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Stabilizing Low-Wage Work: Legal Remedies for Unpredictable Work Hours & Income Stability

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STABILIZING LOW-WAGE WORK: LEGAL REMEDIES FOR UNPREDICTABLE WORK HOURS AND INCOME INSTABILITY

Charlotte Alexander,* Anna Haley-Lock,** and Nantiya Ruan***

Low-wage, hourly-paid service workers are increasingly subject to employers’ “just-in-time” scheduling practices. In a just-in-time model, employers give workers little advance notice of their schedules, call workers in to work during non-scheduled times to meet unexpected customer demand, and send workers home early when business is slow. The federal Fair Labor Standards Act, the main guarantor of workers’ wage and hour rights, provides no remedy for the unpredictable work hours and income instability caused by employers’ last minute call-in and send-home practices. This Article examines two alternative sources of legal protection that have received little attention in the literature on low-wage work: provisions in unionized workers’ collective bargaining agreements that guarantee a minimum number of hours of pay when workers are called in to or sent home from work unexpectedly, and state laws that contain similar guaranteed pay provisions. The Article concludes by assessing these tools’ effectiveness in reducing work hour fluctuations and income instability in low-wage, hourly service jobs.

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INTRODUCTION

Caleigh is a former employee at the flagship location of Abercrombie and Fitch, a chain of stores selling “casual, classic, All-American lifestyle ... clothing.”¹ She initially applied for a full-time job at the retailer, and began working four to five days per week.² However, her hours soon dwindled. She says, “I went from having four to five days a week ... to having only one day, which was ‘on-call.’ ... I would call to speak to a manager about it and they had no idea who I was because they have so many employees.”³ Some days, she would report for a scheduled shift, only to be sent home because the store was overstaffed. “I didn’t get paid for that at all. It was hard to work around that. You can’t make plans if you don’t get your schedule until the day before you work.”⁴

Bintou also works at Abercrombie and Fitch. She attends school full time, supports her high-school aged sister, and sends money to her family in Togo.⁵ Because she cannot rely on her hours at Abercrombie, she has been forced “to

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² Freleng, supra note 1.
³ Id.
⁴ Id.
take on a second job and at times skip classes to attend on-call shifts she [is] required to make in order to keep her job.”

Debbra, a support stock associate at lingerie and women’s apparel chain Victoria’s Secret, has struggled to pay her student loans with her unstable paychecks.7 In a petition to the retailer about its scheduling practices, Debbra and her co-worker Phillesia, a cashier, say, “Our hours fluctuate wildly, so we never know how much our paychecks will be, and since we don’t have guaranteed minimum hours, our hours are slashed without notice – leaving us unable to pay our rent, succeed at school, get promotions, or take care of our families.”

Low-wage, hourly-paid service workers like Caleigh, Bintou, Debbra, and Phillesia are increasingly subject to “just-in-time” scheduling practices.9 Rather than schedule a fixed number of workers in case their labor is needed, retail, restaurant, hotel, and other service-sector employers adjust staffing levels in real time, calling workers in to meet unexpected customer demand and sending them home early when business lags.10 A 2012 report on New York City retail workers, for example, found that only seventeen percent of workers had a set schedule, and seventy percent were given fewer than seven days’ advance notice

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6 Freleng, supra note 2.
8 Id.
of their work hours for the coming week.\textsuperscript{11} Other studies have found that restaurant owners and managers routinely send wait staff home before the end of their scheduled shifts when customer traffic is slow.\textsuperscript{12}

These cost-cutting practices transfer the risk of doing business from employers to their low-wage, hourly-paid employees. They have become more prevalent over the past decade as the economy has worsened, facilitated by the emergence of sophisticated data management and scheduling software.\textsuperscript{13} For example, the chief financial officer of restaurant chain Jamba Juice reports that “scheduling software ‘helped us take 400, 500 basis points out of our labor costs,’ or 4 to 5 percentage points, a savings of millions of dollars a year.”\textsuperscript{14}

The trend toward just-in-time scheduling joins the rise in part-time work and employers’ increasing use of temporary, contingent, and contract labor as indications that the traditional, stable, long-term employment relationship may be breaking down, to the detriment of the workers at the bottom end of the labor market.\textsuperscript{15} Already, 25.5 million workers in America are considered part-time, defined as working 34 or fewer hours in a week; 8.3 million are “involuntarily” part-time, representing those who want but are denied full-time hours.\textsuperscript{16} In addition, since the end of the recession in mid-2009, “almost one-fifth of the total job growth . . . has been in the temp sector,” in jobs which typically lack benefits, security, and a path toward promotion.\textsuperscript{17}


\textsuperscript{12} Haley-Lock, supra note 10, at 833 (“Numerous managers also acknowledged that they often sent scheduled waiters home, or called them to tell them not to come in, when business was unexpectedly slow.”).

\textsuperscript{13} See Nancy K. Cauthen, Scheduling Hourly Workers: How Last Minute, “Just-In-Time” Scheduling Practices are Bad for Workers, Families and Business, DEMOS 1, 1 (2011), http://www.demos.org/sites/default/files/publications/Scheduling_Hourly_Workers_Demos.pdf (“Used widely in the service sector, employers rely on scheduling software and measures of demand (such as floor traffic, sales volume, hotel registrations, or dinner reservations) to match workers’ hours to labor needs.”); Greenhouse, supra note 9 (describing increasing popularity of software tools such as Kronos and Dayforce that account for customer demand and even weather forecasts in setting staffing levels).

\textsuperscript{14} Greenhouse, supra note 9.

\textsuperscript{15} Gillian Lester, Careers and Contingency, 51 STAN. L. REV. 73, 74 (1998) (discussing “the most celebrated ‘crisis of work’ of the past decade,” “the perceived replacement of career employment with "contingent" jobs of limited duration, hours, or security”).


\textsuperscript{17} Michael Grabell, The Expendables: How the Temps Who Power Corporate Giants Are Getting Crushed, ProPublica (Jun. 27, 2013) (citing data from the Bureau of Labor Statistics and
As one in this panoply of strategies to cut labor costs, employers’ last minute call-in and send-home practices create two problems for low-wage workers: (1) unpredictable fluctuation in work hours and (2) income instability. Being sent home from work before the end of a scheduled shift reduces the labor hours on which workers had planned and deprives them of income on which they rely. The uncertainty created by employers’ last minute call-in and send-home procedures also impedes workers’ ability to arrange child and dependent care and to engage in long-term planning and saving. Moreover, employer-driven instability in total weekly hours can prevent individuals from maintaining the minimum work hours required to qualify for employer-provided fringe benefits such as health insurance and public benefits programs (e.g., Temporary Assistance for Needy Families benefits and child care subsidies), essential resources for many low-wage workers. The resulting logistical, economic, and emotional consequences for workers can be significant.

U.S. employers have wide discretion over establishing these conditions, and the federal Fair Labor Standards Act (FLSA), the main legal mechanism for assuring a wage floor for workers, does not reach this issue. Though the FLSA guarantees a minimum wage for all hours worked, requires overtime pay for more than forty work hours per week, and, in some narrowly-defined circumstances, requires pay to workers who are “on-call,” it does not establish minimum hours requirements or regulate schedule fluctuations. Nor does it offer protection to a worker who is given fewer work hours than she believed a job would provide.

This Article examines two approaches to regulating unpredictable work hours and income instability in low-wage workplaces: (1) contract terms in unions’ collective bargaining agreements (CBAs) that require “call-in pay” and “send-home pay,” and (2) statutes and regulations in some U.S. states, the District of Columbia, and Puerto Rico that contain similar minimum hours and pay requirements. Uncertainty in and of itself is problematic, even if it is a result of workers’ being called in to work extra hours (thereby earning extra income), because of the havoc it wreaks on workers’ ability to schedule their non-work lives. Julia R. Henly, H. Luke Shaefer & Elaine Waxman, Nonstandard Work Schedules: Employer- and Employee-Driven Flexibility in Retail Jobs, 80 SOC. SERV. REV. 609, 609–634 (2006); Susan J. Lambert, Anna Haley-Lock & Julia R. Henly, Schedule Flexibility in Hourly Jobs: Unanticipated Consequences and Promising Directions, 15(3) COMMUNITY, WORK & FAM. 293, 293-315 (2012); Lambert, supra note 10.

requirements. These contractual, statutory, and regulatory rules, referred to collectively here as “guaranteed pay provisions,” require employers to pay a minimum number of hours of wages (sometimes at a premium wage rate) to workers who are called in to or sent home from work unexpectedly. These hours guarantees apply even if workers do not actually perform that many hours of work: workers are usually entitled to the guaranteed minimum or their actual hours worked, whichever is greater.

By attempting to establish some predictability in work hours and income, guaranteed pay provisions are designed to protect workers’ expectations about when their time will be their own and when they will be required to work. They also create a financial disincentive for employers to shift the risk of business fluctuations onto their workforce through last minute scheduling changes. Interestingly, many of these guaranteed pay provisions significantly pre-date the current popularity of just-in-time scheduling practices. However, these legal remedies appear to be relatively under-utilized by workers. In addition, despite increasing scholarly and media attention to scheduling and work hour issues, there has been little recent focus on these tools for stabilizing low-wage work. This Article begins to fill that gap.


21 See, e.g., Walter P. Reuther, The United Automobile Workers: Past, Present, and Future, 50 VA. L. REV. 58, 73 (1964) (noting that the UAW union “established the principle[] of ‘call-in pay’ in 1939 and defining ’[c]all-in pay,’ otherwise known as ‘reporting pay’ [a]s a minimum guaranteed to employees who report for work as scheduled.”).

22 Media outlets and scholars have devoted significant recent attention to scheduling issues. See, e.g., Greenhouse, supra note 9 (discussing scheduling issues); Gus Lubin, Retail Workers Can’t Stand This Growing Management Trend, BUSINESS INSIDER (Jan. 17, 2012), http://articles.businessinsider.com/2012-01-17/strategy/30634343_1_shifts-schedule-worker (discussing variable schedules); LOW-WAGE AMERICA: HOW EMPLOYERS ARE RESHAPING OPPORTUNITY IN THE WORKPLACE (Eileen Appelbaum, Annette Bernhardt & Richard J. Murnane, eds., 2006); Nantiya Ruan, Same Work, Different Day: A Survey of the Last Thirty Year of Wage Litigation and its Impact on Low-Wage Workers, 28 HOFSTRA LAB. & EMP. L.J. (forthcoming 2013); Françoise Carré & Chris Tilly, America’s Biggest Low-Wage Industry: Continuity and Change in Retail Jobs (Inst. for Research on Labor and Emp’t, Working Paper 2009-6, 2008); Susan J. Lambert & Anna Haley-Lock, The Organizational Stratification of Opportunities for Work-Life Balance: Addressing Issues of Equality and Social Justice in the Workplace, 7(2) COMMUNITY, WORK & FAM. 181, 181-97 (2004); Henly, Shaefi & Wexman, supra note 19, at 609–34; Lambert, supra note 10, at 1203-27. However, the only comprehensive treatment of guaranteed pay provisions in either CBAs or state laws in the law review literature was written in 1984 and focused only on union contracts. Abrams & Nolan, supra note 21, at 867 (examining the way in which arbitrators handled labor disputes arising under CBAs’ guaranteed pay provisions).

23 A forthcoming companion article by authors Alexander and Haley-Lock presents the results of an original empirical analysis of send-home pay practices in retail stores in New York City, adding new insight about the impact of just-in-time scheduling on workers and the prevalence of such practices in the retail sector. The companion piece also places the problems of
Part I summarizes the social science literature on variable work hours and income instability and presents examples of call-in and send-home practices in the restaurant, retail, and hospitality sectors. Part II explores the impact on workers of unpredictable work hour fluctuations and income instability caused by “just-in-time” scheduling. Part III addresses the lack of coverage under the FLSA for the problems caused by call-in and send-home practices. Part IV describes the contractual, statutory, and regulatory protections offered by CBAs and state laws. Part V assesses these tools’ effectiveness and discusses additional possible strategies for reducing work hour fluctuations and income instability in low-wage, hourly jobs. The appendix offers a comprehensive list and brief summary of all state call-in and send-home pay laws.

I. JUST-IN-TIME SCHEDULING: CALL-IN AND SEND-HOME PRACTICES

Today’s just-in-time scheduling practices in service jobs had their origin in 1950s Japan as a way to eliminate waste in manufacturing.24 According to the just-in-time philosophy, “waste” is “anything other than the minimum amount of equipment, materials, parts, space, and workers’ time, which are absolutely essential to add value to the product or service.”25 In the manufacturing context, this means reducing the amount of inventory stored in warehouses, and instead “producing goods ‘just-in-time’ to meet customer demand.”26 In other words, “the aim of just in time . . . is to perfectly match the output of a manufacturing system to the needs of a market.”27 Wal-Mart has become synonymous with just-in-time inventory management strategies, famously receiving continuous deliveries of goods to its warehouses, “where they are selected, repacked, and then dispatched to stores, often without ever sitting in inventory. Instead of

unpredictable work hours and income instability in a comparative context, examining the effectiveness of scheduling protections and guaranteed pay provisions available under other countries’ labor laws.

24 Cem Canel, Drew Rosen & Elizabeth A. Anderson, Just-in-Time Is Not Just for Manufacturing: A Service Perspective, 100 INDUS. MGMT. & DATA SYS. 51, 51-60 (2000) (describing history of just-in-time manufacturing practices); Pei-Chun Lai & Tom Baum, Just-in-Time Labour Supply in the Hotel Sector: The Role of Agencies, 27 EMP. RELS. 86, 93-94 (2005) (“A pull scheduling technique, the kanban system (Japanese for card), employed in the [just-in-time] system seeks to ensure that preceding operations within the manufacturing chain only supply and produce as much as is needed by succeeding operations . . . Using the kanban system, JIT elements are produced to meet exact demand.”).

25 Canel, Rosen & Anderson, supra note 25; see also Nick Oliver, The Dynamics of Just-In-Time, 6 NEW TECH., WORK, AND EMP. 19, 19 (1991) (“At its simplest, a just-in-time system means simply that final assembly produces goods just-in-time to be sold; sub-assemblies produce goods just-in-time for final assembly; and bought out parts arrive from outside suppliers just-in-time to be fabricated into subassemblies.”).

26 Cauthen, supra note 13, at 3.

27 Oliver, supra note 25, at 19.
spending valuable time in the warehouse, goods just cross from one loading dock to another in 48 hours or less.”

Over time, the just-in-time philosophy migrated from inventory management to labor management, taking hold in the service sector and particularly in industries such as restaurants, retail, and hospitality that employ large numbers of low-wage, hourly-paid workers. As employment scholar Susan Lambert has observed, because jobs in these industries are “low-skill, non-production jobs,” “excess labor . . . cannot be absorbed by producing [additional] goods for inventory.” Instead, in employers’ eyes, “excess labor” in restaurants, retail stores, and hotels takes the form of service workers “sitting there and doing nothing.” As a result, in Lambert’s words, “pressures to quickly adjust work hours to demand [by adopting just-in-time scheduling models] are likely to be especially strong.” While employers strive to keep hours (and therefore payroll) to the barest minimum, they also have a strong incentive to tailor workers’ hours to fall short of forty per week, the trigger point under the FLSA for time-and-a-half overtime pay.

