

LEGAL UPDATE

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By: *Joshua Zuckerberg and Stephanie R. Kline*

NEW WAGE REGULATIONS FOR RESTAURANTS AND HOTELS GO INTO EFFECT BY FEBRUARY 28, 2011

The New York State Department of Labor has issued a Hospitality Industry Wage Order (the "Wage Order") effective as of January 1, 2011, which is to be implemented by February 28, 2011, and which makes a number of changes in how hotel and restaurant employees must be paid. For purposes of this Update, we refer to hotels and restaurants collectively as "Hospitality Employers," and their employees as "Hospitality Employees." Certain of the most significant changes found in the new Wage Order include:

INCREASED MINIMUM WAGE FOR TIPPED EMPLOYEES

The Wage Order lowers the maximum tip credit that Hospitality Employers may take toward satisfying the minimum wage. Tipped food service employees, *e.g.*, waiters, must receive a wage of no less than \$5.00 per hour, up from \$4.65, with a tip credit of no more than \$2.25 per hour. As for tipped non-food service employees, *e.g.*, delivery people, the minimum wage has been raised to \$5.65 per hour, up from \$4.90, with a maximum tip credit of \$1.60 per hour. Different rates apply, however, to certain types of Hospitality Employees, such as those working in resort hotels.

REQUIRED HOURLY RATES

All Hospitality Employees not commissioned or otherwise exempt must be paid on an hourly basis. Compensation on a weekly or per diem basis, or any other salary is no longer permitted.

TIP CREDIT CHANGE

Hospitality Employers may not take a tip credit for the entire day on any day that an employee works at a non-tipped position for either at least two hours or for 20% of the shift, whichever is less.

REQUIRED WRITTEN NOTIFICATION OF TIP CREDITS, PAY RATES, AND PAY DATES

Hospitality Employers must give their employees written notification of the employee's regular hourly rate, the overtime hourly rate, the regular payday, and the amount of tip credit being taken from the wage. This notification must be provided in both English as well as any other language spoken by the employee, so long as the New York State Department of Labor has made the notification available in that language on its website. The employer must give the notification to the employee prior to the beginning of employment and again before any change in the employee's wage. The employer is required to keep the employee's signed acknowledgment of receipt of the notification for six years.

SERVICE CHARGES

Any charge in addition to charges for food, drink and lodging is now presumed to be a gratuity. Any charge that is not to be construed as a gratuity, including charges for holding a banquet, special function, or package deal, must be clearly identified as not a gratuity and customers must be clearly notified as such.

SPREAD OF HOURS PAY NO LONGER PHASED OUT

Spread of hours pay, where an additional hour of pay at minimum wage is required to be paid when an employee's workday begins and ends more than 10 hours apart, is no longer due only to those getting paid at or near minimum wage. Now, spread of hours pay is due to all non-exempt employees and does not phase out as the employee's wage rises.

TIP POOLING

The new Wage Order makes it clear that mandatory tip pooling is lawful, with certain procedural safeguards, but also fleshes out the law forbidding tip appropriation by the employer.

The foregoing is merely a discussion of The New York State Department of Labor's Hospitality Industry Wage Order. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Joshua Zuckerberg at (212) 326-0885, jzuckerberg@pryorcashman.com or Stephanie Kline at (212) 326-0437, skline@pryorcashman.com.

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Joshua Zuckerberg has been with Pryor Cashman since 2000 and became a partner in January 2007. His practice covers the entire spectrum of labor and employment issues. He has extensive experience representing and counseling employers on all matters affecting the workplace, including discrimination, harassment, and disability claims, restrictive covenants, wage and hour issues, and termination and severance practices.

In addition, Mr. Zuckerberg represents employee associations whose membership includes physicians, professors, stage directors and fire officers. Mr. Zuckerberg has developed considerable expertise in arbitration, mediation, collective bargaining, and federal and state litigation.

Recently, Mr. Zuckerberg has:

- Represented high level executives in various termination and severance negotiations
- Prosecuted and defended collective action wage and hour cases in the restaurant industry
- Initiated and settled a sexual harassment litigation against a Fortune 500 Bank
- Defended a real estate company and its executive in a quid pro quo sexual harassment claim

Mr. Zuckerberg is a 1997 graduate of Brooklyn Law School, where he was a member of the Brooklyn Journal of International Law and the Moot Court Honors Society. He was awarded an Edward V. Sparer Public Interest Law Fellowship.



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Stephanie Kline is an associate in Pryor Cashman's Litigation, Intellectual Property and Entertainment, Media & Communications Groups. Her practice covers a wide variety of matters, ranging from trademark and publicity rights to antitrust and civil RICO liability. Stephanie joined Pryor Cashman in 2010 after working for the firm in the summer of 2009.

Stephanie attended Fordham University School of Law, where she served as a Competition Editor on the Fordham Moot Court Board and Associate Editor on the *Fordham Journal of Corporate and Financial Law*.

During law school, Stephanie worked as a law clerk for the Federal Litigation Clinic, where she handled cases involving prisoner civil rights and federal fraud claims.