreed that many industries require flexibility and employers need a mechanism to adjust to unpredictable circumstances like an employee calling out sick, a worker leaving unexpectedly, delays in the delivery of materials or inclement weather conditions. For businesses, testimony pointed to a decrease in employee turnover and an increase in attendance and worker loyalty as likely benefits of predictable scheduling practices. In addition, these proposed regulations still allow employers, without an unfair burden, to contend with unforeseen issues, including severe weather, fluctuations due to seasonal demand and other market conditions like material supply and emergency situations.

Employees. Many workers and advocates described the precarious nature of jobs that involve schedules with little to no worker input, schedules that vary wildly day-to-day or week-to-week, and schedules that demand around-the-clock availability. Workers said they often do not find out until hours before their shift whether they will work that day and face involuntary rotation or shift extensions with little to no notice. Even as part-time workers, they must be ready to work during the amount of time equivalent to working a full-time job, but are not compensated and, in the end, do not actually work many shifts for which they're supposed to be available. The hearings revealed that low wage workers are most likely to contend with the difficulties of unpredictable work schedules as well as be severely impacted by unpredictable work scheduling practices that commonly involve announcing schedules less than a week, or sometimes less than a day, in advance. Additionally:

- Testimony at these hearings showed that unpredictable work schedules negatively impact workers' income, leaving them without the ability to

hold a second job – potentially having to turn down all other opportunities for outside income – or receive a reliable and predictable paycheck. These scheduling practices prevent workers from working full-time or making overtime, budget for recurring expenses and large purchases, pursue further educational opportunities like attending college classes, and securing reliable and affordable transportation.

- Testimony showed that workers were unable to predict childcare with employees sometimes being forced to pay in advance and lose that money if the need never materialized. Such scheduling practices also impacted their eligibility for supportive services like childcare subsidies and limited their access to high-quality and reliable childcare.

- Testimony also pointed to the inability to achieve an appropriate work-life balance with unpredictable schedules that cause stress and psychological distress, which has been shown to lead to unhealthy behaviors like smoking and excessive alcohol consumption. In addition, these practices made it more difficult for individuals trying to get their life back together (as a domestic violence survivor, for example) by eliminating dependable routines. Testimony pointed to problems workers had attending important family gatherings, buying tickets to events, and attending to their own or a family member's health needs.

- Testimony also showed that unpredictable scheduling is bad for business, resulting in high turnover, which leads to lost productivity and higher unemployment insurance contributions. This, in turn, can cause reduced morale and low customer satisfaction, which, in industries like home health care, can leave patients severely impacted. Today, sophisticated technology and algorithms has changed the nature of work and how workers are notified of work hours and require the state's regulatory framework to be updated to address and acknowledge the realities of modern working conditions.

- Testimony pointed to numerous benefits of increased predictability in scheduling, including stability in workers' lives as workers get more control and are allowed a voice in setting their own schedules. Workers would be compensated for the time they give up for the sake of the employer but retain the ability to have a flexible schedule if desired and the ability to swap shifts without employer intervention – all while participating in a transparent scheduling process.

The proposed regulation updates the Wage Order's long-established call-in pay regulations (12 NYCRR §§ 142-2.3 & 142-3.3) to protect minimum wage employees from unpredictable work schedule practices, while providing for appropriate exceptions for emergency and other unforeseen circumstances.

**COSTS:**

This proposed regulation does not impose any mandatory costs on the regulated community, as employers may avoid call-in pay by providing sufficient notice to employees of work schedules. Additionally, the requirements of the proposed regulation provide for exceptions for unforeseeable or unavoidable changes or delays in informing employees of their work schedule, including changes necessitated due to declared states of emergency and during the initial two weeks of an employee's employment. Furthermore, the revisions in the proposed rule provide for greater flexibility to employers who operate are subject to outside forces like weather (e.g., snow removal), at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or due to customer cancellations or last-minute orders, should not be required to pay employees additional money under such circumstances. Costs for employers who fail to comply with the requirements of the proposed regulation are limited to the payment of employees at their regular rate of pay for actual attendance at work and pay for other hours required by this proposed rule at the applicable minimum wage rate.

The Department of Labor also estimates that there will be no increased or additional costs to the Department, or to state and local governments to implement this regulation.