Though there has been no definitive study of the prevalence of just-in-time scheduling across the service sector, scholars of low-wage work assert that it is “absolutely common place.” A 2007 analysis of census data for all U.S. workers suggests that about six percent of full-time hourly workers had variable

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29 Cauthen, supra note 13, at 3 (“Service industries that rely on large numbers of low-wage hourly workers quickly adapted the [just-in-time] concept by calibrating employee work hours to closely match service demand. Adjusting work schedules week by week, day by day, and even hour by hour, employers seek to ensure they have just enough workers to meet the need of the moment.”).
30 Lambert, supra note 10, at 1209.
31 Lai & Baum, supra note 25, at 96.
32 Lambert, supra note 10, at 1209.
33 Id. at 1208 (“For example, when fixed costs are low, managers may keep headcounts high in order to avoid paying overtime or to maximize their ability to call workers in at the last minute.”); Carré & Tilly, supra note 23, at 12 (“Managers must sparingly manage their use of work hours and many retailers control manager access to overtime for hourly workers (paid time and a half for hours over 40.
hours, while almost eleven percent of part-time hourly workers’ hours varied.\textsuperscript{35} Studies of service jobs report much higher percentages. A report on retail employment notes that “[a]lmost 30 percent of workers report having schedules with variable start and end times,” and half of participants interviewed had schedules “posted with advance notice of 1 week or less.”\textsuperscript{36}

The mechanics of just-in-time scheduling tend to follow the same broad outlines across service jobs. An employer monitors consumer demand as it relates to its target labor costs, often assisted by tracking software.\textsuperscript{37} In a retail setting, these data may include “floor traffic or sales volume”; in restaurants and hotels, they might include meal and room reservations.\textsuperscript{38} Managers may consider annual, monthly, weekly, or daily demand trends; in fact, some large retailers monitor demand every fifteen minutes,\textsuperscript{39} while some restaurants analyze demand in thirty-minute increments.\textsuperscript{40} Using these data, managers estimate future demand and make staffing and scheduling decisions that are designed to maintain a “specified ratio of employee hours worked to [the designated] measure of consumer demand.”\textsuperscript{41} In theory, employers armed with such data should be able to make accurate demand predictions and schedule workers properly to maintain the designated labor-demand ratio. In practice, demand is often unpredictable, and so in response some employers make frequent changes to work schedules, calling staff in at the last minute and sending them home after they have reported for a shift.\textsuperscript{42}

\textsuperscript{35} Lambert, supra note 10, at 1208 (“Analyses of 2007 CPS data indicate that 5.7 percent of full-time, hourly workers and 10.6 percent of part-time, hourly workers report that their ‘hours vary’”).
\textsuperscript{36} Henly, Schaefer & Waxman, supra note 19, at 610.
\textsuperscript{38} Cauthen, supra note 13, at 1, 4.
\textsuperscript{40} In restaurants, employers often adjust staffing levels during the day, sometimes in half-hour or shorter increments, in order to achieve pre-determined ratios between labor and customer sales. Haley-Lock, supra note 10, at 833; Lambert, supra note 10, at 1212 (“Managers responsible for scheduling staff were given a base number of hours to distribute among employees. This initial number was calculated from projected sales (or traffic), commonly based on corporate projections derived from analyses of prior sales and current retail trends.”).
\textsuperscript{41} Cauthen, supra note 13, at 4.
\textsuperscript{42} Lambert, supra note 10, at 1213 (“For example, when sales were below expectations, managers reported that they might ‘save hours’ by not calling in a replacement when another sales associate called off work, or they might ask for volunteers to come in an hour later or leave an hour earlier another day, making the adjustment at least predictable.”).
For example, studies of restaurant employment in rural and urban Washington State and suburban Seattle and Chicago found that restaurant owners and general managers carefully monitored ratios between labor costs and customer sales, which fluctuated during as well as across shifts, days, and seasons.\footnote{Haley-Lock, \textit{supra} note 10; Anna Haley-Lock, \textit{The Structural Contexts of Low-Wage Work: Restaurant Employment Practices Across Firm Geography, Size, and Ownership Status}, 16 \textit{J. POVERTY} 447, 447-68 (2012).} An owner of a rural Washington restaurant had established a target of twenty-one percent as his labor cost to sales ratio.\footnote{Haley-Lock (2012), \textit{supra} note 45 at 458.} He or his manager on duty checked the ratio every thirty minutes and sent staff home to ensure compliance with the twenty-one percent figure. Similarly, an urban restaurant owner reported a goal of capping labor costs at thirty percent of sales, using the send-home practice to make adjustments as needed during the day.\footnote{\textit{Id.}}

General managers at two chain restaurants described similar practices. At one suburban location, wait staff stayed “if the restaurant [was] busy,” but went home “really quickly” if business slowed.\footnote{\textit{Id.} at 459.} This manager also retained a reserve of “on-call” waiters who went unpaid unless they were called in, but were required as a condition of employment to stay available for work in the case of an unpredicted uptick in customer traffic.\footnote{\textit{Id.} Part III, \textit{infra}, discusses the legal rules governing whether such on-call waiting time would be compensable under the FLSA.} Likewise, a manager at a rural chain location usually reduced wait staff levels every thirty minutes, starting with nine employees and going as low as four, if business proved slower than expected.\footnote{\textit{Id.}}

The retail and hospitality industries employ similar last minute call-in and send-home practices. A hospitality industry trade publication, for example, lists the following “real time control actions” over hotel employees’ schedules: “sending employees to or recalling them from break, extending the length of an employee’s shift . . . sending employees home early, [and] calling additional employees in to work.”\footnote{Thompson, \textit{supra} note 39, at 86. Likewise, a study of the use of just-in-time scheduling practices in the Scottish hospitality industry managers reported that such practices (along with using third party employment agencies to provide hotel staff) prevented workers from “sitting there and doing nothing.” Lai & Baum, \textit{supra} note 25, at 96.}

\begin{itemize}
\item[44] Haley-Lock (2012), \textit{supra} note 45 at 458.
\item[45] \textit{Id.}
\item[46] \textit{Id.} at 459.
\item[47] \textit{Id.} Part III, \textit{infra}, discusses the legal rules governing whether such on-call waiting time would be compensable under the FLSA.
\item[48] \textit{Id.}
\item[49] Thompson, \textit{supra} note 39, at 86. Likewise, a study of the use of just-in-time scheduling practices in the Scottish hospitality industry managers reported that such practices (along with using third party employment agencies to provide hotel staff) prevented workers from “sitting there and doing nothing.” Lai & Baum, \textit{supra} note 25, at 96.
\end{itemize}
before the shift, and then what do you do? I have also had the experience where I got to work and then they would say, ‘I don’t need you.’”

In just-in-time scheduling regimes such as these, work hours become like Wal-Mart’s inventory. Instead of sitting in a warehouse waiting to be purchased, Wal-Mart products are delivered from the manufacturer only when consumer demand requires. And instead of waiting in a restaurant, hotel, or retail store to serve customers, workers are called to work only when customers need to be served, and sent home when customer flow wanes. In this way, employers shift the risk of variable business trends onto their low-wage, hourly-paid workforce, using reductions in labor to absorb business losses.

II. IMPACT ON WORKERS

Employers’ risk-shifting creates two distinct problems for low-wage workers: (1) unpredictable fluctuations in work hours and (2) insufficient and unstable income. Both significantly and negatively affect low-wage workers’ ability to balance work and family responsibilities, as well as to manage financial obligations and budgeting.

First, unpredictable fluctuations in work hours can have “dire implications” for workers with “care responsibilities.” When workers with dependents are required to come in at a moment’s notice, they are put in untenable situations of finding last-minute coverage, paying premium rates for unplanned care, or leaving their charges without adequate supervision. When workers are sent home early after arranging care, they may face paying for that care even though they themselves are not earning wages.

Schedule fluctuations have also been shown to harm family dynamics. Studies have shown that families led by parents working unstable schedules are less able to follow consistent household routines, such as around children’s

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50 Lubin, supra note 22.
51 Carré & Tilly, supra note 22, at 1. Moreover, workers who are called in to work hours beyond their scheduled shifts often lose hours elsewhere, as employers seek to keep workers’ total labor hours part time or below the forty hour overtime threshold. Henly, Schaefer & Waxman, supra note 18 at 621 (“Given their poor economic circumstances, participants report that additional hours are often welcomed. However, some employees report that extra hours worked one day could result in shortened shifts on another. Employers thereby keep workers within the hourly range of part-time status or avoid the accumulation of overtime hours.”).
52 Though a last minute call-in can produce (desired) additional income, for the reasons explored in this Part, the uncertainty associated with unpredictable work schedules is problematic in and of itself. See note 18, supra.
homework completion and shared meals.\textsuperscript{53} Other research has reported statistically significant associations between parents’ working nonstandard hours and work-family conflict, marital problems, and fewer hours spent with children.\textsuperscript{54} Even for workers without caregiving responsibilities, fluctuating schedules can impede planning around education, secondary employment, transportation, and other personal obligations or avocations.\textsuperscript{55} Two of the workers profiled in this Article’s introductory paragraphs, for example, reported skipping classes or dropping out of school due to their changing work hours.

Second, just-in-time scheduling in the service sector endangers the income stability of an already vulnerable working population. Hourly-paid service workers’ earnings are already at the bottom of the wage scale\textsuperscript{56}; reductions in hours due to just-in-time scheduling keeps these workers in a constant state of “underwork,” assigned fewer hours, and therefore earning less income, than they want and need.\textsuperscript{57} Reductions in hours may also threaten workers’ eligibility for employer-provided fringe benefits like health insurance that are reserved for full-time employees.\textsuperscript{58} Moreover, send-home practices may reduce workers’ hours below the threshold required for public benefits programs such as Temporary Assistance for Needy Families and child care subsidies that act as a safety net for the working poor.\textsuperscript{59} Finally, the income instability caused by unstable schedules

\textsuperscript{53} Lambert, supra note 10, at 1204 (“For example, instability in work schedules can make it difficult to secure reliable child care and to establish family routines such as homework monitoring and regular mealtimes “); see also Henly, Shafer, & Waxman, supra note 18, at 610 (“Compared with working standard times, working at nonstandard times is linked to fewer hours spent in specific family activities such as eating meals together, homework supervision, and shared leisure time.”).

\textsuperscript{54} Henly, Shafer, & Waxman, supra note 18, at 610 (“For example, survey findings reveal that working nonstandard hours is statistically significantly associated with work-family role conflict, low marital quality and stability, and reduced time spent with children.”); Mark Tausig & Rudy Fenwick, Unbinding Time: Alternate Work Schedules and Work-Life Balance, 22(2) J. FAM. ECON. ISSUES 101, 101-19 (2001) (finding that greater stability in work hours improves work-life balance).

\textsuperscript{55} Henly, Shafer, & Waxman, supra note 18, at 610 (“Child-care centers and preschools almost exclusively operate on daytime schedules, leaving nonstandard workers to rely mostly on informal providers (especially relatives) and to package together multiple arrangements to match their variable work hours.”).

\textsuperscript{56} Characteristics of Minimum Wage Workers: 2012, BUREAU OF LABOR STATISTICS (Feb. 26, 2013), http://www.bls.gov/cps/minwage2012.htm (reporting that “three-fifths of workers earning the minimum wage or less in 2012 were employed in service occupations”).

\textsuperscript{57} Arne L. Kalleberg, The Mismatched Worker: When People Don’t Fit Their Jobs, 22 ACAD. MGMT. PERSP. 24, 24-40 (2008) (discussing the concept of underwork: “underworking is usually related to economic hardship and often does not lead to better jobs in the futures”).


\textsuperscript{59} See, e.g., PETER EDELMAN, SO RICH, SO POOR: WHY IT’S SO HARD TO END POVERTY IN AMERICA (2012).
can prevent workers from engaging in the sort of long-term budgeting and saving that might enable them to leave low-wage work entirely: establishing an emergency savings fund or retirement or education savings accounts. As one New York City retail worker comments, “I have been scheduled for as few as six hours in a week, and as many as 40, so my paycheck is always different. How is anyone . . . supposed to plan their budget with such erratic schedules?”

In some ways, the problems that just-in-time scheduling causes for low-wage, hourly workers may be seen as corollaries to the problems with work-life balance experienced by upper-income professionals, a topic that has recently received much popular attention. Many commentators have suggested increased flexibility around work hours and schedules as a way to address the conflict, particularly for professional women, between work and family obligations. Low-wage workers who experience the effects of just-in-time scheduling do, in fact, have flexibility, but it is flexibility by fiat, imposed externally by their employers with little to no input by the workers themselves. As work scholars Susan Lambert and Elaine Waxman have argued, this flexibility without control can be extremely harmful to workers: “Without control, variations in work hours are better characterized as introducing instability rather than flexibility into workers’ lives.”

III. THE FAILURE OF THE FLSA

Consider the worker at Urban Outfitters quoted in Part I: her employer would call her unexpectedly to work, “literally one hour” before she had to report to the store. The same worker would sometimes arrive at work, only to have her

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60 Lubin, supra note 22 (quoting a sales associate at clothing retailer Uniqlo).
62 See, e.g., Slaughter, supra note 61 (proposing flexible work arrangements to improve work-life balance). Pro-business lobbying efforts have also attempted to capitalize on the interest in flexibility to promote their desire to abolish overtime premium pay requirements under the FLSA. The “Working Families Flexibility Act,” or H.R. 1406, currently being considered in Congress, would allow employers to pay their workers nothing extra for overtime work, other than the promise of compensatory time that can only be used at the employer’s discretion. See http://www.govtrack.us/congress/bills/113/hr1406/text. As of the date of this Article, the bill passed the House but remained in the Senate for consideration.
64 Lubin, supra note 22.
employer say, “I don’t need you,” and send her home.65 Caleigh, one of the workers profiled in the introductory paragraphs, told a similar story: she would report to work, only to be sent home due to overstaffing.66 The federal FLSA, the main guarantor of wage and hour rights for workers, provides no remedy for the instability introduced by these sorts of call-in and send-home practices.

While the work of American laborers has evolved over the last century in myriad ways, the main federal statutory regime that regulates this work, the Fair Labor Standards Act of 1938, has not undergone major revision.67 “Passed as part of the New Deal legislation of the early twentieth century, the FLSA was enacted during a time when workers desired more leisure time away from their jobs but also wanted protection from job insecurity and unemployment.”68 The impetus during this time period was to employ more people, to “spread the work” across society, but also to create a minimum set of worker-protective labor standards.69 As President Roosevelt presciently testified in support of the FLSA’s enactment, “Overwhelming workloads, job insecurity, and conflicting job responsibilities in the nation’s workplaces pose a threat to the health of workers.”70

Today, eight decades after its enactment, the FLSA remains the primary source of wage protection for low-wage workers.71 The statute mandates a minimum wage,72 requires premium overtime pay for work exceeding forty hours per workweek,73 prohibits child labor,74 and requires employers to keep accurate time records.75 However, scholars debate the continued ability of the statute to address the problems faced by today’s low-wage workforce.76

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65 Id.
66 Freleng, supra note 2.
68 Ruan, supra note 22 at 2.
73 § 207(a)(1).
74 § 212.
75 § 211(c).
76 Ruan, supra note 22 at 3 (“Workplace scholars have disputed and questioned the continued viability of the FLSA, juxtaposing the need for employer flexibility, worker
Indeed, for many types of low-wage work, the FLSA does not apply at all. The FLSA’s minimum wage and overtime protections cover only employers of a certain size – enterprises with gross annual sales of at least $500,000 – or whose employees engage in interstate commerce.\(^7\) In addition, certain types of low-wage work are specifically exempted, including home health care workers, who are not covered by the minimum wage protection, live-in domestic workers, who are not covered by overtime pay,\(^7\) and agricultural workers, who are also exempt from overtime pay.\(^7\)

In addition, with narrow exceptions, the FLSA’s pay mandates apply only to work *actually performed*. The retail workers profiled above would therefore receive no compensation under the FLSA for having reported to work and then being sent home, as they never engaged in productive activity. Nor would they receive compensation under the FLSA for the disruption caused by their employers’ last minute calls to work.

