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FORMAL TESTIMONY BEFORE SENATE COMMITTEE ON COMMERCE, ECONOMIC DEVELOPMENT AND SMALL BUSINESS AND SENATE ADMINISTRATIVE REGULATIONS REVIEW COMMITTEE

JANUARY 4, 2018

First, let me thank Senator Jacobs and Senator Boyle for inviting me to testify this morning. As said, my name is Mike Durant, the State Director for the National Federation of Independent Business (NFIB).

NFIB represents nearly 11,000 small and independent businesses across New York. We appreciate the opportunity to comment and express concerns about issues impacting our members. More specifically, small business owners are alarmed regarding the proposed new regulations relative to predictive scheduling or “call-in pay requirements”.

On September 9, 2017, Governor Cuomo announced that the State Department of Labor would be conducting hearings on the issue of “on-call” or predictive scheduling. He urged any new regulations to be sensible, and without a clear indication of what the Governor and Department of Labor were specifically considering, the public was asked to comment on the concept.

And to be frank, small business was skeptical of this process and doubted that it would result in fair examination of the impact on both employers and employees. Given the Governor’s track record with using the wage boards, small business was concerned about due consideration. Their experience in the past makes them troubled that these processes are folly and already have a predetermined conclusion.

On October 12, 2017 NFIB submitted our formal comments on the concept of “on call” or predictive scheduling. We strongly urged the Department of Labor to consider the vast differences between small business and large employers. We detailed our concerns and provided explanation showing a “one-size fits all” approach disproportionately impacts small employers.

Among those concerns we stated:

- Many small businesses lack formal human resource operations; most small businesses contract these services out.
- Small business contends with a lower market to offer their goods and services in addition to operating with tighter profit margins compared to big box stores and national brands.
- Small business, in most instances, have less employees thus less flexibility when unforeseen issues arise and frankly cannot anticipate needs weeks in advance.

- We also have noted that New York currently requires employees be paid a minimum for showing up to work at an employer's request. In fact, New York's current standards exceed the federal Fair Labor Standard's Act, which guarantee a minimum wage for all hours worked and overtime pay after the fortieth hour worked in a week.

In addition to detailing reasons small employers are unique, we pointed out that other states and municipalities have recognized this fact. We also encouraged the Department to examine the methodology that Oregon and other municipalities use related to enacting any new regulations. For example:

- Oregon recently enacted their "Fair Work Week Act" which requires employers in the retail, foodservice and hospitality industry to give their employees seven days written notice of scheduled shifts and at least 10 hours of rest between shifts. This law only applies to employers with at least 500 employees worldwide.
- In 2017 Seattle enacted a local ordinance limited to retail and food establishments that employ more than 500 employees worldwide.
- San Jose has a local statute that exempts businesses with 35 or fewer employees. San Francisco's law applies to businesses with 20 or more employees and have more than 20 locations.
- Even the legislation proposed in New York, which has not passed (S.3486/A.2007) exempted small business with fewer than 50 employees, and the sponsor's memo clearly indicated the need to be mindful of potential negative small business impact.

We have and continue to state that any new "on-call" or predictive scheduling regulations should have a small business exemption, and we are disheartened that the Department has once again neglected to consider the unique nature of small employers with the proposed regulations. Further, given the multitude of small businesses across every industry that will be negatively impacted by this proposed regulation, it seems that the Department also has ignored the Governor's directive that any new regulations should be "sensible."

Please note, these proposed regulations cover ALL employers apart from farms, hospitality employers, non-profit employers and the building service industry.

There are countless scenarios that require flexibility on the part of the small business owner and employees. For example, what happens when an employee calls in sick or goes out on paid leave? How about what happens when an employee submits an impromptu vacation request or has a family emergency, and a current employee does not volunteer to cover the shift?

Consider the small manufacturer that could, at any given moment, suffer a mechanical breakdown that impacts employees' ability to work. Or consider the ice cream stand when the machine that produces the ice cream breaks down. The employer is required to pay employees' wages for shifts not worked when the situation is not foreseeable and not within the employer's control.

While failing to protect the fragility of New York's small businesses, this proposed regulation also fails to recognize the large number of weather dependent businesses across New York and across various industries. How could a golf course, ski resort, home builder or landscaping business accurately predict employees' schedules two weeks in advance when their needs and ability to open for business largely is impacted by weather?

The regulations, as drafted, are impossible for weather dependent businesses to comply with. We acknowledge that the language in the regulations does exempt these businesses due to an "act of God"; however, that is open to interpretation. While rain and/or snow can be considered an "act of God," it is generally not hazardous weather but does in fact limit the ability of many employers to conduct business.

Further, we remain concerned with the mandate that all schedules must be put in place 14 days in advance and the 72-hour notice of shift changes or cancellations. Both requirements are onerous for small businesses, especially those operating without formal human resources departments, and we have encouraged the Department to consider eliminating such a requirement for small business or shortening the advance notice period.

Finally, any labor mandate of this magnitude that impacts small business and the workforce— which studies have shown values flexible working hours— should be debated and negotiated via the legislative process. While the regulatory process allows comments from various stakeholders, the final regulations will not be determined publicly elected officials charged with representing the very people that will be impacted by this regulation. The legislative process should not be circumvented with major issues such as predictive scheduling.

NFIB strongly encourages that any final regulations exempt New York's small employers. The financial and administrative challenges of this "one-size fits all" approach will be substantial. As we have described, other states and municipalities that have acted on this issue have recognized the negative impact on small business, and New York must do the same.