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These comments are submitted with respect to the revised rule making on employer scheduling (call in pay) published in the 12/12/18 New York State Register on behalf of the New York State Builders Association.

The changes made to the referenced regulations do not respond to the issues raised by the New York State Builders Association which represent the interests of residential builders, remodelers and their subcontractors.

The revised regulations do not apply to employees whose duties are directly dependent on weather conditions. The assessment of public comments specifically point, to snow removal as an application of this concept of directly dependent on weather. There is however no further explication of specific situations, which would be covered under the exemption. There is a lack of clarity as to its application to construction activities. For example does this exemption apply during rain, snow or wind events such as: employees pouring concrete for a foundation or basement, framing for a residential home or roofing installation. Broadly in cases where safety concerns arise where workers are engaging in outdoor construction activities using ladders or scaffolding such as painting carpentry or masonry work where weather conditions impact the conditions of the ground from a safety perspective. A more specific standard should be set forth so that the builder, remodeler or subcontractor has sufficient guidance to determine whether an exemption is available. Specific standards with defined parameters are positive for both the employer and employee.

The exemption provided in the case of employees whose weekly wages exceed 40 times the basic minimum wage is problematic because it appears to be applied on a weekly basis. This results in the anomaly where an employee may significantly exceed the minimum wage for 40 weeks but in the 49th week works only two days and would be covered under the terms of this regulation. There should be a gross annual salary which is applicable to avoid a situation where an employee doesn't work a full week but is captured in the regulation despite a annual salary would exceed the minimum wage on an annual basis.

The vast majority of construction workers are paid in excess of the minimum-wage. There are however situations which arise in construction work, when jobs are completed in less than a week and there is not another construction job immediately available for that employee. A break in available work or a small job may result in a situation where an employee compensated in excess of the minimum wage works less than a week. And their weekly income level triggers the application of this regulation. For example a job is completed prior to its projected date of completion, an employer would be required to maintain a schedule to meet those circumstances in the event a scheduled workday was cancelled. This places an unnecessary administrative burden on the employer in the case of employees who on an annual basis are compensated in excess of the minimum-wage.

The revised regulation also provides an exception for employees whose assignments are subject to work orders or cancellations of work orders. The public comments expound on this by stating that it is limited to orders or requests from customers outside of the traditional retail or

customer service setting such as a large print shop orders or last-minute events. The homebuilder, remodeler and subcontractors business is based on work orders as contained and described in construction contracts, including contracts with suppliers delivering construction materials necessary to perform the work. Work orders in the construction industry are subject to changes and cancellations. The fundamental premise of any construction contract is the completion of a work order whether that involves construction of a new home, roof or kitchen. Residential construction should be exempted from the application of this regulation since it clearly is outside the scope of traditional retail. However the regulation is not sufficiently clear as to what a work order is defined as.

Unlike retail where stores are open on a regular schedule, construction work is subject to a variability based on the number of factors, which are not subject to control by the contractor, including weather, availability, and delivery to the job site of materials necessary to perform the required work, necessity for inspection of work by building code officials and the necessity of obtaining permits prior to the commencement of certain work, delay in performance by a subcontractor or supplier prior to undertaking the next phase of work on a construction project, a change order by the customer in the design or job specifications or a requested change by the customer in the completion schedule for the project. Workers are often at a multiple job sites and some work is done on an emergency basis. The variables, which exist in construction, are not found in the retail environment. Particularly since the work is performed at the direction of the customer through work orders contained in the construction contract which are not within the full control of the contractor, remodeler or subcontractor. Construction work is subject to many

variables including the customer requirements, which make it difficult to adhere to a predictive schedule.

The revised regulation should be clarified to ensure that the residential builders, remodelers and subcontractors are definitely included under the exemptions previously cited herein.