In a narrowly-drawn exception to this rule, courts have permitted some workers who are “on-call” or “engaged to wait” by their employers to collect compensation under the FLSA for their waiting time. Although the FLSA was enacted in 1938, the U.S. Supreme Court recognized the principle that “inactive duty” may still constitute “duty” as early as 1913.\(^8\) Two seminal Supreme Court cases on the compensability of “on-call” time came in 1944, in *Armour & Co. v.*

...
Wantock\textsuperscript{81} and Skidmore v Swift & Co.,\textsuperscript{82} where the Court held that neither the FLSA nor common law precluded waiting time from counting under the statute as working time. Today, whether waiting time must be compensated under the FLSA depends upon the circumstances of each particular case and is a question of fact to be resolved by appropriate findings of the trial court.\textsuperscript{83}

In conducting this fact-intensive inquiry, courts consider a variety of factors, including the agreements between the parties, the restrictions placed on the worker by the employer, the degree to which the worker is free to engage in personal matters during the waiting time, any requirement that the worker remain on the employer’s premises or in a designated area, and, most importantly, whether the time spent waiting is predominantly for the employer’s or the worker’s benefit.\textsuperscript{84}

In one recent example, a hotel maintenance worker brought FLSA and New York state wage claims for unpaid wages and overtime pay where the worker was required to be “on-call” at the hotel many days and nights during each week.\textsuperscript{85} The worker was required to stay on the premises during the on-call time, and although he could socialize at the hotel while waiting for assignments, the court found that those facts were insufficient to render the on-call time his own.\textsuperscript{86} Concluding that the worker’s waiting time was essentially working time, the court awarded the worker over $350,000 in damages.\textsuperscript{87}

\textsuperscript{81} Armour & Co. v. Wantock, 323 U.S. 126 (1944).
\textsuperscript{83} FLSA Hours Worked Advisor: On-Call Time, DEP’T OF LABOR, http://www.dol.gov/elaws/esa/flsa/hoursworked/screenER80.asp (last visited July 24, 2013) ("Whether hours spent on-call is hours worked is a question of fact to be decided on a case-by-case basis. All on-call time is not hours worked."). The federal Department of Labor’s Wage and Hour Division provides an interpretative bulletin stating that under the FLSA, an employee must be compensated for “all hours worked,” which includes: (1) all time during which an employee is required to be on duty or to be on the employer’s premises or at a prescribed workplace; and (2) all time during which an employee is suffered or permitted to work whether or not the employee is required to do so. 29 C.F.R. § 778.223 (2013). Therefore, working time is not limited to the hours spent in “active productive labor,” but includes time given by the employee to the employer even when the time may be spent in “idleness.” Id. State wage and hour laws follow the same contours. See, e.g., ARIZ. ADMIN. CODE § 20-5-1202 (2013). Definitions “‘On duty’ means time spent working or waiting that is controlled by the employer and that is not permitted to be used by the employee for the employee’s own purpose.”

\textsuperscript{84} See, e.g., Renfro v. City of Emporia, 948 F.2d 1529 (10th Cir. 1991); Cent. Mo. Tel. Co. v. Conwell, 170 F.2d 641 (8th Cir. 1948); Campbell v. Jones & Laughlin Steel Corp., 70 F. Supp. 996 (W.D. Pa. 1947).
\textsuperscript{85} Moon v. Kwon, 248 F. Supp. 2d 201, 229 (S.D.N.Y. 2002) (“Moon claims that nearly all of the time spent at the hotel during the night-time hours is compensable, since he was ‘never off duty’ and often slept in the basement near the boiler, which interrupted his sleep.”).
\textsuperscript{86} Id. at 230.
\textsuperscript{87} Id. at 238.
Because “on-call” wage claims such as these are heavily fact-dependent, labeling particular types of waiting time as a priori compensable or non-compensable is difficult. However, three rough generalizations are possible. First, workers who are regularly employed, and for whom on-call or standby time is inherent in the nature of their job, may be compensated for that time. For example, courts have deemed compensable the time spent “engaged to be waiting” by private firemen, private security guards, watchmen, and messengers, but these holdings are mostly from the 1940s, 1950s, and 1960s. More recently, courts have been divided on the compensability of time spent waiting by public firemen and bus and truck drivers, and time spent by maintenance employees on-call or standby has mostly been held to be non-compensable.

Second, if a worker is regularly employed and is forced to spend time waiting due to unanticipated work stoppages, including mechanical and equipment breakdowns affecting mill operators, lumber workers, and truck drivers, that waiting time may be deemed compensable. Third, workers employed on an irregular basis, such as workers who report or call in and thereafter spend significant amounts of time voluntarily waiting for active work to become available, will not be compensated for this time.

At first glance, this departure from the FLSA’s focus on compensation for work actually performed would seem to open the door to claims by workers who are called into or sent home from work unexpectedly. Indeed, legal arguments could be made that many service workers in a “just-in-time” economy, who may be required to report to work at a moment’s notice, are functionally “engaged to be waiting” under the compensability factors. For example, Bintou, one of the Abercrombie and Fitch workers profiled in the Introduction, had to “attend on-call

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92 See, e.g., Wirtz v. Sullivan, 326 F.2d 946, 948-49 (5th Cir. 1964) (holding sawmill employees’ time spent waiting during breakdowns at the mill was compensable).
93 Irwin v. Clark, 400 F.2d 882, 883-84 (9th Cir. 1968).
shifts . . . in order to keep her job."94 Short windows of time for reporting to work, such as the one-hour advance notice described by the Urban Outfitters worker from Part I, also impede a worker’s ability to make her leisure time her own.

However, courts’ on-call determinations have not thus far addressed low-wage service workers subject to just-in-time scheduling practices. And given the trend in the judiciary to limit the compensability of on-call waiting time over the last several decades, the likelihood that courts will begin to compensate low-wage workers for the instability caused by unexpected call-ins and send-homes is slim.95 As one commentator has observed, “under the [FLSA], even in extraordinary circumstances, courts do not generally award compensation for time spent on call.”96 Winning on-call pay would likely be particularly difficult for hourly service workers who are subject to call-in practices, because many of them are never formally placed on on-call or standby status. As a result, there is never a clear set of restrictions placed on their time and location of the sort that courts recognize as indicators of compensable on-call time.97 Instead, workers are expected to make themselves generally available for a last minute call-in to work in order to keep their jobs.98

Given the FLSA’s shortcomings, worker advocacy has turned to state laws, as well as to negotiated collective bargaining agreements for workers in unionized workplaces. States and localities can go above the federal FLSA “floor” in providing additional protections,99 while unions are free to seek more worker-protective terms of employment as part of their contractual CBAs.

94 Freleng, supra note 1.
95 Part V, infra discusses a different possible interpretation of the FLSA’s on-call analysis to bring workers subject to call-in practices within the ambit of the statute.
96 See, e.g., Feigin, supra note 88, at 351.
97 See, e.g., Renfro, 948 F.2d 1529; Cent. Mo. Tel. Co., 170 F.2d 641, Campbell, 70 F. Supp. 996.
98 Lambert, supra note 10 at 1217 (describing employers’ expectation of workers’ “open availability”).
99 The FLSA expressly states that it does not preempt state or local laws granting broader minimum or overtime wage rights. 29 U.S.C. § 218(a) (2013) (“No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum work week established under this chapter….’’); see also 29 C.F.R. § 778.5 (2013) (stating same). Additional wage rights provided by some states include a minimum wage or overtime rate higher than that of the FLSA; (2) “daily” overtime for long work days; (3) “spread of hours” pay, such as one extra hour’s minimum wage pay for each day worked ten or more hours; (3) and statutory damages and attorney’s fees for any unpaid wages, not just for unpaid minimum or overtime wages. For example, California requires time-and-a-half pay not only as “weekly overtime” for weeks over 40 hours, but also “daily overtime” for days over 8 hours (even if that long day is not part of a week
Thus, whereas the FLSA would provide no remedy to workers like Caleigh and Bintou who are called in to and sent home from work at the last minute, they might look to two other sources for a legal remedy: contractual guaranteed pay provisions under their unions’ CBAs (if their workplaces are unionized), and their states’ guaranteed pay laws. Though these contractual, statutory, and regulatory protections provide a remedy for unpredictable fluctuations in work hours and income instability, they have been little examined in the literature on low-wage work, and may also be under-used by the workers whom they are meant to protect.

IV. UNION CONTRACTS AND STATE LAWS

Guaranteed pay protections in both union contracts and state laws fall into two categories: call-in pay, also known as call-back pay, and send-home pay, also known as reporting or show-up pay. Call-in protections require a minimum number of hours of pay, sometimes at a premium rate, for workers who are called to their jobs during times when they are not otherwise scheduled to work. Workers who are waiting in an on-call or standby status may also be eligible for a minimum number of hours of pay under call-in pay provisions when they are summoned to work. Workers who are called in are paid either for their actual number of hours worked or the guaranteed minimum, whichever is greater. Similarly, send-home provisions require a minimum number of hours of pay for workers who appear for a scheduled shift but are then sent home early due to a lack of available work or slow customer traffic. Again, workers are entitled to pay for the greater of their actual hours worked or the statutory, regulatory, or contractual minimum.

Both types of guaranteed pay provision protect workers’ expectations about their labor hours: “A call-in pay clause protects the employee’s expectation that leisure time will be available during off-duty hours. A send-home pay clause protects the employee’s expectation that work will be available during regularly scheduled hours.”100 Because employers’ last minute call-in and send-home practices disrupt these expectations, “[g]uaranteed pay provisions were demanded by unions [and enacted by state legislatures] to redress the unfairness of this
100 Abrams & Nolan, supra note 21, at 895 (“call in pay represents “the price of availability outside the employee’s regular shift”).
uncertainty.\textsuperscript{101} By establishing minimum pay requirements, guaranteed pay protections also create a disincentive for cost-minimizing employers to manipulate workers’ hours in response to changing customer demand.

This Part examines guaranteed pay provisions in CBAs and state statutes and regulations as written and as implemented in decisions by labor arbitrators, the National Labor Relations Board (“the Board”), and the courts. It considers the protections’ coverage, exceptions, and exemptions. The subsequent Part examines the effectiveness of state guaranteed pay laws in stabilizing low-wage work.

This Part does not address other possible sources of call-in and send-home protection: individually negotiated employment contracts (sometimes called employment or wage agreements), minimum pay guarantees voluntarily provided by employers, and arguments made under quasi contract or promissory estoppel legal theories. Though individualized contracts and voluntary pay guarantees may provide workers protection against unpredictable work hour fluctuations and income instability, they are not readily accessible for analysis. Moreover, though workers might bring a quasi contract or promissory estoppel suit to enforce an employer’s promises about work hours or scheduling, in the absence of a written employment contract with minimum hours guarantees (a rarity in low-wage, non-union workplaces), such a claim would likely be extremely hard to win.\textsuperscript{102}

A. Collective Bargaining Agreements

Call-in and send-home pay protections have appeared in union contracts since at least as early as 1939.\textsuperscript{103} In a 1969 decision, the Second Circuit characterized them as among “the most fundamental terms and conditions of employment,” alongside “wages, hours of work, overtime, severance pay . . .

\textsuperscript{101} Id. at 869.
\textsuperscript{102} See, e.g., Ayers v. Marsh & McLennan Cos., No. 2:03-2239, 2004 U.S. Dist. LEXIS 29103, at *6-7 (S.D. W. Va. Dec. 30, 2004) (describing a worker’s burden in such circumstances as “heavy”). In addition, the discussion in this Part is confined to non-salaried, hourly-paid employees. Though salaried workers may suffer some of the same inability to plan and disruption of expectations as a result of unpredictable work schedules as do hourly workers (giving rise, in part, to the work-life flexibility debates mentioned in Part II), they tend not to be covered by the call-in and send-home pay protections addressed by this Article. See infra notes 165-166 and accompanying text.
\textsuperscript{103} Reuther, supra note 22, at 73.
holidays, vacations, sick leave, [and] welfare and pensions.”

Today, they are extremely common union contract terms.

However, as discussed further below, both call-in and send-home pay provisions in union contracts usually contain exceptions. The contours of these exceptions influence employers’ operational decisions around matters that range from shift scheduling to plant maintenance, and can limit the provisions’ effectiveness in protecting workers. In addition, guaranteed pay provisions’ coverage has been interpreted in varying ways by labor arbitrators, the Board, and the courts. Because CBAs are contracts, they are interpreted according to contract principles designed to give effect to the intent of the parties, not necessarily to protect workers. Finally, because of the negotiated nature of CBAs, each guaranteed pay provision, and its interpretation, is somewhat idiosyncratic and may not be generalizable across low-wage workplaces.

