



LABOR & EMPLOYMENT DEPARTMENT

# ALERT

## NEW YORK DEPARTMENT OF LABOR RELEASES FINAL VERSION OF HOSPITALITY WAGE ORDER EFFECTIVE JANUARY 1, 2011

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On December 15, 2010, the New York State Department of Labor (NY DOL) issued its final consolidated Wage Order for the Hospitality Industry (Wage Order). Effective January 1, 2011, the Wage Order will increase the tipped minimum wage, increase the spread of hours coverage and affect other areas such as tip pooling and tip sharing, record keeping and private event contracts.

While the Wage Order becomes effective on January 1, 2011, the NY DOL has granted restaurants and hotels a grace period to educate themselves on the new rules and make all necessary payroll system changes needed to comply with the requirements of the new Wage Order. By March 1, 2011 (or the next regularly scheduled pay day following March 1, 2011), all employees covered by the Wage Order must be paid any additional wages owed to them on account of the increases retroactive to January 1, 2011. Given the short time period for compliance, it is imperative employers review current policies and practices and adopt the new requirements forthwith.

A summary of some of the more important changes to the Wage Order follow. A full copy of the Wage Order can be found on the NY DOL web site.

### **Increased Minimum Wage for Tipped Employees**

The new Wage Order increases the amount hospitality employers must pay tipped employees. On January 1, 2011, the minimum wage for food service workers (generally, servers, bussers, runners, bartenders, barbacks, service bartenders, hosts who greet and seat guests and

captains who provide direct food service to guests) will increase to \$5.00 per hour and the tip credit will be reduced to \$2.25 per hour worked, provided the employee's total tips plus his or her wages equal or exceed \$7.25 per hour. Food service workers' overtime rates will increase to \$8.63 per overtime hour.

Similarly, the Wage Order also increases the minimum wage rates for nonfood service employees who customarily earn tips. These employees customarily earn tips and are primarily engaged in direct personal service but are not engaged in food and beverage service. They typically include delivery, coat checks and bathroom attendants. The Wage Order mandates these service employees receive a wage of at least \$5.65 per hour, reducing the tip credit to \$1.60 per hour. The overtime rate for nonfood service employees increases to \$9.28 per hour. In addition, for resort hotels only, service employees must receive at least \$4.90 per hour, while the tip credit cannot exceed \$2.35 per hour, provided the weekly average of tips is at least \$4.10 per hour.

Finally, the Wage Order requires employers to notify their employees in writing of their intent to apply a tip credit to an employee's wages. Prior to the Wage Order, this notice requirement was mandated under federal law but not under New York law.

### **Tip Pooling and Tip Sharing**

The Wage Order will now permit employers to mandate tip pooling and allow employers to set the parameters of the tip pool, including the percentage

distributed to each occupation from the tip pool. However, only food service workers may receive distributions from the tip pool.

Currently, tip sharing — which the NY DOL has defined as the practice of sharing tips between directly tipped employees and other personnel who participate in the service of food and beverages to guests (i.e., bus persons, runners and bartenders) — may be mandated by an employer. The Wage Order does not alter this employer right.

### **Tipped Occupations**

Currently, the law does not specifically identify those food service workers who may receive a share of a guest's tip. The new Wage Order eliminates some of this ambiguity by identifying "examples of eligible occupations." The categories of eligible tipped employees include:

- Wait staff
- Counter personnel who serve food or beverage to customers
- Bus persons
- Bartenders
- Service bartenders
- Barbacks
- Food runners
- Captains who provide direct food service to customers
- Hosts who greet and seat guests

The Wage Order implies that this list is not exhaustive and food service workers who perform services similar to the jobs identified in the Wage Order may also be eligible to receive a share of a guest's tip.

### **Record Keeping**

The new Wage Order imposes several record keeping burdens on industry employers. The Wage Order requires employers to furnish employees with a written notice of pay before the commencement of employment and anytime a rate of pay changes. This notice must identify:

- (1) Hourly rate of pay;
- (2) Overtime hourly rate of pay;
- (3) Amount of the tip credit being taken (if applicable);
- (4) Regular payday; and
- (5) When extra pay is required if the actual tips earned are insufficient to bring the employee up to the basic minimum hourly rate.

The Wage Order also requires employers to provide an employee with a written notice anytime the employer modifies the employee's wages.

These rate of pay notices must be issued in English and in the employee's primary spoken language (if not English). The employer must retain a copy of the employee's signed statement acknowledging receipt of the notice.

The Wage Order also requires employers that operate a tip sharing or tip pooling system to maintain detailed tipping records, including:

- (1) A daily log of all cash and credit card tips received by each employee from guests;
- (2) A list of occupations the employer deems eligible to receive tips through a tip sharing or tip pooling program;
- (3) The shares of tips each occupation is scheduled to receive from the tip sharing or tip pooling program; and
- (4) Each employee's daily share of tips from the tip sharing or tip pooling program.