**LOCAL GOVERNMENT MANDATES:**

None. Employees of federal, state and municipal governments and political subdivisions thereof are generally excluded from coverage under the Minimum Wage Law and the Wage Order by Labor Law §§ 651(5)(n) and 12 NYCRR §§ 142-2.14(b) & 142-3.12(b).

**PAPERWORK:**

This rulemaking does not impact any reporting requirements currently required in either statute or regulation.

**DUPLICATION:**

This rulemaking does not duplicate, overlap, or conflict with any other state or federal requirements.

**ALTERNATIVES:**

There were no significant alternatives considered.

**FEDERAL STANDARDS:**

There are no federal standards relating to this rule.

**COMPLIANCE SCHEDULE:**

Employers who do not currently provide timely notice of scheduling changes will need up to 14 days to comply with this rulemaking. While no

schedule has been set, any future adoption will provide businesses with sufficient time to comply with the rulemaking.

**Revised Regulatory Flexibility Analysis**

**EFFECT OF RULE:** The proposed regulation amends the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR Part 142) (hereinafter "the Wage Order") to strengthen the Call-in pay regulation (12 NYCRR §§ 142-2.3 & 142-3.3) to protections for employees who report to work, who report for unscheduled shifts, who have shifts cancelled at the last minute, who are required to be on-call, and who are required to call-in to be scheduled for work. The rule includes provisions addressing the calculation and applicability of call-in pay under various circumstances, and the revisions in the proposed rule provide for greater flexibility to employers who operate are subject to outside forces like weather (e.g., snow removal), at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or due to customer cancellations or last minute orders, should not be required to pay employees additional money under such circumstances. The proposed rule does not apply to local governments.

**COMPLIANCE REQUIREMENTS:** Small businesses and local governments will not have to undertake any new reporting, recordkeeping, or other affirmative act, other than providing timely notice of scheduling changes, in order to comply with this regulation. The proposed revisions further assist small businesses and ensure that unavoidable costs can be avoided.

**PROFESSIONAL SERVICES:** No professional services would be required to effectuate the purposes of this regulation.

**COMPLIANCE COSTS:** The Department estimates that there will be no costs to the small businesses or local governments to implement this regulation, and the proposed revisions help to alleviate concerns about unavoidable costs for employers. See Regulatory Impact Statement, at Costs.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:** The regulation does not require any use of technology to comply.

**MINIMIZING ADVERSE IMPACT:** The Department does not anticipate that this regulation will adversely impact small businesses or local governments. Since no adverse impact to small businesses or local governments will be realized, it was unnecessary for the Department to consider approaches for minimizing adverse economic impacts as suggested in State Administrative Procedure Act § 202-b(1). Furthermore, the revised rulemaking helps to ensure that no adverse impact to small businesses will be realized by eliminating costs that could be difficult to avoid with certain types of work duties.

**SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:**

The Department does not anticipate that this rule will have an adverse economic impact upon small businesses or local governments, nor will it impose new reporting, recordkeeping, or other compliance requirements upon them. Nevertheless, small businesses and local governments had opportunity to participate in the rulemaking process by participating in public hearings that were held pursuant to Labor Law § 659 and by providing comment during the public comment period.

**Revised Rural Area Flexibility Analysis**

**TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:** The Department anticipates that this regulation will have a positive or neutral impact upon all areas of the state; there is no adverse impact anticipated upon any rural area of the state resulting from adoption of this regulation.

**REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:** This regulation will not impact reporting, recordkeeping or other compliance requirements.

**PROFESSIONAL SERVICES:** No professional services will be required to comply with this regulation.

**COSTS:** The Department estimates that there will be no new or additional costs to rural areas to implement this regulation. Furthermore, the revisions in the proposed rule provide for greater flexibility to employers who operate are subject to outside forces like weather (e.g., snow removal), at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or due to customer cancellations or last-minute orders, should not be required to pay employees additional money under such circumstances. The proposed revisions further assist small businesses and ensure that unavoidable costs can be avoided. See Regulatory Impact Statement at Costs.