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105 Abrams & Nolan, supra note 21, at 869 (“Call-in and reporting pay clauses are now included in a large majority of collective agreements.”).
106 Id. at 876 (“Under a reporting pay clause, parties to a collective agreement allocate the risk of potential loss when work is not available. When a guarantee is expressed without exceptions, management bears the total risk, including a monetary obligation to employees, when work cannot be provided to employees at their regularly scheduled times. Normally parties provide exceptions to their guarantee and thus share the risk when work is unavailable as a result of one of the excusing circumstances. The employees must bear their own loss of pay and the costs of reporting; management must bear its own loss from lack of production.”).
i. Call-in Pay

When workers are called in to work during a time when they are not otherwise scheduled for a shift, contractual call-in pay provisions require that they be paid a minimum number of hours, ranging between two and four, depending on the contract. Workers who are called in are entitled to the flat number of guaranteed hours even if they actually work fewer hours. If the call-in provision does not apply, then they are entitled only to pay for their actual number of hours worked. Call-in pay is sometimes at the worker’s regular rate of pay and sometimes at a premium rate. For example, a Steelworkers union contract’s call-in pay requirement mandates that:

If an employee is “called-back” to the plant for emergency work and performs such work during hours outside of his regularly scheduled work shift, he will be given a minimum of four (4) hours of pay at his straight time hourly rate, or pay for the time actually worked, whichever amount is greater.\(^{107}\)

Similarly, a contract between Verizon and the International Brotherhood of Electrical Workers requires “a minimum of two (2) hours at the overtime rate or for actual time worked, whichever is greater,” when a worker is “called for work after he has left the premises.”\(^{108}\)

In interpreting call-in pay provisions, courts, the Board, and arbitrators have tackled a threshold question: What counts as being “called in” to work? Adjudicators disagree on this point. Some have decided that workers who clock out, but remain on the employer’s premises to complete additional work, do count as being “called in.” Others require that workers physically leave the work site and then return in order to be “called in.” For example, a member of the Steelworkers union had clocked out and was in the midst of showering and changing at the plant when his employer asked him to “repair [a] broken-down crane.”\(^{109}\) He completed the repairs, working for 1.4 hours, and then requested the full four hours of call-in pay guaranteed by his union contract.\(^{110}\) The arbitrator held that the employer’s “request was an imposition on [the worker’s]
personal time whether or not he had left plant” and awarded him four hours of call-in pay.111

In contrast, in another case, an arbitrator denied call-in pay to an electrician who had completed his shift and was signaled to return to work as he was exiting the plant.112 His supervisor then “told him to come back to work as there was a problem which needed correction.”113 The worker complied, worked for thirty minutes, and then requested his full four hours of call-in pay.114 Reasoning that the contract guaranteed “call-out compensation upon the employee being ‘called out to work’ and ‘reporting for work,’” the arbitrator ruled that “where the employee is physically present on the Company’s premises,” he may not demand call-in pay, but is limited to pay for the hours he actually worked.115 Similarly, the Seventh Circuit has questioned a worker’s receipt of call-in pay when he stayed on the employer’s premises and continued working beyond the end of his shift.116 Other cases involving work completed at an employee’s home have adopted the same bright line rule involving the worker’s physical location: where the contract was explicit that call-in pay would only be triggered when the employee was called back to the work site, work performed at home did not count as call-in work.117

When a worker is properly called back to the employer’s premises, however, adjudicators are quite generous in granting call-in pay. For example, an arbitrator has held that workers called back to work to participate in disciplinary investigations are entitled to call-in pay. Applying the rules of contract construction, the arbitrator reached this decision “notwithstanding [the] employer’s contention that phrase ‘called back to work’ applies only to case when people are brought back to perform production activities; if there is to be exception to call out provision as for disciplinary meetings, it should be stated in labor agreement.”118 In addition, even if workers are called to a location other than the employer’s premises, but are asked to complete tasks that are typically

111 Id.
113 Id.
114 Id.
115 Id.
116 Fyfe v. City of Fort Wayne, 241 F.3d 597, 600 (7th Cir. 2001) (“It is unclear why Zettle received ‘call in’ pay instead of the regular overtime rate of time and one-half. ‘Call in’ pay, as we read the collective bargaining agreement, is required only when an employee is called to work by supervisors at a time when he or she is not otherwise scheduled to work. As Fyfe points out, there is no evidence that Zettle was called to work from home, as opposed to merely staying at work at the end of her shift to complete the spraying.”).
117 Dep’t of Veterans Affairs, 114 LA 1665 (2000) (Benedetto, Arb.).
118 Mobil Oil Corp., 76 LA 3 (1981) (Allen, Arb.).
considered part of the worker’s job duties, adjudicators have awarded call-in pay.\textsuperscript{119}

Finally, in order for a call-in provision to apply, workers need actually to accept their employer’s call in to work. Adjudicators have held that an employer’s call alone, if refused or unanswered by the worker, does not trigger the employer’s call-in pay obligation. For example, a service technician for a gas company was called at 5:00 a.m. and asked to report to work.\textsuperscript{120} He declined the call, and then requested the contractually-mandated two hours of call-in pay. An arbitrator denied the request, reasoning that a worker need actually respond to his employer’s call-in in order to be eligible for the call-in pay guarantee: “The Grievant was not assigned work, nor was his time otherwise restricted by the Company. Rather, the Grievant was given the option of accepting the assignment and he declined. Under these facts, the Grievant was not ‘called-out.’”\textsuperscript{121}

\textbf{ii. Send-home Pay}

Whereas call-in pay compensates workers whose expectation of leisure time is interrupted by a return to work, send-home pay compensates workers whose expectation of work is interrupted by a forced return to leisure, by being sent home after reporting for their scheduled shift.\textsuperscript{122} Send-home pay guarantees in collective bargaining agreements tend to range from two to eight hours, or sometimes a worker’s entire shift. As with call-in pay, workers who qualify receive the guaranteed block of hours, regardless of their actual hours worked. If they do not qualify for the guarantee, they are paid at their straight or overtime rate, whichever is applicable, for only their actual hours worked.

A Food and Commercial Workers union contract, for example, requires that employers pay “a minimum of two (2) hours pay at the regular straight-time hourly rate and shift premium, where applicable” to any worker “who reports for work for the scheduled work period (not having been previously notified not to report).”\textsuperscript{123} Likewise, a Teamsters contract requires that any employee who “reports for work at the beginning of his scheduled shift and who has not been

\textsuperscript{119} County of Somerset, 126 LA 1219 (2009) (Miles, Arb.) (awarding four hours of call-in pay to correctional officers subpoenaed to testify in legal proceedings, when testimony was considered part of officers’ jobs).
\textsuperscript{120} Southwest Gas Corp., 119 LA 1284 (2004) (Bognanno, Arb.).
\textsuperscript{121} Id.; see also Contract Clause Classification Outline, supra note 104 (No employee shall arbitrarily refuse to perform emergency duties (Verizon and Electrical Workers [IBEW])).
\textsuperscript{122} Admittedly, low-wage workers are likely not returning to “leisure” in the sense of rest and relaxation. The term is used here as a term of art, as distinguished from work time.
\textsuperscript{123} Contract Clause Classification Outline, supra note 104 (John Morrell & Co. and Food and Commercial Workers).
notified not to so report prior to his scheduled starting time shall be guaranteed a minimum of four (4) hours of straight-time pay at his regular hourly rate.”

Some send-home pay provisions are more generous: one Board decision refers to a CBA that required “show up pay for an entire shift where an employee is sent home soon after arrival” another contract requires send-home pay in four hour increments, so if an employee works for more than four hours, she is due eight hours of pay; another requires a full eight hours regardless of hours worked.

In adjudicating send-home pay disputes, courts, the Board, and labor arbitrators first tackle the threshold question of what counts as “reporting” for a scheduled shift, the trigger for the send-home pay requirement. As in the call-in pay inquiry, location matters. Workers who are merely held over from a previous shift for additional work obligations, and then sent home, cannot claim send-home pay, as they never “reported” for work in the first place.

In addition to location, adjudicators consider a variety of other factors in determining whether workers have properly reported for work before being sent home. In Arnold v. Cabot Corp., a CBA required two hours of send-home pay when workers reported for work and then were dismissed early. The plaintiff appeared for work wearing “street clothes” rather than his work attire, attended a safety meeting, and then had a discussion with his supervisor, which led to his taking a voluntary layoff. The employer refused to pay the two hours required by the CBA, arguing that the plaintiff did not intend to “report” to work when he

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124 Id. (National Material Co. and Teamsters).
126 Sullivan Transfer Co., 247 N.L.R.B. 772, 774 (1980). On January 19, Respondent received a letter from the Union, dated January 18, claiming that Respondent was violating the collective-bargaining agreement by failing to pay employees the guaranteed wage as provided in Article VIII, Section 2-B of the agreement, which provides for 2 hours show-up pay, a 4-hour guarantee if any work is performed less than 4 hours and an 8-hour guarantee if the employee works in excess of 4 hours.
127 New England Joint Bd. Retail v. Decatur & Hopkins Co., 677 F. Supp. 657, 658 (D. Mass. 1987) (a) If a full time permanent employee reports for work in accordance with his regular schedule without having been notified not to report for work, such employee shall be guaranteed eight (8) hours' work, or pay in lieu thereof, except where lack of work is caused by breakdowns, Acts of God, or circumstances beyond the reasonable control of the Employer. In case of severe snowstorm or plant closing, the Employer shall notify the employees as soon as possible, but in no event later than 6:00 AM via radio broadcast WHDH.”).
128 Abrams & Nolan, supra note 21, at 877 (“As might appear obvious, in order to qualify for reporting pay an employee must actually report for work. Reporting is ‘a condition precedent to compensation.’”).
131 Id. at *5-6.
appeared in his street clothes before being sent home.\textsuperscript{132} The court did not resolve this factual question, but did set out a series of relevant factors: “[What was] the custom and practice of the Cabot facility[?] For example, what was [the plaintiff’s] usual attire at work? What was the customary dress for those attending safety meetings? What does ‘report to work’ mean? Did [the plaintiff] refuse to start work or stop work of his own volition?”\textsuperscript{133}

Even if a worker properly “reports” to work before being sent home, contractual send-home pay guarantees commonly include exceptions and exemptions that relieve employers of their obligation to pay. These include notice, where the employer informs the worker that her shift is cancelled before she arrives at work; events outside the employer’s control that necessitate a send-home, such as inclement weather, machinery breakdown, and other “acts of God”; and a worker’s being reassigned to other work for the duration of her shift or, in the alternative, waiving her entitlement to reporting pay and volunteering to leave.

The first exception, notice, is oft litigated, with widely varying contractual requirements and outcomes.\textsuperscript{134} At one extreme, employers are merely required to use “good faith” or “reasonable” efforts to inform workers of a shift cancellation.\textsuperscript{135} These provisions do not require actual notice to workers, but instead focus on the efforts made by the employer. At the other extreme, contracts require actual notice to the worker within a designated time prior to the shift’s beginning, or specify in great detail the length and manner of notice. For example, some contracts require that the worker receive actual notice by telephone\textsuperscript{136}, by telephone, message, or radio announcement two hours before the shift begins, or by posting at the facility’s main gate sixteen hours before the shift begins. This may be quite important, as the court did not resolve this factual question.

\begin{footnotes}
\item[132] \textit{Id.}
\item[133] \textit{Id. at *18.}
\item[134] Abrams & Nolan, supra note 21, at 892. Many reporting pay provisions make reference to the issue of notice. Some of these clauses expressly oblige management to notify employees of the lack of work. Others excuse payment of the guarantee when management has used reasonable means to notify employees not to report. Still other clauses excuse the guarantee only if employees have received actual notice not to report. An arbitrator must read and apply the particular notification requirement or notice excuse adopted by the parties in order to resolve their reporting pay dispute.
\item[135] Contract Clause Classification Outline, supra note 104 (“Nor shall these provisions apply if the Company has made a good faith effort to contact an employee about the unavailability of work but is unable to do so.” (PMI Food Equipment Group and Metal Polishers)); \textit{id. (“Notification to Employees not to report means reasonable efforts by management to communicate with the Employee.” (Pittston Coal Group Cos. and Mine Workers)).
\item[136] Contract Clause Classification Outline, supra note 104 (“The provisions of this section [Reporting Pay] shall not apply, however, when the employee cannot be reached by telephone . . . .”) (National Material Co. and Teamsters)).
\end{footnotes}
begins\textsuperscript{137}; by announcement before the end of the preceding shift or “by telephone, telegraph, or visitation prior to the time [that workers] customarily leave their homes for reporting to work.”\textsuperscript{138} Some provisions also allow for notice by proxy, deeming sufficient notice given to a foreman\textsuperscript{139} or shop steward, provided that the intermediary is given enough time actually to notify the workers.\textsuperscript{140}

Though these notice provisions do not explicitly regulate employers’ scheduling practices, they do so indirectly. The more onerous a notice provision – the harder it is for an employer to give sufficient notice in order to escape send-home pay obligations – the more careful an employer might be in setting workers’ schedules. The more lenient a notice provision, the more likely an employer might be to play fast and loose with scheduling, and to change a worker’s schedule at the last minute. If, for example, an employer is exempted from send-home pay requirements only by making a good faith or reasonable effort to notify a worker of a cancelled shift, or merely by making a radio announcement, then the employer may be more willing to cancel shifts. These lenient notice provisions may undermine the effectiveness and deterrent power of send-home pay guarantees.

\begin{footnotes}
\footnote{\textit{Contract Clause Classification Outline, supra} note 104 (“In no event shall less than four (4) hours straight time pay be paid to an employee for reporting to work: (b) Unless notice is given to the employee by telephone, or by message, or by radio announcements at least two (2) hours prior to the beginning of his scheduled shift or by notice posted at the main gate time clock at least sixteen (16) hours before the start of such shift.” (Masonite Corp., Hardboard Div. and Machinists)).}

\footnote{\textit{Contract Clause Classification Outline, supra} note 104 (“Employees may be notified not to report for work either before leaving the facility on their preceding shift or by telephone, telegraph, or visitation prior to the time they customarily leave their homes for reporting to work.”) (Pirelli Armstrong Tire Corp., Special Products Div. and Steelworkers)); \textit{see also} id. (“In the event notice cannot be given one and one-half (11/2) hours before the scheduled starting time of the shift, those employees who report to their supervisor will be paid for not less than four (4) hours at the regular hourly rate.”) (Liggett Group Inc. and Bakery, Confectionery and Tobacco Workers)).}

\footnote{\textit{Contract Clause Classification Outline, supra} note 104 (“Notification through bulletin board or foreman shall be deemed sufficient and employees absent at time of notification shall not be paid as above [Report-in Pay] unless work is available.”) (Brown & Williamson Tobacco Corp. and Bakery, Confectionery and Tobacco Workers)).}

\footnote{\textit{Contract Clause Classification Outline, supra} note 104 (“Where notification to the men is required under this Agreement to the effect that work shall not be performed on a particular day, notification of such fact to the steward shall be sufficient notification to the men, provided the steward is permitted enough time during working hours to notify the men.”) (Construction Industries of Massachusetts Inc. and Laborers)); \textit{see also} Neenah Paper, Inc., 129 LA 637 (2011) (Kessler, Arb.) (finding that voice mail message left thirteen hours before shift eliminates employer’s reporting pay obligation”).}
\end{footnotes}
The second set of send-home pay exemptions and exceptions focuses on the reasons that workers are sent home from work. These exceptions apply when workers report to work, but their labor is not needed for reasons that are truly outside the employer’s control. As labor law scholars Roger Abrams and Dennis Nolan put it, “Parties to a collective bargaining agreement generally recognize these unusual situations—where it cannot be said that the employer mismanaged the scheduling of work—by including express exceptions to the send-home pay clause.”

Common exceptions include work stoppages and labor disputes, storms, flooding, fire, power or utility outages, machinery breakdown, and other “acts of God.”

Because the exempting event must be beyond the employer’s control, the question of employer control is a frequent subject of dispute, and influences employers’ operational decisions. For example, an employer may not claim an exception to a send-home pay requirement if workers are sent home due to electrical problems, where the employer had not had the electrical system inspected in twelve years. Likewise, where an employer opted into a utility contract that warned that service interruptions might occur without notice, the employer could not claim such service interruptions as a reason not to provide send-home pay to workers sent home as a result. Finally, an employer who

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141 Abrams & Nolan, supra note 21, at 879 (“The typical reporting pay clause includes exceptions to the guarantee of pay. Guaranteed pay clauses often include one or more general exclusions. For example, the guarantee may not apply when lack of work is caused by an act of God, a condition beyond the control of management, or an emergency situation. In addition to, or in lieu of, such general exceptions, reporting pay clauses may list more specific exceptions. For example, management may be excused from the pay obligation when the lack of work results from an equipment breakdown or a power failure. Other common exceptions excuse payment when employees are sent home because of weather, natural calamities, or a work stoppage.”).

142 Abrams & Nolan, supra note 21, at 871 (“Unforeseeable circumstances beyond the control of management may cause a lack of work. If a machine suddenly breaks down just before the commencement of the shift or if the independent trucker carrying raw materials has an accident on the road that morning, management cannot foresee or avoid the lack of work. Parties to a collective bargaining agreement generally recognize these unusual situations—where it cannot be said that the employer mismanaged the scheduling of work—by including express exceptions to the reporting pay clause. By agreeing to exceptions from the reporting guarantee, the workers have agreed to share some of the risks of doing business.”).