The Wage Order grants food service workers the right to inspect the tip records concerning themselves only.

The Wage Order also mandates that every employer establish, maintain and preserve weekly payroll records that identify each employee's:

- (1) Name and address;
- (2) Social Security number or other employee identification number;
- (3) Occupational classification;
- (4) Number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
- (5) Regular and overtime hourly wage rates;
- (6) Amount of gross wages;
- (7) Deductions from gross wages;
- (8) Amount of net wages;
- (9) Tip credits, if any, claimed as part of the minimum wage;
- (10) Meal and lodging credits, if any, claimed as part of wages;
- (11) Money paid in cash;
- (12) Student classification; and

## (13) Uniform maintenance.

With respect to executive, administrative and/or professional employees, the Wage Order requires only that employers maintain records that include:

- (1) Employee name and address;
- (2) Employee Social Security number or other employee identification number;
- (3) Description of the employee's occupation; and
- (4) For individuals who work in an executive or administrative capacity, their total wages and the value of meal and lodging credits, if any, for each payroll period.

Finally, if a hotel or restaurant employs a student, the employer must maintain a statement from the school indicating whether or not the student:

- (1) Is a student whose course of instruction is one leading to a degree, diploma or certificate; or
- (2) Is completing residence requirements for a degree; and
- (3) Is required to obtain supervised and directed vocational experience to fulfill curriculum requirements.

Employers must keep all of these records for six years.

### Service Charges

The Wage Order addresses ambiguities in the "service charge" issue that developed as a result of the 2008 New York Court of Appeals decision in *World Yacht*. Under the Wage Order, there is a rebuttable presumption that any charge in addition to charges for food, beverages or other specified materials, including any charge for "service," is a charge purporting to be a gratuity. Nevertheless, the Wage Order specifically provides that a charge clearly identified as a charge for the administration of a banquet, special function or package deal is not a charge that purports to be a gratuity provided that customers are informed that the administrative charge is not a gratuity. The notification must be included on the banquet contract or on any menu or bill listing prices and state that the administrative charge is used to offset administrative costs associated with the event; is not a gratuity; and will not be distributed as gratuities to service employees who work during the event. According to the NY DOL, this statement must be written in a font size similar to the surrounding text, but no smaller than 12-point font.

The Wage Order also allows employers to charge a "combination charge," part of which is a gratuity that is to

be distributed entirely to food service workers who assist during the banquet or private event, and part of which is a charge for the administration of the banquet or private event. The Wage Order requires operators who want to charge such a combination charge to break down each portion of the charge by percentage and to notify their guests of the nature of the charge as described above.

If an employer institutes a mandatory service charge or mandatory gratuity in connection with a banquet or special event, it must also maintain and preserve records for at least six years demonstrating the amount of mandatory service charges or mandatory gratuities collected and the nature of distribution of these proceeds. These records must be made available to the employer's food service workers for inspection.

### Spread of Hours

Pursuant to current law, restaurant employers must pay minimum wage employees whose work days last longer than 10 hours (between the start of the employee's work day and the end of the employee's last shift) an extra hour's pay at the full minimum wage rate. Employees whose wages are high enough that their actual total wages exceed the wages a minimum wage employee who worked one more hour than the employee would have earned are not entitled to receive spread-of-hours pay.

The Wage Order changes current law on spread-of-hours payments. The Wage Order expressly states that the spread-of-hours rule applies to all nonexempt employees who work in restaurants and all-year hotels, regardless of an employee's regular rate of pay. The provision applies where a covered employee's work day lasts longer than 10 hours (between the start of the employee's work day and end of the employee's last shift — even if those hours are non-consecutive and even if the total time actually worked is less than 10 hours). For example, if a prep cook (earning \$12.00 per hour), works a morning shift from 7 a.m. to 10 a.m. prepping for lunch and then an evening shift from 4 p.m. to 10 p.m., he is entitled to the \$7.25 spread of hours payment. Although he only worked nine hours that day, those hours were "spread" over more than 10 hours in one working day — entitling him to a single spread of hours payment.

### Call-In Pay

Oftentimes, employers send employees home from work early because of a disciplinary action or a slow business day, or call employees in just for a meeting. The Wage Order requires employers to pay employees who report to work at the request or permission of the

employer at least three hours of pay (or the number of hours in the regularly scheduled shift if that is less) at the employee's applicable wage rate. Additionally, an employer is obligated to pay an employee for at least six hours if he or she reports for two shifts totaling six hours or less (or the number of hours in the regularly scheduled shift if that shift is less). Finally, the Wage Order requires an employer to pay an employee for at least eight hours for three shifts totaling eight hours or less (or the number of hours in the regularly scheduled shift, if that shift is less). The regulations governing call-in pay are applicable to all non-exempt employees regardless of a given employee's regular rate of pay.