**MINIMIZING ADVERSE IMPACT:** The Department does not anticipate that this regulation will have an adverse impact upon any region of the state. As such, different requirements for rural areas were not necessary. Furthermore, the revised rulemaking helps to ensure that no adverse impact to small businesses will be realized by eliminating costs that could be difficult to avoid with certain types of work duties.

**RURAL AREA PARTICIPATION:** The Department does not anticipate that the regulation will have an adverse economic impact upon rural areas nor will it impose new reporting, recordkeeping, or other compliance

requirements. Nevertheless, rural areas in the state had an opportunity to participate in the rulemaking process by participating in public hearings that were held pursuant to Labor Law § 659 and by providing comment during the public comment period.

#### **Revised Job Impact Statement**

**NATURE OF IMPACT:** The Department of Labor (hereinafter “Department”) projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this regulation. The nature and purpose of this regulation is such that it will not have an adverse impact on jobs or employment opportunities.

**CATEGORIES AND NUMBERS AFFECTED:** The Department does not anticipate that this regulation will have an adverse impact on jobs or employment opportunities in any category of employment. This regulation will apply to employees covered by the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR Part 142) (hereinafter “the Wage Order”) and will exclude workers who are covered by collective bargaining agreements that provide for call-in pay and workers whose weekly wages exceed 40 times the applicable minimum wage. The Wage Order covers all industries and occupations other than those that are covered by the hospitality and the building services industries. The Department’s Division of Research and Statistics estimates that just under one million employees will be covered by this regulation, based on the number of employees who work in industries and occupations other than hospitality and building service whose weekly wages do not exceed 40 times the hourly minimum wage.

**REGIONS OF ADVERSE IMPACT:** The Department does not anticipate that this regulation will have an adverse impact upon jobs or employment opportunities statewide or in any particular region of the state.

**MINIMIZING ADVERSE IMPACT:** Since the Department does not anticipate any adverse impact upon jobs or employment opportunities resulting from this regulation, no measures to minimize any unnecessary adverse impact on existing jobs or to promote the development of new employment opportunities are required. Furthermore, the revised rulemaking helps to ensure that no adverse impact to small businesses will be realized by eliminating costs that could be difficult to avoid with certain types of work duties.

**SELF-EMPLOYMENT OPPORTUNITIES:** The Department does not foresee a measurable impact upon opportunities for self-employment resulting from adoption of this regulation.

#### **Assessment of Public Comment**

The Department received comments following publication of the proposed rulemaking in the November 22, 2017 edition of the NY Register. The following represents a summary and analysis of such comments, and the reasons why any significant alternatives were not incorporated into the rulemaking. Generally, comments were received arguing against the adoption of the present rulemaking, and comments were received commending the Department for this proposal and urging its adoption.

##### **Comment 1:**

Very few employees earn 40 times the minimum wage on an hourly basis; this should be lowered.

##### **Response 1:**

The rulemaking does not apply to employees earning 40 times the applicable minimum wage on an hourly basis, but rather only to employees who earn less than 40 times the applicable minimum wage on a weekly basis.

##### **Comment 2:**

Shifts that were cancelled due to an employee calling in (e.g., sick) should not require payment to the employee who called in sick.

##### **Response 2:**

The rulemaking does not require any additional compensation for employees who call in or otherwise notify their employer that they will not be working a shift. Rather, additional payment is only required where the cancellation is due to the action or decision of the employer. Furthermore, the rulemaking has been revised to provide employers and employees with greater flexibility to provide coverage for scheduling changes that are outside of the employer’s control or through reasonable efforts by an employer to solicit volunteers to cover.

##### **Comment 3:**

Employers that operate subject to outside forces like weather (e.g., snow removal), at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or due to customer cancellations or last-minute orders, should not be required to pay employees additional money under such circumstances.

##### **Response 3:**

The Department has revised the rulemaking in response to this comment to provide an expanded exception for employees whose duties are (1) weather dependent, (2) necessary to protect the health or safety of the public or any person, or (3) subject to large or unpredictable orders from

customers and customer needs. With regard to orders from customers, such exception is limited to orders or requests from customers outside of the traditional retail or customer service setting, such as large print shop orders or last-minute events.

##### **Comment 4:**

The cost to implement and administer the rulemaking would be cost-prohibitive and harmful, including for employers that depend on negotiated or government funding, like Medicare-funded home health care and education, or for small businesses.