143 Contract Clause Classification Outline, supra note 104 (“The provisions of this section [Reporting Pay] shall not apply, however, . . . when the failure of the Company to provide work is caused by work stoppage, labor dispute, storm, flood, unavailability of power or utilities, fire or any other condition beyond the control of the Company.”) (National Material Co. and Teamsters); id. (“These provisions [Reporting Pay] shall not apply when work is unavailable because of reasons beyond the Company's control including power failure—plant or area, work stoppage, fire, explosion, flood, windstorm, or acts of God.”) (PMI Food Equipment Group and Metal Polishers); id. (Masonite Corp., Hardboard Div. and Machinists) (listing storm, flood, accident, power breakdown, machinery breakdown).

144 Metalloy Corp., 109 LA 1093 (1997) (Borland, Arb.).

sent workers home due to bad weather after they arrived for their shifts, but had made no earlier attempts to learn the weather forecast, could not claim an exception to send-home pay rules.\footnote{Thiokol Corp., 103 LA 1025 (1994) (Goodstein, Arb.).} These sorts of limits on the send-home pay exception may influence employers to proceed with prudence in making maintenance decisions, choosing suppliers, and monitoring the weather – all in an attempt to preserve their ability to claim a send-home pay exception.

Third, some contracts relieve an employer of send-home pay obligations if the employer reassigns a worker to other work for the duration of the shift. The worker must accept the reassignment in order to remain eligible for send-home pay, in case there is also insufficient work at the new job assignment.\footnote{Contract Clause Classification Outline, supra note 10 \textsuperscript{4} (“[t]o qualify for the reporting guarantee an employee must accept such work assignment as may be made by the Company”) (National Material Co. and Teamsters)).} Some contracts also allow workers to “individually waive [the send-home pay] guarantee and leave work upon being released” rather than be transferred to other work for the duration of their scheduled shift.\footnote{Collective Bargaining Agreement between SEIU Local 49 and Legacy Emanuel Hospital, July 1, 2011 to June 30, 2014, SEIU Local 49 Article 6 (2011), http://www.seiu49.org/files/2011/09/2011_EmanuelContract.pdf.}

Thus, the guaranteed pay requirements of CBAs offer protection for workers who are called in to or sent home from work unexpectedly. By penalizing employers who engage in just-in-time scheduling, these contract provisions may reduce the disruptions experienced by workers who are subject to last minute call-ins and send-homes. However, the strength of guaranteed pay requirements may be undermined by exceptions and exemptions. In addition, CBAs are idiosyncratic, a result of the negotiation process between a particular union and a particular employer. As such, any given call-in or send-home pay provision may not be replicable across workplaces. Finally, though unions and other labor advocacy groups have recently launched “sustainable scheduling” campaigns in an attempt to improve scheduling practices in the service economy, union density remains at historically low levels in the private sector, and is particularly low in service industries.\footnote{See, e.g., Steven Greenhouse, \textit{Share of the Work Force in a Union Falls to a 97-Year Low, 11.3\%}, NY TIMES, Jan. 21, 2013, http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html; Jenny Brown, \textit{Enough with the Just in Time Schedules, Say Retail Workers}, LABOR NOTES (Nov. 19, 2012), http://www.labornotes.org/2012/11/enough-just-time-schedules-say-retail-workers; Lubin, supra note 22; \textit{What You Need to Know About Erratic Scheduling: 5 Trends in Unpredictable Retail Scheduling}, RETAIL ACTION PROJECT, http://retailactionproject.org/advocacy/policy/erratic-scheduling/ (last visited July 24, 2013).} Indeed, many of the guaranteed pay provisions of CBAs described above come from manufacturing and
transportation, not service, unions. Thus, if unions cannot reach the majority of low-wage, hourly-paid service workers, then the guaranteed pay provisions of their CBAs may be of limited utility in addressing hours and income instability in low-wage work.

In addition to the guaranteed pay provisions of CBAs, some states and the District of Columbia have enacted laws that require call-in and send-home pay under certain circumstances. The following section provides an overview of these laws’ structures, highlights the most and least worker-protective, and discusses their interpretation by courts that have expanded or narrowed the laws’ coverage. Tables 1 and 2 in the Appendix provide an exhaustive listing of all state call-in and send-home pay laws.

### B. State Laws

Almost half of the U.S. states have passed laws that provide for call-in pay, and eight states, the District of Columbia, and Puerto Rico have enacted send-home pay laws. Like the call-in and send-home pay provisions in unions’ CBAs, many of these laws predate the current popularity of just-in-time scheduling. For example, New York’s call-in pay law was enacted in 1966, whereas Connecticut’s send-home pay law took effect in 1972. However, despite their age, these protections may be under-used by the workers whom they are designed to protect, as evidenced by the dearth of relevant court opinions.

#### i. Call-in Pay

States’ call-in pay laws generally resemble call-in provisions in union contracts, requiring a designated number of hours of pay for workers who are summoned to work during non-scheduled times. On one end of the spectrum,

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150 *See* Tables 1 and 2 in the Appendix for the full list of state laws. Statutes or regulations in twenty-one states and the District of Columbia require call-in pay and in eight states, the District of Columbia, and Puerto Rico require send-home pay. Montana is also listed in both tables, as a twenty-second and ninth state, respectively, but its regulatory language only takes effect where an underlying employment agreement requiring call-in or send-home pay exists between the employee and employer. In addition, certain federal executive branch employees are also entitled to call-in pay. 5 C.F.R. § 550.101, § 550.112 (“Irregular or occasional overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration for the purpose of premium pay, either in money or compensatory time off.”). Finally, some local ordinances provide for call-in or send-home pay. *See*, e.g., City of Aztec, AZ Personnel Policy, Rule 4.13 (June 2013) (requiring one hour of “show-up pay” for designated non-exempt employees who report to work when called out from off-duty status, but time spent is less than one hour”).

Delaware provides robust protection, requiring four hours of guaranteed pay at the regular hourly rate when workers are called in when not scheduled. Similarly, Connecticut requires four hours of straight pay when workers in certain industries are unexpectedly called into work, and New York requires the lesser of four hours or the number of hours in a regular shift, paid at the minimum wage. Other states provide three hours, and the majority of states require two hours of guaranteed pay, some at the regular hourly rate, and others at the premium time-and-a-half overtime rate. At the bottom end of the scale, two states provide one hour of guaranteed pay: New Jersey and Maryland. Finally, some state laws do not create specific hours guarantees, but instead leave the decision up to individual employers’ determinations, or provide only for called-in workers’ travel time, rather than a set number of hours.

Some states’ call-in pay laws apply only to particular categories of workers. A large majority apply only to state civil service employees, and

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152 See 19 DEL. ADMIN. CODE § 3001-5.16 (2013).
155 MICH. CIVIL SERVICE COMM’N REG. 5-4.4 (Michigan: requiring three hours of call-in pay for state civil service employees); N.H. CODE ADMIN. R. ANN. PER. 903.06 (2013) (New Hampshire: requiring three hours of call-in pay for state employees who are eligible for overtime).
158 See MD. CODE REGS. 17.04.02.12 (2013) (requiring one hour of call-in pay plus travel time).
159 N.M. ADMIN. CODE §1.7.4.15 (2013) (New Mexico: requiring a number of call-in pay hours for state employees established by each state agency); 25 N.C. ADMIN. CODE 1.D.1501, 1504 (2013) (North Carolina: requiring a number of call-in pay hours established by Office of State Personnel consistent with prevailing practices in the applicable labor market for state employees on on-call status).
160 ILL. ADMIN. CODE tit. 56, § 210.110 (Illinois: giving as an example of compensable time an employee’s travel time when she must report “in response to an emergency call back to work outside his/her normal work hours”); OR. ADMIN. R. 839-020-0045 (2013) (Oregon: requiring payment of any travel time “spent in excess of time spent in normal home-to-work travel” when an employee “has left the employer's premises or job site after completing the day's work and is subsequently called out to travel a substantial distance [defined as “beyond a 30-mile radius of the employer's place of business”] to perform an emergency job”).
161 See Tables 1 and 2 in the Appendix. Other states require call-in pay for sub-categories of state workers, often university employees. See, e.g., Univ. of Minnesota, Rules for Civil Service Employees, Rule 10.5.1 – 10.5.4, available at http://www1.umn.edu/ohr/policies/governing/civilrules/rule10/ (requiring 2 hours of call-in pay at overtime rate). Tables 1 and 2 do not include these call-in pay guarantees because they apply to relatively small groups of workers.
Connecticut’s law lists five specific industries to which call-in pay mandates apply.\textsuperscript{162} Further, some states allow call-in pay only for those employees who are held in an “on-call” status by their employers. In Arkansas, the District of Columbia, Oklahoma, and South Carolina, employees are guaranteed two hours if they are waiting “on-call” and are summoned to work.\textsuperscript{163} However, Nevada’s call-in regulation explicitly excludes any “[e]mployee who is called into work while on standby status,” as do the regulations of four other states.\textsuperscript{164} Finally, some states’ call-in pay laws apply only to those workers who also qualify for overtime under the FLSA.\textsuperscript{165} Though the line between overtime-eligible and -exempt workers is often subject to dispute, as a general rule, salaried workers with executive, administrative, or professional responsibilities are exempt from overtime, whereas eligible workers are those who hold front-line positions.\textsuperscript{166} Many states’ call-in pay laws cover only this latter category of workers, while some also allow overtime-exempt employees to collect call-in pay with approval by the employers.\textsuperscript{167}

In addition to excluding certain groups of workers, some call-in statutes and regulations contain other exemptions and exceptions. Nevada exempts employers from the call-in pay requirement not only if workers are already on standby status, but also if workers are called in within an hour of their shift’s start time, or if the time for beginning call-in work is set at the employee’s request.\textsuperscript{168} New Jersey exempts employers that have already given a worker “the minimum number of hours of work agreed upon” before the day of the call-in.\textsuperscript{169} Oklahoma allows employers to issue “compensatory time in lieu of cash payment” as call-in pay.\textsuperscript{170} Finally, as in union contract provisions, a worker’s location can determine her eligibility for call-in pay. Many state laws apply only when a worker has

\textsuperscript{162} See CONN. AGENCIES REGS. § 31-62-A2, B2, C2, D2, E1 (2013) (providing for four hours of call-in pay for workers in beauty shops, laundries, cleaning and dyeing operations, the mercantile trade, and the restaurant and hotel industries).

\textsuperscript{163} A.C.A. § 21-5-221(m)(3)(C)(i) (2012) (Arkansas); D.C. MUN. REGS. tit. 6 § 1137.6 (District of Columbia); OKLA. PERS. ACT §74-840-2.29 (Oklahoma); OKLA. ADMIN. CODE § 530:10-7-16 (2013) (Oklahoma); S.C. CODE REGS. 19-705.07 (2012) (South Carolina). North Carolina’s law applies to on-call state employees, but leaves the decision of the number of guaranteed hours to the employer. 25 N.C. ADMIN. CODE 1.D.1501, 1504 (2013).

\textsuperscript{164} NEV. ADMIN. CODE § 284.214 (2012); CAL. CODE REGS. tit. 8, § 11010(5)-11150(5) (2013) (California); KAN. ADMIN. REGS. § 1-5-25 (2013) (Kansas); MICH. CIVIL SERVICE COMM’N REG. 5-4.4 (Michigan); WAC 357-28-185 (Washington).

\textsuperscript{165} See, e.g., WY. COMPENSATION POLICY CH. 4 § 7 (2010); COLO. CODE REGS. § 4-801-3-44 (2013) (Colorado); 19 DEL. ADMIN. CODE § 3001-5.16 (2013) (Delaware).

\textsuperscript{166} 29 U.S.C. § 213(a)(1) (2013) (exempting from overtime “any employee employed in a bona fide executive, administrative, or professional capacity”).

\textsuperscript{167} See, e.g., COLO. CODE REGS. § 4-801-3-44 (2013) (Colorado).

\textsuperscript{168} NEV. ADMIN. CODE § 284.214 (2012).

\textsuperscript{169} N.J. ADMIN. CODE § 12:56-5.5 (2013).

\textsuperscript{170} OKLA. PERS. ACT §74-840-2.29; OKLA. ADMIN. CODE § 530:10-7-16 (2013).
physically “left the premises” and then returned pursuant to a call-in.\footnote{171} Nevada’s law explicitly exempts employees who are not required to leave their residence or location to respond to a call-in.\footnote{172} 

As with unionized workers’ contractual call-in pay rights, the strength of any given call-in pay law depends on the contours of its coverage and the breadth of its exceptions. Some states, such as Connecticut and North Carolina, have extremely narrow coverage as written and as applied, extending protection only to certain industries or to certain sub-categories of workers.\footnote{173} Others have generous coverage as written, but include exceptions that, as applied, may threaten to swallow the rule. Oklahoma’s substitution of compensatory time for actual payment, for example, may undermine the effectiveness of a call-in pay requirement in stabilizing low-wage workers’ income, as compensatory time can be a poor substitute for actual payment of wages.\footnote{174} 

Interestingly, unlike CBAs’ guaranteed pay provisions, these call-in pay statutes and regulations are rarely litigated by workers, and very few court decisions are published.\footnote{175} The lack of caselaw on states’ call-in protections could mean that employers are generally complying with the law and issuing call-

\footnote{171} 19 DEL. ADMIN. CODE § 3001-5.16 (2013) (applying call-in pay guarantee to “FLSA-covered employees who have left the work site at the end of their scheduled shift”); MD. CODE REGS. 17.04.02.12 (2013) (applying guarantee to any “employee who is called to report to work on the employee’s regular day off or who has been recalled to work after having left the employer’s premises”). \footnote{172} NEV. ADMIN. CODE § 284.214 (2012). \footnote{173} CONN. AGENCIES REGS. § 31-62-A2, B2, C2, D2, E1 (2013) (providing for four hours of call-in pay for workers in beauty shops, laundries, cleaning and dyeing operations, the mercantile trade, and the restaurant and hotel industries); 25 N.C. ADMIN. CODE 1.D.1501, 1504 (2013) (applying only to state employees on on-call status, when approved by each agency personnel director and Office of State Personnel). \footnote{174} David J. Walsh, The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights? 20 BERKELEY J. EMP. & LAB. L. 74, 136 (1999) (“[P]rivate sector comp time reveals itself to be a change that is far more in the interests of employers . . . than those of workers. It represents a retreat from an entitlement to overtime pay and a step backward toward more individualized dealings between workers and their far more powerful employers.”); Michael Z. Green, Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Employee Action?, 42 CONN. L. REV. 1139, 1174 n.230 (2010) (noting that a proposed amendment to the FLSA substituting compensatory time for overtime pay have failed to win the support of Democrats and union officials “because it would reduce overtime pay and allow employers to coerce employees into accepting comp time and lost pay with little enforcement opportunities to protect against such coercion”). The call-in pay requirement for federal executive branch employees also allows substitution of compensatory time for pay. 5 C.F.R. § 550.112. \footnote{175} Alix v. Wal-Mart Stores, Inc., 16 Misc. 3d 844, 846-47 (N.Y. Sup. Ct. 2007) (describing plaintiffs’ allegations of violations of New York’s call-in pay requirement, which were ultimately dismissed from the case); Aleman v. AirTouch Cellular, 209 Cal.App.4th 556, 573-74 (2012) (holding that trial court properly awarded no damages on plaintiffs’ call-back pay allegations under California law).
in pay when required. A more likely explanation, however, is that these laws are little-used and call-in pay rights under-enforced. This may be because call-in pay statutes and regulations tend to apply exclusively to front-line, non-managerial, hourly-paid workers, a group that often lacks knowledge of its legal rights and faces barriers to becoming private rights enforcers.\textsuperscript{176} As Charlotte Alexander and Arthi Prasad have demonstrated in their empirical work on workplace law enforcement, low-wage workers often have “gaps in [their] legal knowledge and powerful incentives to stay silent in the face of workplace problems,”\textsuperscript{177} including a well-founded fear of retaliation and a belief that “their claim[s] would have no effect.”\textsuperscript{178} Low-wage, hourly-paid service workers may not know how about the rights guaranteed by call-in pay statutes and regulations, or may fear the consequences of enforcing those rights. Indeed, as one California court commented, “[I]t is difficult and daunting for employees to challenge allegedly unlawful practices. This is especially true of low-wage workers, who are disproportionately affected by employers’ increasing demands for non-traditional hours of work.”\textsuperscript{179}

Moreover, as discussed further in Part V, \textit{infra}, the tiny damage awards available for guaranteed pay lawsuits (the few hours of lost pay) and the lack of attorneys’ fees, provide little incentive for litigation. Regardless, then, of the extent of a call-in law’s coverage, questions of enforcement may ultimately determine the strength of the protection it offers to workers who face unpredictable work hours and income instability.

