NYSCWA POSITION PAPER

This memorandum is submitted on behalf of the New York State Car Wash Association in response to proposed regulations by the New York State Department of Labor on employee call-in pay requirements of the minimum wage order for miscellaneous industries and occupations.

These regulations would have a significant negative impact on car washes and many other small businesses, which are dependent on part time employees particularly when their work schedules are impacted by the weather.

The proposed regulations mandate that employers establish a schedule 14 days in advance for their employees. Predictive scheduling is intended to permit employees to effectively plan their schedules to adjust for childcare and other life responsibilities. This goal is particularly important for full time employees. However, the majority of the employees in the car wash industry are part time employees, mainly students, who are attracted to the flexibility of the work schedules. These employees have the ability to either accept or reject work opportunities without any consequence. The pool of part time workers available allows for this flexibility.

The proposed regulations expand the applicability of call-in pay based on the schedule requirement as follows:

- Employees that work a shift which is not scheduled in advance receive 2 hours of call-in pay
- Employees whose shift is cancelled within 72 hours of the start receive 4 hours of call-in pay
- In the case of an employee required to be available to any shift would be entitled to 4 hours of call-in pay
- In the case of an employee required to confirm within 72 hours of a shift to confirm whether to report would be entitled to 4 hours of call-in pay

The changes to call-in pay discourage either calling the part time employees for unscheduled work or cancelling a part time employee scheduled to work because of the requirement for additional compensation. Car wash operations are inextricably tied to weather conditions. Rain and snow virtually bring operations to a standstill. Without the ability to call off employees car washes would be required to carry substantial overhead costs without any return on this mandated expenditure. The margins in car washes don't allow for substantial overhead increases. Adding workers in situations where the demand is increased often as a consequence of weather would also be penalized by the additional compensation required. The call-in payments are a negative incentive to calling in part time workers, many of whom would be anxious to earn the additional income.

The increases in call-in pay follow the recent increases in minimum wages. Small business operators such as car washes are already adjusting to significant increases in personnel costs based on the escalation in minimum wages. The additional costs of call-in pay in the proposed regulations are being imposed on fragile businesses, which have made changes to their business models to account for compressed margins caused by minimum wage increases.

The net effect of the proposed regulations on car washes is to increase costs of operations and discourage operators from using part time workers. Car washes business plans would need to be significantly adjusted. Many car washes would change to automated operations with minimal employee headcount. This approach would negatively impact the part time workers, often students who depend on the schedule flexibility and additional income which they earn. Car washes would not invest in expansion of new locations, rather capital investment would be directed at converting current locations to automation.

The weather-dependent nature of the car wash business results in significant swings in the number of employees needed to staff a car wash. The flex schedule approach for car wash employees is critical to a car wash. A predictable schedule is not practical for car wash operations. Weather conditions dictate the number of employees that are required to effectively operate the car wash.

Predictive scheduling generates administrative costs for car washes and other small businesses. Payroll programs would need to be adjusted to implement the call-in pay requirements. Changes in schedule could not be negotiated among employees by trading shifts because there would be call-in pay consequences. The scheduling requirement would place the car wash operator in a difficult position in terms of changing a schedule without notice to give an employee time off. Allowing a student worker time off once the schedule is posted, would require the operator to pay a penalty for granting the schedule change to accommodate the employees while at the same time requiring the operator to pay the replacement additional call-in pay, despite the fact that the replacement volunteers to work to obtain the additional hours and pay. The argument for schedule predictability is not valid for weather dependent businesses with part time employees, many of whom are students. A 14 day schedule, which punishes flexibility with economic consequences, is not appropriate for either the employees or the car wash industry. Any schedule changes would have to be monitored and accurately reported, adding new recordkeeping requirements. The Department of Labor would audit work schedules and the resulting payrolls. This change creates administrative and payroll costs not currently borne by carwash operators.

The proposed regulations go beyond the other predictive scheduling statutes, which have been adopted by other municipal jurisdictions and Oregon. These predictive scheduling laws apply to larger retail and fast food employers. The recently enacted Oregon law covers non-exempt employees in food service, hospitality and retail industries operating in Oregon that have at least 500 employees worldwide. The New York City ordinance on predictive scheduling which became effective on November 26 applies to retail companies with more than 20 employees in New York City and to fast food establishments, which are part of a chain with at least 30 locations nationwide. Unlike the current laws, these regulations extend to small businesses without any consideration of their business model and whether employees were negatively impacted.

The regulatory flexibility analysis accompanying this proposed regulation indicates that the Department of Labor does not anticipate that the regulation will adversely impact small businesses. Despite the fact that the Department of Labor's primary mission is to protect employees, there is no substantive justification for arriving at the conclusion there is no adverse impact on small business.

The proposed regulation negatively impacts the car wash industry in New York State since it burdens car washes with undue additional costs for personnel and administration, it negatively impacts car washes ability to react to weather related events, it requires changes to the business plans of car washes, and it limits schedule flexibility for employees.