### **Meal Credits**

The Wage Order continues to allow employers to apply a meal credit against employees' wages. In fact, the amount of the credit for all-year hotel and restaurant workers is increased to \$2.50 per meal, effective on January 1, 2011. A credit for more than one meal shall not be permitted for any employee working less than five hours on any day.

### **Uniforms**

The Wage Order provides employers with a "wash and wear" exception to the uniform maintenance pay, if the uniform can be laundered with other garments and does not require dry cleaning or other special treatment. For example, it is likely employers that require employees to wear a uniform consisting merely of a logo-crested T-shirt are no longer required to pay the uniform maintenance allowance so long as the shirt is "machine washable."

Employers are also exempt from paying uniform maintenance pay if an employee forgoes using an employer-provided laundry service that: (1) launders uniforms regularly and free of charge; (2) ensures an adequate supply of clean and properly fitting uniforms; and (3) is disclosed and known to employees.

The regulations governing uniform pay are applicable to all nonexempt employees regardless of a given employee's regular rate of pay.

### **Credit Card Fees**

The Wage Order memorializes the NY DOL's position that an employer may deduct the prorated amount of credit card processing fees actually incurred when processing any gratuities.

### **Non-Tipped Work**

The Wage Order clarifies the amount of non-tipped work a food service worker may do in any day while

subject to a tip credit. Specifically, if a food service worker performs either two or more hours of work in non-tip producing occupations or performs work in non-tip producing occupations for more than 20 percent of his or her shift, then the employer may not take the tip credit with respect to that employee for that day.

### **Hourly Rates Required**

The Wage Order expressly prohibits employers from paying employees, other than commissioned salespeople, a shift rate, a piece rate, a flat or daily, a flat weekly rate or on any basis other than an hourly rate. If an employer fails to pay an employee an hourly rate of pay, the employee's regular rate of pay will be determined by dividing the employee's total weekly earnings, not including exclusions from the regular rate, by the lesser of 40 hours or the actual number of hours worked by the employee. This could potentially punish an employer by excluding any overtime hours worked from the method of calculating the hourly rate.

### **Summary**

Even with the March 1, 2011, grace period, the NY DOL has provided industry employers with a very short time period in which to become acquainted with the new rules and regulations provided by the Wage Order. It behooves employers to make every effort to implement the tipped minimum wage increases and other changes with all deliberate speed. Accordingly, it is imperative for employers to begin the compliance process immediately. The following are specific steps employers should implement on or before January 1, 2011, in order to comply with the Wage Order:

- Ensure payroll-processing staff (including outside payroll vendors) are aware of the changes to the tipped minimum wage. Vendors may not make these changes automatically. All food service workers must be paid at least \$5.00 per hour and at least \$8.63 per overtime hour. Service employees, such as delivery persons, coat checkers and bathroom attendants, must receive a wage of at least \$5.65 per hour and \$9.28 per overtime hour.
- Ensure compliance with all of the new wage notification requirements. Tipped employees must be provided with written notice: (1) that identifies the employees' rate of pay; (2) that the tip credit will be taken and the amount of the tip credit; (3) of their regular rates of pay; (4) of their overtime rates of pay; and (5) of the designated pay day. Tipped employees must also be advised in writing that if they do not receive enough in tips over the course of

the work week to make up the difference of the tip credit, then they will be paid additional wages to bring them up to the minimum wage. Employees must sign and acknowledge receipt of these forms, and the forms must be issued in English and in the employee's native language (if it is not English). Acknowledgement forms must be kept for at least six years.

- Update record keeping policies concerning tipped employees. Employers must now maintain: (1) a daily log of all cash and credit card tips received by each employee from guests; (2) a list of occupations the employer deems eligible to receive tips through a tip sharing or tip pooling program; (3) records including the shares of tips each occupation is scheduled to receive from the tip sharing or tip pooling program; and (4) each employee's share of tips from the tip sharing or tip pooling program.
- Alert payroll staff and/or vendors that all nonexempt employees must be paid the spread-of-hour premium any time their work day lasts longer than a spread of 10 hours (between the start of the employee's work day and the end of the employee's last shift). Ensure managers are trained to understand the full parameters of the spread of hours and the impact on scheduling and costs.
- Review existing private event or banquet contracts and revise where necessary. If the employer wants to

keep any portion of any mandatory surcharge in addition to food and beverage costs, the charge must not be referred to as either a gratuity or service charge. Instead, it must be named an "administrative charge." Make sure all written customer forms, contracts, menus and bills clearly explain the "administrative charge" is not a gratuity and will not be distributed to service employees as a gratuity. This explanation should not be in fine print and should be written in at least 12-point font. It should also be written alongside the notation of the surcharge in the contract.

- A system for maintaining the Wage Order's specific tip record keeping requirements should be set up and maintained, as well as the Wage Order's Notice of Pay Rates and Pay Day form requirements.

This summary is only intended to provide an overview of the Wage Order and does not address every item contained therein. Employers should seek the independent advice of their own counsel concerning the implication of this wage order on their workplace.

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