\textbf{ii. Send-home Pay}

Like their counterpart provisions within CBAs, send-home pay statutes and regulations “protect employees . . . from the expense and inconvenience of reporting to work at the unscheduled request of the employer, and who are then later sent home without pay because work became unavailable.”\textsuperscript{180} Alongside this compensatory goal, send-home laws have a “corollary purpose of shaping

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item Nashua Young Women's Christian Ass'n v. N.H. Dep't of Labor, 134 N.H. 681, 684-85 (N.H. 1991) (discussing purpose of N.H. REV. STAT. ANN. 275:43 (2013)).
\end{enumerate}
\end{footnotesize}
employer conduct,”181 to “encourage[e] proper notice and scheduling” on the part of employers by penalizing their use of just-in-time scheduling.182

Send-home laws are in effect in eight states, the District of Columbia, and Puerto Rico, and provide varying minimum pay guarantees.183 In California, workers must be given work for at least half of the hours for which they are scheduled, or are entitled to that same number of hours of pay, amounting to no more than four and no fewer than two hours.184 Connecticut and Puerto Rico require four hours of send-home pay at the worker’s regular rate;185 the District of Columbia and New York provide for four hours or the number of scheduled hours, whichever is fewer.186 In Massachusetts, workers who are scheduled for at least three hours, but do not receive these hours of work, are entitled to three hours of send-home pay,187 Rhode Island workers may claim three hours of pay, and workers in New Hampshire may seek two hours of send-home compensation.188 As with call-in pay, New Jersey’s send-home pay law is among the least generous, allowing only one hour of pay.189 Finally, Oregon’s law, which applies only to minors, requires that a worker be provided enough work

182 Murphy v. Kenneth Cole Prods., Inc., 40 Cal. 4th 1094, 1111 (Cal. 2007); see also Price v. Starbucks Corp., 192 Cal. App. 4th 1136, 1146 (Cal. App. 2d Dist. 2011) (“[T]he primary purpose of the reporting time pay regulation ‘is to guarantee at least partial compensation for employees who report to work expecting to work a specified number of hours, and who are deprived of that amount because of inadequate scheduling or lack of proper notice by the employer.’”); Cal. Mfrs. Ass’n v. Indus. Welfare Comm’n, 109 Cal. App. 3d 95, 112 (Cal. App. 4th Dist. 1980) (noting that the purpose of regulation is to ensure proper scheduling).
183 See Table 2 in the Appendix. Montana is listed as a ninth state in Table 2, but its regulatory language only takes effect where an underlying employment agreement requiring send-home pay exists between the employee and employer.
188 N.H. REV. STAT. ANN. § 275:43-a (LexisNexis 2013); see also Nashua Young Women's Christian Ass'n v. N.H. Dep’t of Labor, 134 N.H. 681, 685 (N.H. 1991) (finding that fitness instructors who worked for less than 2 hours are not covered: “These fitness instructors specifically contracted to teach classes of a duration of less than two hours, were scheduled well in advance for periods of less than two hours, and were not called in for unscheduled work time at the employer’s request. To apply RSA 275:43-a to these part-time employees serves no protective purpose and therefore contravenes the legislature’s intent. We find that the statute does not apply to the employees involved in this case and, accordingly, reverse the ruling of the trial court ordering the plaintiff to pay for uncompensated work time.”).
hours to earn at least half the amount that she would have earned had she been given her scheduled number of hours.\footnote{OR. ADMIN. R. 839-021-0087 (2013).}

Like call-in pay entitlements, many states’ send-home pay laws apply only to certain groups of workers. Connecticut’s laws apply only to workers employed by beauty shops, laundries, mercantile establishments, restaurants, and hotels.\footnote{CONN. AGENCIES REGS. § 31-62-A2(b) (2013) (beauty shop employees); § 31-62-B2(c) (laundry employees); § 31-62-C2(c) (women and minors); § 31-62-D2(d) (mercantile employees); § 31-62-E1(b) (restaurant and hotel employees).} Massachusetts’ law does not apply to charitable organizations, while New Hampshire’s law exempts employees of counties and municipalities.\footnote{455 MASS. CODE REGS. 2.03 (2013); N.H. REV. STAT. ANN. § 275-43a (LexisNexis 2013).} Oregon’s law covers only minors, and California’s law leaves out workers who are already on paid standby status.\footnote{R. 839-021-0087; CAL. CODE REGS. tit. 8, § 11010(5)(D), 11020(5)(D), 11030(5)(D), 11040(5)(D), 11150(5)(D) (2013).}

In addition, many states’ send-home pay laws contain exemptions and exceptions that are similar to those that have been recognized in the CBA context. Many states relieve employers from their send-home pay obligation if the employer gave proper advance notice to workers not to report to work. New Hampshire, for example, requires that employers put forth a “good faith effort” to notify workers not to report.\footnote{§ 275-43a.} Oregon’s law mandates a specific procedure for issuing notice, requiring employers to formulate a notice policy, post it at the work site, inform minor workers of the policy on their first day of work, and execute the policy in the event of a cancellation “so as to give the minor notice before the minor must leave home to travel to work.”\footnote{R. 839-021-0087.}

Likewise, many states’ send-home pay laws contain exemptions for employers whose last minute send-homes are caused by events beyond their control. California’s regulation lists, as examples, threats to people or property at the work site, utility failures, and acts of God.\footnote{tit. 8, § 11010(5)(C), 11020(5)(C), 11030(5)(C), 11040(5)(C), 11150(5)(C).} Connecticut’s and Oregon’s laws provide similar lists, including “suspension of operations due to breakdown,”\footnote{CONN. AGENCIES REGS. § 31-62-A2, B2, C2, D2, E1 (2013).} and snowstorms, flooding, power outages, and unforeseeable equipment failures.\footnote{R. 839-021-0087.} As with send-home pay guarantees in union contracts, the statutes’ and regulations’ use of terms such as “unforeseeable equipment failures”
seems intended to distinguish between situations in which an employer uses send-homes as a form of strategic risk-shifting and situations in which the employer is truly blameless for cutting shifts short.

Unlike call-in pay laws, states’ statutory and regulatory send-home protections have generated a modest amount of litigation, an indication that workers, or perhaps the plaintiffs’ employment bar, may be more aware of the rights conferred by these laws. However, this litigation activity is relatively narrow in scope. Most of the lawsuits raise claims under California’s send-home pay law, and most center on a single issue: the threshold question of the worker’s own expectation of the number of hours she is scheduled to work on the day she is sent home early. California’s send-home pay law applies to any employee who is required to report for work and does report, but receives “less than half said employee’s usual or scheduled day’s work.” The application of the law hinges on the length of the employee’s scheduled shift that day or, as some courts have characterized this threshold inquiry, “the employee’s expectation of the hours in the customary workday.” Therefore, courts have held that plaintiffs who were summoned to work for meetings, rather than for normal productive activity, could not claim send-home pay under the regulation, because they did not arrive at their job expecting to perform work.

Thus, the legal remedies for the unpredictable work hours and income instability caused by just-in-time scheduling are marked by variety. They vary in coverage across unions, workplaces, and states. They vary in their exceptions and exemptions, and in the extent to which they are enforced via union grievance procedures and lawsuits. Within this variation, there are pockets of real protection for workers – for those who are in unions, or who work in states with robust guarantees for both call-in and send-home pay – but there are also pockets of no protection, where workers bear the brunt of employers’ strategic risk-

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199 One California case addressed the question of whether that state’s send-home pay law even permitted private lawsuits, and held that there was a private right of action. Kamar v. Radioshack Corp., No. CV07-2252AHM(AJWx), 2008 U.S. Dist. LEXIS 40581, at *36-37 (C.D. Cal. May 15, 2008). In another California case, a class of plaintiffs won class certification and a settlement of approximately $441,000 covering all servers who worked at Olive Garden restaurants who were not paid proper reporting pay. Alberto v. GMRI, Inc., No. Civ. 07-1895WBSDAD, 2008 U.S. Dist. LEXIS 91691, at *20-21 (E.D. Cal. Nov. 12, 2008).


202 Id.; Johnson v. Sky Chefs, Inc., No. 11-CV-05619-LHK, 2012 U.S. Dist. LEXIS 140760, at *20-21 (N.D. Cal. Sept. 27, 2012) (“Plaintiff here, like the plaintiff in Price, has made no allegations that she was scheduled to work or had an expectation of working on March 9, 2011. The FAC alleges simply that Plaintiff "returned to work for a meeting called by her employer" after a month-long suspension.”).
shifting. The final Part assesses this landscape, considering the ability of these legal remedies to create greater stability in low-wage service work.

V. ASSESSMENT OF EFFECTIVENESS AND PROPOSALS FOR REFORM

The foregoing Parts have highlighted some shortcomings of CBAs’ and states’ guaranteed pay provisions: relatively narrow categories of workers who receive protection; exceptions and exemptions that may swallow the rule; possible problems with enforcement; and under-use, as indicated by the paucity of court decisions arising under state laws.

Guaranteed pay protections may also suffer from additional, structural defects. First, call-in and send-home pay requirements address only one of the two separate problems caused by just-in-time scheduling practices: income instability. Guaranteed pay requirements smooth workers’ income fluctuations by mandating a certain minimum take-home pay for workers in call-in and send-home situations. However, no contractual, statutory, or regulatory requirement outlaws last minute call-in and send-home practices entirely. Instead, CBAs and state laws provide ex post compensation to the workers who are called in and sent home unexpectedly. Compensation after the fact may give rise to greater income stability for low-wage, hourly-paid workers, but it does not address the hours instability, and its associated disruptions, that workers have already experienced by the time they become eligible for compensation.

Guaranteed pay provisions suffer from a second, related, structural defect with respect to enforcement. Though call-in and send-home pay requirements are primarily compensatory in nature, they also attempt to regulate employer behavior indirectly by raising the cost of just-in-time scheduling practices through private enforcement actions. However, that cost to employers does not take effect until a worker decides to take steps to enforce her rights, to engage in a union grievance process or file a lawsuit. Such steps can be extremely costly, requiring time, financial resources, legal knowledge, belief in the efficacy of the grievance or litigation process, and meaningful protections against retaliation.203 For the low-wage, hourly-paid hotel, restaurant, and retail workers who are the subject of this

203 Alexander & Prasad, supra note 176 (examining barriers to workers acting as private law enforcers).
Article, these costs may simply not be worth the benefit of enforcing their call-in or send-home rights, and employers, therefore, may be insufficiently deterred.\footnote{204}{While some states provide for state labor departments to enforce their guaranteed pay provisions, little has been reported on such enforcement efforts, including a dearth of reported case decisions on the topic.}

Third, there is some risk that guaranteed pay provisions, if enacted more broadly and enforced more rigorously, might provoke employers to abandon schedules altogether. Most CBA and state call-in and send-home pay requirements take as their starting point a worker’s established schedule. For example, Kansas law requires call-in pay when a worker must go to work “on a regular day off” or “after a regular work schedule.”\footnote{205}{KAN. ADMIN. REGS. § 1-5-25 (2013).} Likewise, the send-home pay requirement in a Teamsters CBA refers to a worker’s reporting “at the beginning of his \textit{scheduled shift} and who has not been notified not to so report prior to his \textit{scheduled starting time}.”\footnote{206}{Contract Clause Classification Outline, supra note 104 (National Material Co. and Teamsters).}

Finally, whether a worker receives compensation under California’s send-home pay law hinges largely on her expectation of her work schedule on the day she is sent home. Courts in California have elevated this issue to a pleading requirement necessary to survive a motion to dismiss, stating, for example: “Without an allegation that Plaintiff was either scheduled to or had the expectation of \textit{working a normal shift}, Plaintiff has failed to plead the element of expectation that is needed to claim more than the minimum of two hours of reporting time pay under [the law].”\footnote{207}{Johnson, 2012 U.S. Dist. LEXIS 140760, at *21; see also Price, 192 Cal. App. 4th at 1146-47.}

Given that schedules are a threshold requirement in both the call-in and send-home pay analyses, some employers might decide to avoid guaranteed pay liability by abolishing schedules altogether and moving to an entirely non-scheduled, on-call model. This is not as far-fetched as it might sound: some restaurant managers already maintain a large pool of on-call wait staff ready to come to work when customer demand requires.\footnote{208}{Haley-Lock, supra note 43 at 459.} Similarly, academics writing in the human resources field have suggested that hotels rely almost entirely on temporary contract workers supplied by an outside agency to fill their front-line service positions, summoning them only “as and when demand requires them so to do.”\footnote{209}{Lai & Baum, supra note 25, at 98.} There is no affirmative legal requirement that employers maintain a schedule, and if employers can steer clear of the FLSA’s relatively lenient compensability requirements for waiting time (see Part III, \textit{supra}), then they
would avoid any penalty associated with such a model. An all on-call world would significantly increase hours and income instability for low-wage workers.

To mitigate the harm that just-in-time scheduling causes to low-wage workers (and to avoid the “doomsday scenario” of the entirely on-call workplace), state legislatures, Congress, the U.S. Department of Labor (DOL), and worker advocates should pursue the following strategies for reducing work hour fluctuations and income instability in low-wage, hourly jobs: (1) strengthening and broadening guaranteed pay provisions in state laws and CBAs; (2) amending the FLSA to penalize employers’ use of fluctuating schedules; (3) adopting a DOL interpretation of “on-call time” under the FLSA that would encompass workers who are unexpectedly called in to work; and (4) strengthening current union and worker campaigns, and launching new ones, around the importance of stable schedules.

These proposals are justified on a variety of grounds. First, just-in-time scheduling practices were borne from a theory that equates inventory with labor. As outlined in Part I, the just-in-time philosophy originated with the maxim that waste should be eliminated through close management of inventory. But people are not goods, and human dignity demands that some workplace practices yield, even if they are justified on economic grounds. For example, child labor practices, though profitable, offend our sense of human rights in the workplace. Likewise, health and safety concerns require expensive mitigation efforts, but our laws nevertheless require such efforts in order to protect workers. Less

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210 See, e.g., U.S. Dept. of Labor, Wage and Hour Division, Opinion Letters - Fair Labor Standards Act, FLSA2008-14NA (Dec. 18, 2008) (“While the FLSA provides many labor standards, it does not generally regulate work schedules and work assignments.”).