##### **Response 4:**

The Department has revised the rulemaking in response to this comment to provide greater flexibility for employers and to minimize or eliminate any required costs associated with this rulemaking. Such revisions provide for greater flexibility and options to eliminate unavoidable costs through proactive compliance measures by employers.

##### **Comment 5:**

Workers who desire or require additional flexibility to accommodate their last-minute scheduling needs could be harmed by a regulatory approach that increases employers’ costs and limits their flexibility.

##### **Response 5:**

As described above, the Department has revised the rulemaking in response to this comment.

##### **Comment 6:**

The exception in (c)(4) of the rulemaking (exempting employers who cease operations due to acts of god or circumstances outside of their control) should be expanded to apply to all of the scheduling requirements of the rulemaking and to include situations which could endanger the health or safety of any employee or person, or cause damage to property.

##### **Response 6:**

The Department has revised the rulemaking in response to this comment.

##### **Comment 7:**

The 14-day notice requirement is too long and will require, in practice, as much a 21-day notice.

##### **Response 7:**

The Department has revised the rulemaking to measure the 14-day requirement from the last day of the schedule, rather than from the start of the workweek so as to limit the requirement to 14 days, rather than requiring as much as 21 days.

##### **Comment 8:**

The Department should clarify what “voluntary” means within the context of an employee working a shift without the requisite advanced notice. Requests for employees to volunteer should be made in writing, as should the employee’s consent to such.

##### **Response 8:**

The Department has revised the rulemaking in response to this comment.

##### **Comment 9:**

The Department should reconsider the scope of employers within the coverage of this rulemaking to exclude non-profits and weather-dependent businesses.

##### **Response 9:**

The Department has revised the rulemaking in response to this comment.

##### **Comment 10:**

All employers should be required to provide a good-faith estimate of employees’ work schedules.

##### **Response 10:**

The Department has revised the rulemaking in response to this comment.

##### **Comment 11:**

The rulemaking will have a negative financial impact on employers, who may not be able to avoid last-minute schedule changes.

##### **Response 11:**

The Department has revised the rulemaking in response to this comment to provide employers with greater flexibility and to limit costs where additional pay would be required at no fault of the employer.

##### **Comment 12:**

Employees who are not designated as “heads of households” on their federal tax returns should be exempt from the rulemaking.

##### **Response 12:**

The Department disagrees as such status is facially irrelevant to the need for a predictable schedule and could have a potentially disparate impact based upon gender or other protected classes.

##### **Comment 13:**

The rulemaking should be amended to include an affirmative record-keeping obligation. Conversely, the rulemaking is onerous in that employers will need to keep records of all employee schedules and the records that support compliance with the rulemaking.

##### **Response 13:**

While no affirmative rulemaking requirement is included in the revised proposed rulemaking, employers are encouraged to keep and maintain additional records that can help demonstrate their compliance.

Comment 14:  
The rulemaking should apply to independent contractors as well.  
Response 14:  
This exceeds the Department’s rulemaking authority under Article 19 of the Labor Law.  
Comment 15:  
The effective date of the rulemaking should be delayed providing employers with time to comply.  
Response 15:  
The Department agrees, and any future adoption will provide businesses with sufficient time to comply with the rulemaking.  
Comment 16:  
Temporary staffing agencies should be exempted as their entire business model is based around last minute scheduling.  
Response 16:  
The Department has revised the rulemaking in response to this comment to provide employers with greater flexibility to respond to last-minute orders and customer requests.

Comment 17:  
It is not clear if the rulemaking preempts local laws, such as New York City’s Fair Workweek Law.  
Response 17:  
The preemptive effect of the rulemaking is a matter for the courts, not the Department.  
Comment 18:  
Students working for schools or non-profits should be exempted from the rulemaking.  
Response 18:  
Students working in a not-for-profit organization or institution are exempt from the Minimum Wage Order for Miscellaneous Industries, which contains the rulemaking, so long as the organization is organized and operated exclusively for these charitable, educational, or religious purposes, and they attend an institution leading to a degree or certificate.