211 An additional avenue for advocacy might be a legal claim for discrimination under Title VII of the Civil Rights Act of 1964. See Nantiya Ruan & Nancy Reichman, Scheduling Shortfalls: Hours Parity as the New Pay Equity, Working Paper, University of Denver (2013) (on file with authors) (addressing the potential legal remedies for scheduling discrimination by female and minority part-time workers); Joan C. Williams & Stephanie Bornstein, Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination, 41 U.S.F. L. Rev. 171 (2006) (“FRD is employment discrimination against people based on their caregiving responsibilities - whether for children, elderly parents, or ill partners.”). Under this theory, just-in-time scheduling practices would be portrayed as having a disparate impact on certain categories of workers, including women, for stereotypes that they are not the “ideal worker” because of family caregiving responsibilities and may therefore experience the brunt of the disruption caused by last minute call-in and send-home practices. An equality-based focus on the harms caused solely to women workers – while certainly real and highly damaging – risks masking the class-based harms to low-wage workers on the whole that employers’ call-in and send-home practices create.

212 See supra Part I.

213 See supra notes 67-70 and accompanying text.

214 See supra note 74.

dramatically, our labor and employment regulations recognize overwork as an “evil” and demand premium overtime pay from employers that require such practices. Where the negative human life consequences outweigh economic advantage, law steps in to regulate employers and protect workers. The fact that schedule fluctuations are already regulated by collective bargaining agreements and state statutes reflects their pernicious effects. Just-in-time scheduling should thus be viewed as an affront to workplace fairness ideals and should be limited, even as the employers that promulgate such practices argue for their continued use as measures to cut costs.

A. Broadening State Guaranteed Pay Laws

Despite the potential limitations of statutory and regulatory guaranteed pay provisions outlined above, there is evidence that state-level call-in and send-home pay requirements can achieve worker-protective outcomes. Anna Haley-Lock studied restaurant workers in Vancouver, British Columbia, where a provincial law guarantees four hours’ pay at the minimum wage if a worker is scheduled for a full day of work, and two hours if scheduled for a half day. She found that managers sent waiters home before the end of a scheduled shift much less frequently in Vancouver than in restaurants in Washington and Illinois, states without send-home pay laws. Chain managers in Vancouver described making staffing calculations more strategically than their U.S. counterparts, taking into account recent and historic shift needs, and having wait staff engage in side work, such as food preparation or deep cleaning, when business did ebb.

This evidence of the deterrent effect of guaranteed pay laws supports expansion of call-in and send-home pay provisions to all states and to broader categories of workers. As described in Part IV supra, the exceptions and exemptions of current laws and under-enforcement and under-use by workers limit their effectiveness. While under-utilization of the current protections may be addressed by labor advocacy (as discussed in Part V(C) infra), amending guaranteed pay laws to broaden their coverage to additional categories of workers would be a positive step in protecting against instability, as would expansion to the dozens of other states that have no such laws on the books. As summarized in

217 See supra Part IV.
218 Haley-Lock (2012), supra note 10 at 827.
219 Id. at 833 (“Notably, this practice was less commonly reported in Vancouver, where the British Columbia minimum daily pay law limits employers’ freedom to engage in “just-in-time” staffing adjustments without incurring financial cost.”).
220 Id.
221 See supra Part IV.
Tables 1 and 2 in the Appendix, about half of the fifty states do not have call-in statutes or regulations, while the vast majority do not have send-home protections.\(^{222}\) Twenty-seven states have no form of guaranteed pay requirement at all.\(^{223}\) Moreover, many states limit their coverage to particular industries or certain sub-categories of employees.\(^{224}\) Expanding coverage beyond the current states and to more categories of workers would make an important difference in stabilizing low-wage workers’ schedules and income.

Additionally, state laws could be amended to include higher available damage awards and attorneys’ fees provisions.\(^{225}\) As currently written, many state guaranteed pay laws provide a claim to workers only for the few hours of guaranteed pay that are lost when an employer fails to comply with a call-in or send-home pay requirement. Few rational low-wage workers, or plaintiffs’ attorneys, would likely be willing to expend the time, resources, and effort required to bring a lawsuit over two, three, or four hours of pay. Even fewer workers can be expected to take that step if a worker is required to fund the cost of a lawsuit out of her own pocket. Instituting treble damage awards and allowing fee-shifting, in which the losing defendant pays not only the plaintiff’s damages but also her attorney’s fees, could help eliminate these barriers to enforcement.\(^{226}\)

While state guaranteed pay laws do not prohibit last minute call-ins and send-homes outright, they make these practices more expensive, and therefore less attractive, to employers. Spreading call-in and send-home protections across more states and more groups of workers, as well as increasing the costs of non-compliance, could lessen the disruptive effects of just-in-time scheduling on low-wage workers’ lives.

\(^{222}\) See infra Tables 1 & 2.
\(^{223}\) They are Alabama, Alaska, Arizona, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana (see note 150, supra), Nebraska, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.
\(^{224}\) CONN. AGENCIES REGS. § 31-62-A2, B2, C2, D2, E1 (2013) (providing for four hours of call-in pay for workers in beauty shops, laundries, cleaning and dyeing operations, the mercantile trade, and the restaurant and hotel industries); 25 N.C. ADMIN. CODE 1.D.1501, 1504 (2013) (applying only to state employees on on-call status, when approved by each agency personnel director and Office of State Personnel).
\(^{225}\) Thanks to Alex Long for this idea.
\(^{226}\) Though there is no published case on point, it appears that Rhode Island law, for example, may allow prevailing plaintiffs in send-home pay cases to collect liquidated damages (twice the wages owed) as well as attorneys’ fees. 1-13 Wages & Hours: Law and Practice § 13.42 (“Employers who violate the minimum wage or overtime provisions [which include the Rhode Island send-home pay requirement] are liable to aggrieved employees for unpaid wages, costs and attorney’s fees. Such sums may be recovered in civil actions, filed by or on behalf of the employees.”).
B. Amending the Fair Labor Standards Act

While broadening state guaranteed pay laws would be an important step in reducing employers’ reliance on just-in-time scheduling, federal legislation would enact comprehensive, uniform protection for all workers and further incentivize employers to minimize instability in low-wage work. Although the minimum wage has periodically increased with the cost of living, the FLSA has not been amended substantively since 1947. Expanding coverage to protect workers from scheduling instability would recognize the new realities of the American workplace, and would comport with the FLSA’s statutory purpose of protecting workers against exploitive employer policies and practices.

The FLSA could be amended to adopt call-in and send-home pay structures like those in place in state law. With respect to call-in pay, Michigan’s civil service regulations provide a model. In Michigan, state employees who are called in to work unexpectedly are eligible for three hours of guaranteed pay at the premium overtime rate. The two exceptions to the rule would provide some flexibility to employers who are faced with fluctuating customer demand. First, employees who are already on paid standby or on-call status would not receive an additional premium call-in payment, but instead would receive payment only for their on-call hours and actual hours worked. Second, the call-in pay requirement would not apply if workers are called in to work within a certain number of hours of their scheduled start time. Michigan’s law specifies three hours; a proposal more friendly to workers, and more respectful of their non-work scheduling needs, could be two hours.

With respect to send-home pay, California’s law could be duplicated as an amendment to the FLSA. California workers who report to work for a scheduled shift and are then sent home early are entitled to pay at their regular rate for half of their scheduled shift, in any case no fewer than two or more than four hours. Employers are protected via a variety of exceptions, including the same exclusion for workers already on paid standby status and in circumstances where the lack of work is beyond the employer’s control. Amending the FLSA

228 See supra Part II.
229 Mich. Civil Service Comm’n Reg. 5-4.4.
230 Id.
232 Id.
233 Id.
to mirror these state law call-in and send-home pay requirements would provide significant protection against fluctuating work hours and income instability.

An additional possible FLSA amendment is a mandate that employers adopt a set schedule for workers and notify them at least one month in advance. This one month notice period is quite modest in comparison to the scheduling and notice regimes in place in some European countries: “Danish retail bargaining agreements [which cover the majority of retail workers] mandate 16 week advance notice of schedules while German collective bargaining agreements mandate 26 weeks advance notice.” Under an amended FLSA, workers who wish to waive this scheduling notice requirement, and to make themselves eligible for paid on-call or standby status, for example, would be free to do so by written agreement with their employer.

Finally, the FLSA could be amended to institute a tiered minimum wage, whereby workers subject to just-in-time scheduling would earn more per hour on a scale dependent on the severity of their schedule fluctuations. Any of these reforms would reduce workers’ income instability by establishing an income floor and lessen hours instability by discouraging employers’ use of fluctuating schedules.

C. Changing the DOL’s Interpretation of FLSA “On-Call” Time

As an alternative to amending the FLSA itself – admittedly a politically challenging proposition – the U.S. Department of Labor might adopt an interpretation of the FLSA that treats workers who are subject to last minute call-in practices as on-call workers. For these workers, the hours spent waiting to be called to work would be compensable. As discussed in Part III, supra, courts engage in a fact-intensive inquiry to determine whether workers’ waiting time must be paid as working time under the FLSA. Current caselaw would likely exclude most workers who are called in to work at the last minute.

To provide greater protection to these workers, the Wage and Hour Division of the DOL might issue a Field Assistance Bulletin, clarifying the

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234 Carré & Tilly, supra note 23 at 33.
236 See note 96, supra, and accompanying text.
237 United States Department of Labor, Wage and Hour Division, Field Assistance Bulletins, available at http://www.dol.gov/whd/FieldBulletins/ (‘Field Assistance Bulletins provide Wage and Hour Division (WHD) investigators and staff with guidance on enforcement
circumstances under which the time that workers spend waiting, on the chance that they might be called in to work, is compensable. In such an interpretation, the fact that a worker is not formally labeled an “on-call” or “standby” employee should not bar her from being compensated for her waiting time. In addition, if a worker is required to report to work due to a last minute call-in, or else be fired, her waiting time should be per se compensable. Such a policy would extend protection to circumstances like those described by Susan Lambert, where retail workers were expected to offer nearly unlimited “open availability” to their employers:

Many employers specified that being available to work a wide span of days and shifts was a necessity for employment at the point of hiring. For one retailer, ‘open availability’ – being willing to work any hours the store is open – was a condition for full-time employment and in all retailers, [human resources] staff said they gave priority when hiring to applicants who could work varying shifts. Managers often expected employees to be available the entire week and scheduled workers accordingly by varying individuals’ work days and shifts. Often this meant that employees would need to be prepared to work at virtually any time of the day or night. A worker might only work three days a week, but would need to prepare for seven days of work, just in case.238

Of course, the DOL’s interpretation would need to define the amount of waiting time that would be paid; perhaps the employer’s operating hours, which represent the full length of time during which a worker might be called in at the last minute, would provide the beginning and end point of compensable time. Such an interpretation, and the DOL’s resulting enforcement activity, would make just-in-time call-in practices highly expensive, and therefore highly unattractive, to employers. It would also prevent employers from adopting an all on-call scheduling model, as employers would be forced to compensate workers for rearranging their private lives to accommodate a possible, highly disruptive, last minute call-in to work.239

positions and clarification of policies or changes in policy of WHD. These bulletins are developed under the general authority to administer the various laws enforced by WHD. They typically provide positions reflecting changes or clarifications in the administration of these laws and related regulations based upon court decisions, legislative changes and opinions of the WHD Administrator.).

238 Lambert, supra note 10 at 1217.
239 Of course, if the DOL were to adopt such an interpretation, employers might respond by overscheduling workers, having workers report at the scheduled time, and then sending them home early in case of overstaffing. The possibility that employers would engage in such strategic
D. Engaging in Union and Worker Campaigns

A final reform strategy centers on the power of workers themselves to make change in the workplace. While union CBAs historically have addressed scheduling instability through guaranteed pay provisions, these provisions may not be sufficiently expansive to eliminate the harm caused to workers, as outlined in Part IV supra. Moreover, the fact that only 6.6 percent of private sector workers are unionized significantly reduces CBAs’ effectiveness in addressing this trend.240

However, worker advocacy both within and outside traditional labor unions has made gains for low-wage workers around the issue of scheduling stability. For example, the Retail Action Project in New York City has launched a “Just Hours” campaign, targeting unpredictable scheduling practices in retail stores, which has received significant media attention.241 Additionally, in 2011, Wal-Mart workers began the “Our Wal-Mart” campaign, presenting a “Declaration of Respect” to Wal-Mart management in Arkansas, including as one of their principles the need to create “dependable, predictable work schedules.”242 Likewise, in 2012, the Retail Wholesale and Department Store Union Local 1-S won stable scheduling in their employment at Macy’s and Bloomingdales stores in New York City.243

Not only does advocacy by unions and worker groups have the potential to convince service sector employers such as Wal-Mart to change their practices voluntarily, but it can also inform workers of their existing rights and assist them in taking steps to become rights enforcers. Through advocacy around scheduling stability, workers might learn about call-in and send-home pay guarantees that are already on the books in their state. The power of worker movements might also be harnessed to push for the types of reforms proposed earlier in this Part: broadening state guaranteed pay laws, amending the FLSA, and changing the DOL’s interpretation of on-call time.

behavior further highlights the need for send-home pay guarantees, to create income and schedule stability on both “ends” of the spectrum.

240 Economic News Release, Bureau of Labor Statistics, Union Members Survey (Jan. 23, 2013), http://www.bls.gov/news.release/union2.nr0.htm (noting that the overall union membership rate in 2012 is down from 2011 with only 6.6% of private-sector workers in a union, which is five times lower than that of public-sector workers.).


243 Freleng, supra note 2.
CONCLUSION

Today’s low-wage workers face increased instability in their schedules. Last minute call-ins and send-homes, borne out of a just-in-time scheduling philosophy, can cause two problems for workers: unpredictable fluctuations in work hours and instability in income. This Article has examined two legal remedies for workers who are subject to call-in and send-home practices: guaranteed pay provisions in unionized workers’ collective bargaining agreements and state law call-in and send-home pay requirements. While both are steps in the right direction, they are limited in their ability to address the growing hours and income crisis for hourly service workers; therefore, new approaches are needed. Broadening existing guaranteed pay laws, enacting new federal scheduling rights, recasting called-in workers as on-call workers, and harnessing the power of worker movements are all strategies for reducing work hour fluctuations, smoothing workers’ income, and stabilizing low-wage work.
## APPENDIX

### Table 1: State Call-In Pay Laws

<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
<th>Guaranteed Hours of Pay</th>
<th>Hourly Pay Rate</th>
<th>Eligible Employees (exceptions noted in next column)</th>
<th>Excluded Employees and Other Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>A.C.A. § 21-5-221(m)(3)(C)(i) (2012)</td>
<td>2</td>
<td>Regular rate</td>
<td>State employees on on-call or standby status</td>
<td></td>
</tr>
<tr>
<td>California†</td>
<td>Cal. Code Regs. tit. 8, § 11010(5)-11150(5) (2013)</td>
<td>2</td>
<td>Regular rate</td>
<td>Employees who report to work for a second time in any 1 workday and are assigned fewer than 2 hours of work</td>
<td>Employees on paid standby status. Does not apply when operations cannot begin/continue due to threats to employees or property, public utility failure, or circumstances outside employer’s control.</td>
</tr>
<tr>
<td>Colorado</td>
<td>Colo. Code Regs. § 4-801-3-44 (2013)</td>
<td>2</td>
<td>Regular rate</td>
<td>State employees who are eligible for overtime</td>
<td>Does not apply when employee is not released from work between regular shift and call-back hours. State employees who are overtime-exempt when approved by department head.</td>
</tr>
<tr>
<td>State</td>
<td>Citation</td>
<td>Guaranteed Hours of Pay</td>
<td>Hourly Pay Rate</td>
<td>Eligible Employees (exceptions noted in next column)</td>
<td>Excluded Employees and Other Notes</td>
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<td></td>
<td></td>
<td>62-B2)</td>
<td>when regular working day is less than 4 hours</td>
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<td></td>
<td>Employees of cleaning and dyeing operations (§ 31-62-C2)</td>
<td>• Does not apply if employee given a day’s notice not to report</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Employees in the mercantile trade (§ 31-62-D2)</td>
<td>In cleaning and dyeing operations:</td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
<td>Employees in restaurant and hotel occupations (§ 31-62-E1)</td>
<td>• 4 hours due</td>
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<td>• Employee must be willing and able to work for 4 hours</td>
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<td></td>
<td>• Does not apply in case of breakdown or act of God</td>
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<td>In the mercantile trade:</td>
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<td></td>
<td>• 4 hours due</td>
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<td></td>
<td></td>
<td>• 2 hours due where regularly scheduled employment is less than 4 hours, upon written agreement between employer and employee and approval by labor department</td>
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<td></td>
<td></td>
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<td>In restaurant and hotel occupations:</td>
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<td>• 2 hours due</td>
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<td></td>
<td>• Employee must be willing and able to work for 2 hours</td>
</tr>
<tr>
<td>State</td>
<td>Citation</td>
<td>Guaranteed Hours of Pay</td>
<td>Hourly Pay Rate</td>
<td>Eligible Employees (exceptions noted in next column)</td>
<td>Excluded Employees and Other Notes</td>
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<tr>
<td>Delaware</td>
<td>19 Del. Admin. Code § 3001-5.16 (2013)</td>
<td>4</td>
<td>Greater of regular rate for 4 hours or overtime pay for actual hours worked</td>
<td>State employees who are eligible for overtime</td>
<td>Does not apply if employee given a day’s notice not to report</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>D.C. Mun. Regs. tit. 6 § 1137.6</td>
<td>2</td>
<td>Regular rate</td>
<td>District of Columbia employees on on-call status</td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>FL Admin. Code 60L-34.0031</td>
<td>2</td>
<td>Regular rate</td>
<td>State employees</td>
<td></td>
</tr>
<tr>
<td>Illinois**</td>
<td>Ill. Admin. Code tit. 56, § 210.110</td>
<td>Travel time</td>
<td>Regular rate</td>
<td>All employees</td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>Kan. Admin. Regs. § 1-5-25 (2013)</td>
<td>2</td>
<td>Regular rate or overtime, as applicable</td>
<td>State employees who are eligible for overtime</td>
<td>Employees on standby status</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Law enforcement and firefighting employees when approved by agency head</td>
<td>Does not apply when employee called in during 2 hours immediately before scheduled shift</td>
</tr>
<tr>
<td>Maryland</td>
<td>Md. Code Regs. 17.04.02.12 (2013)</td>
<td>1 hour plus travel time</td>
<td>Greater of regular rate or applicable overtime rate</td>
<td>State employees</td>
<td>Does not apply if employee is already guaranteed more than 1 hour of pay</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>No travel time due if employee is paid for 8 hours or more</td>
</tr>
<tr>
<td>State</td>
<td>Citation</td>
<td>Guaranteed Hours of Pay</td>
<td>Hourly Pay Rate</td>
<td>Eligible Employees (exceptions noted in next column)</td>
<td>Excluded Employees and Other Notes</td>
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<tr>
<td>Michigan</td>
<td>Mich. Civil Service Comm’n Reg. 5-4.4</td>
<td>3</td>
<td>Overtime</td>
<td>State employees</td>
<td>Employees on on-call status</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Does not apply if employee is called in within 3 hours of regular start time</td>
</tr>
<tr>
<td>Montana***</td>
<td>Mont. Admin. R. 24.16.2523 (2013)</td>
<td>Specified in employment agreement</td>
<td>Regular rate or overtime, as applicable</td>
<td>All employees subject to an employment agreement</td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>Nev. Admin. Code § 284.214 (2012)</td>
<td>2</td>
<td>Overtime</td>
<td>State employees who are eligible for overtime</td>
<td>Employees on standby status</td>
</tr>
<tr>
<td></td>
<td></td>
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<td></td>
<td>Part-time or intermittent workers unless has worked 8 hours in 1 calendar day</td>
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<td>Employees with discretion as to performance of duties</td>
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<td></td>
<td>Employees who are not required to leave their residence or location to comply with call-in</td>
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<td></td>
<td></td>
<td>Does not apply when</td>
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<td></td>
<td>• Employee called in during 1 hour immediately before or after scheduled shift</td>
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<td></td>
<td>• Time for beginning work is set at employee’s request</td>
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<tr>
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<td></td>
<td></td>
<td>• Work begins during same 2 hour period</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Citation</td>
<td>Guaranteed Hours of Pay</td>
<td>Hourly Pay Rate</td>
<td>Eligible Employees (exceptions noted in next column)</td>
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</tr>
<tr>
<td>New Jersey†</td>
<td>N.J. Admin. Code § 12:56-5.5 (2013)</td>
<td>1</td>
<td>Regular rate</td>
<td>All employees</td>
<td>Does not apply when employer has made available the minimum number of work hours agreed upon prior to the commencement of work on the day involved</td>
</tr>
<tr>
<td>New Mexico</td>
<td>N.M. Admin. Code §1.7.4.15 (2013)</td>
<td>Established by each state agency</td>
<td>Regular rate or overtime, as applicable</td>
<td>State employees</td>
<td></td>
</tr>
</tbody>
</table>
| New York†     | N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.3 (2013)                    | Lesser of 4 hours or number of hours in regularly scheduled shift | Minimum wage | All employees                                          | Employees subject to a specific wage order  
Employees of a nonprofitmaking institution which has elected to be exempt from coverage under a minimum wage order |
<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
<th>Guaranteed Hours of Pay</th>
<th>Hourly Pay Rate</th>
<th>Eligible Employees (exceptions noted in next column)</th>
<th>Excluded Employees and Other Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Carolina</td>
<td>25 N.C. Admin. Code 1.D.1501, 1504 (2013)</td>
<td>Established by Office of State Personnel consistent with prevailing practices in the applicable labor market</td>
<td>Established by Office of State Personnel consistent with prevailing practices in the applicable labor market</td>
<td>State employees on on-call status, when approved by each agency personnel director and Office of State Personnel</td>
<td>Coverage includes those employees who must respond to a call-in from home via telephone or computer If time on call back exceeds the guaranteed minimum hours, employee receives the applicable rate of pay or compensatory time for the exact amount of time elapsed</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Okla. Pers. Act §74-840-2.29</td>
<td>2</td>
<td>Regular rate or compensatory time</td>
<td>State employees on on-call status</td>
<td></td>
</tr>
<tr>
<td>Oregon****</td>
<td>Or. Admin. R. 839-020-0045 (2013)</td>
<td>Travel time</td>
<td>Regular rate</td>
<td>All employees</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Citation</td>
<td>Guaranteed Hours of Pay</td>
<td>Hourly Pay Rate</td>
<td>Eligible Employees (exceptions noted in next column)</td>
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</tr>
<tr>
<td>South Carolina</td>
<td>S.C. Code Regs. 19-705.07 (2012)</td>
<td>2</td>
<td>Regular rate plus applicable shift differential</td>
<td>State employees on on-call status who are eligible for overtime, when approved by each state agency</td>
<td>Does not apply if call-in is canceled and employee received advance notice not to report or if employee reports anyway but refuses alternate work assignment</td>
</tr>
<tr>
<td>Washington</td>
<td>WAC 357-28-185</td>
<td>2</td>
<td>Regular or overtime rate, as applicable</td>
<td>State employees who are eligible for overtime</td>
<td>Employees on on-call status</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Wy. Compensation Policy Ch. 4 § 7 (2010)</td>
<td>2</td>
<td>Regular rate</td>
<td>State employees who are eligible for overtime</td>
<td></td>
</tr>
</tbody>
</table>

* California’s call-in pay requirements are found in wage orders that apply to individual industries. However, the requirements are the same across all industries, and the wage orders’ coverage is exhaustive.

** Illinois does not have a formal call-in pay statute or regulation. However, an employee’s travel time when she must report “in response to an emergency call back to work outside his/her normal work hours” is given as an example of time that would be compensable as working time under the state minimum wage law. Paid travel time therefore functions as a call-in pay guarantee. Ill. Admin. Code tit. 56, § 210.110.

*** Montana’s regulation does not itself mandate call-in pay, but gives force to and illustrations of call-in or call-back pay requirements in employment agreements negotiated between employers and employees. It is copied directly from the federal regulation implementing the FLSA, which concerns whether call-in pay is counted as hours worked for purposes of calculating overtime. 29 C.F.R. § 778.221.

**** Like Illinois, Oregon does not have a formal call-in pay statute or regulation. State law requires payment of any travel time “spent in excess of time spent in normal home-to-work travel” when an employee “has left the employer’s premises or job site after completing the day’s work and
is subsequently called out to travel a substantial distance [defined as “beyond a 30-mile radius of the employer's place of business”] to perform an emergency job.” Or. Admin. R. 839-020-0045 (2013).

† The same regulatory language appears to apply to both call-in and send-home situations.
Table 2: State Send-Home Pay Laws

<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
<th>Guaranteed Hours of Pay</th>
<th>Hourly Pay Rate</th>
<th>Eligible Employees (exceptions noted in next column)</th>
<th>Excluded Employees and Other Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>California*†</td>
<td>Cal. Code Regs. tit. 8, § 11010(5)-11150(5) (2013)</td>
<td>Half of the scheduled shift; no fewer than 2 or more than 4 hours</td>
<td>Regular rate</td>
<td>All employees</td>
<td>Employees on paid standby status</td>
</tr>
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<td></td>
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<td></td>
<td>Does not apply when operations cannot begin/continue due to threats to employees or property, public utility failure, or circumstances outside employer’s control</td>
</tr>
<tr>
<td>Connecticut†</td>
<td>Conn. Agencies Regs. § 31-62-A2, B2, C2, D2, E1 (2013)</td>
<td>2, 3, or 4</td>
<td>Regular rate</td>
<td>Employees of beauty shops (§ 31-62-A2)</td>
<td>In laundries:</td>
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<tr>
<td></td>
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<td></td>
<td></td>
<td>Female, minor, and male production employees in laundry occupations (§ 31-62-B2)</td>
<td>• 4 hours due, except 3 hours due on Saturdays when regular working day is shorter than 4 hours</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Employees of cleaning and dyeing operations (§ 31-62-C2)</td>
<td>• Does not apply if employee given a day’s notice not to report</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Employees in the mercantile trade (§ 31-62-D2)</td>
<td>In cleaning and dyeing operations:</td>
</tr>
<tr>
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<td></td>
<td>Employees in restaurant and hotel occupations (§ 31-62-E1)</td>
<td>• 4 hours due</td>
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<td></td>
<td>• Employee must be willing and able to work for 4 hours</td>
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<td></td>
<td>• Does not apply in case of breakdown or act of God</td>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td>In the mercantile trade:</td>
</tr>
<tr>
<td>State</td>
<td>Citation</td>
<td>Guaranteed Hours of Pay</td>
<td>Hourly Pay Rate</td>
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<tr>
<td>District of Columbia</td>
<td>D.C. Code Mun. Regs. tit. 7 § 907.1 (2013)</td>
<td>Lesser of 4 hours or hours regularly scheduled</td>
<td>Regular rate for hours worked; minimum wage for hours not worked</td>
<td>All employees</td>
<td>4 hours due</td>
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<td></td>
<td>2 hours due where regularly scheduled employment is shorter than 4 hours, upon written agreement between employer and employee and approval by labor department</td>
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<td>In restaurant and hotel occupations:</td>
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<td>2 hours due</td>
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<td></td>
<td>Employee must be willing and able to work for 2 hours</td>
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<td></td>
<td>Does not apply if employee given a day’s notice not to report</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>455 Mass. Code Regs. 2.03 (2013)</td>
<td>3</td>
<td>Minimum wage</td>
<td>All employees scheduled to work for at least 3 hours</td>
<td>Does not apply to charitable organizations</td>
</tr>
<tr>
<td>Montana**</td>
<td>Mont. Admin. R. 24.16.2522 (2013)</td>
<td>Specified in employment agreement</td>
<td>Regular rate or overtime, as applicable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Citation</td>
<td>Guaranteed Hours of Pay</td>
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<td></td>
<td>Does not apply if employer has made good faith effort to notify employee not to report to work</td>
</tr>
<tr>
<td>New Jersey†</td>
<td>N.J. Admin. Code § 12:56-5.5 (2013)</td>
<td>1</td>
<td>Regular rate</td>
<td>All employees</td>
<td>Does not apply when employer has made available the minimum number of work hours agreed upon prior to the commencement of work on the day involved</td>
</tr>
<tr>
<td>New York†</td>
<td>N.Y. Comp. Codes R. &amp; Regs. tit. 12, § 142-2.3 (2013)</td>
<td>Lesser of 4 hours or number of hours in regularly scheduled shift</td>
<td>Minimum wage</td>
<td>All employees</td>
<td>Employees subject to a specific wage order</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Employees of a nonprofitmaking institution which has elected to be exempt from coverage under a minimum wage order</td>
</tr>
<tr>
<td>Oregon</td>
<td>Or. Admin. R. 839-021-0087 (2013)</td>
<td>Greater of 1 hour or half of scheduled shift</td>
<td>Regular rate</td>
<td>All minor employees</td>
<td>Does not apply when</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>• Employer posts a notice policy in the workplace, communicates it to the minor, and follows it in making a good faith effort to notify minor not to report</td>
</tr>
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<td>• Circumstances beyond</td>
</tr>
<tr>
<td>State</td>
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<tr>
<td>Puerto Rico</td>
<td>Minimum Wage Board Reg. No. 7; Mandatory Decrees 7, 11, 15, 20, 22, 23, 24, 25, 37, 38, 41, 44, 50, 57, 67</td>
<td>4</td>
<td>Regular rate</td>
<td>Employees in the construction, quarrying, ice cream, lumber and wood products, metal furniture, doors and windows, straw, hair and related products, laundry and dry cleaning, transportation, general agricultural activities, and stone, clay, glass, cement, and related products industries  &lt;br&gt;See regulations for specific additional guarantees and exemptions applicable to employees in the printing, publishing, and other graphic arts, theater and cinema, sugar, hotel, beer, hospital, clinic, and sanatorium industries</td>
<td>Applies when employee receives less than 4 hours’ notice to report  &lt;br&gt;Does not apply when  &lt;br&gt;• Employer notifies employee before end of previous work shift not to report  &lt;br&gt;• Acts of God prevent performance of work</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>R.I. Gen. Laws § 28-12-3.2 (2012)</td>
<td>3</td>
<td>Regular rate</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* California’s send-home pay requirements are found in wage orders that apply to individual industries. However, the requirements are the same across all industries, and the wage orders’ coverage is exhaustive.
Montana’s regulation does not itself mandate send-home pay, but gives force to and illustrations of show up or reporting pay requirements in employment agreements negotiated between employers and employees. It is copied directly from the federal regulation implementing the FLSA, which concerns whether send-home, show up, or reporting pay is counted as hours worked for purposes of calculating overtime. 29 C.F.R. § 778.220.

† The same regulatory language appears to apply to both call-in and send-home situations.