Comment 19:  
The proposed rule is difficult for employers, many of them in the health care sector, who rely on government funding to operate.  
Response 19:  
The Department has revised the rulemaking in response to this comment to provide greater flexibility for employers and to minimize or eliminate any required costs associated with this rulemaking. Such revisions provide for greater flexibility and options to eliminate unavoidable costs through proactive compliance measures by employers.  
Comment 20:  
Employees who work shorter shifts will incur higher proportionate costs for cancelled shifts.

Response 20:  
The Department has revised the rule to provide for 2 hours of call-in pay if the shift is scheduled more than 72 hours in advance of the scheduled shift, or 4 hours of call-in pay if it is cancelled with less than 72 hours in advance. This should lessen the effect on employees who work shorter shifts.

## Office of Mental Health

### NOTICE OF WITHDRAWAL

#### Children’s Mental Health Rehabilitation Services

**I.D. No.** OMH-47-18-00003-W

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Notice of proposed rule making, I.D. No. OMH-47-18-00003-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on November 21, 2018.

**Subject:** Children’s Mental Health Rehabilitation Services.

**Reason(s) for withdrawal of the proposed rule:** Did not receive sign-off from RRU.

## Office for People with Developmental Disabilities

### NOTICE OF ADOPTION

#### Telehealth

**I.D. No.** PDD-32-18-00003-A

**Filing No.** 1092

**Filing Date:** 2018-11-26

**Effective Date:** 2018-12-12

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

**Action taken:** Amendment of Subpart 635-13 and Part 679 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b), 16.00; Public Health Law, sections 2999-cc and 2999-dd

**Subject:** Telehealth.

**Purpose:** To authorize telehealth as a new modality for the delivery of clinical services.

**Text of final rule:** • New paragraph 679.1(c)(4) is added as follows, and all remaining paragraphs are renumbered accordingly:

(4) *Providing access to clinical services to a person located in his/her residence or other temporary location via telehealth (see glossary) while the provider is located either at a main clinic site certified by OPWDD or at a certified satellite site (see glossary).*

- New subdivision 679.2(c) is added as follows, and all remaining paragraphs are renumbered accordingly:

(c) *Section 367-u of the Social Services Law provides that the commissioner shall not exclude from the payment of medical assistance funds the delivery of healthcare services through telehealth when the services are provided pursuant to section 2999-cc(3) of the Public Health Law and meet the requirements of federal law, rules and regulations.*

- New subdivision 679.2(f) is added as follows:

(f) *Section 2999-cc of the Public Health Law provides that health care services, which must include the assessment, diagnosis, consultation, treatment, education, care management, and/or self-management of a patient, may be provided via the use of electronic information and communication technologies between qualifying providers located at a distant site and a patient located at an originating site.*

- New subdivision 679.2(g) is added as follows:

(g) *Section 4406-g of the Public Health Law provides that a health maintenance organization shall not exclude from coverage a service that is covered under an enrollee contract of a health maintenance organization because the service is delivered via telehealth.*

- New subdivision 679.2(h) is added as follows:

(h) *Sections 3217-h and 4306-g of the Insurance Law provide that under an insurance policy that provides comprehensive coverage for hospital, medical or surgical care, said services shall not be excluded from coverage because the service is delivered via telehealth.*

- Existing subdivision 679.5(c) is amended as follows:

(c) *A clinic visit may include face-to-face service as defined by allowable Current Procedural Terminology (CPT)/Healthcare Common Procedure Coding System (HCPCS) and/or Current Dental Terminology (CDT) codes, or such allowable services provided via telehealth.*

- Existing subdivision 679.6(b) is amended as follows:

(b) *Each agency that operates a clinic treatment facility shall provide OPWDD information it requests, including but not limited to the following: services provided by CPT/HCPCS and/or CDT codes, where such services were delivered, including the location of both the provider and the individual when services are delivered via telehealth, (i.e., on-site or at a certified satellite site, or, prior to April 1, 2016, off-site) and revenues by funding source or payee. These data shall correspond to the identical time period of the cost report.*

- New subdivision 679.99(w) is added as follows, and all remaining subdivisions are renumbered accordingly:

(w) *Telehealth. The use of electronic information and communication technologies by a health care provider to deliver health care services to an individual while such individual is located at a site that is different from the site where the health care provider is located.*

- New subdivision 635-13.4(c) is added as follows, and all remaining subdivisions are renumbered accordingly: