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New York Issues New Wage Order for Hotels and Restaurants Effective January 1, 2011

The New York Department of Labor has merged the wage orders affecting hotels and restaurants into a single wage order (to be contained in 12 NYCRR 146) effective January 1, 2011. The new wage order contains significant departures from the existing rules governing the payment of wages to employees in the hospitality industry. Some of the most notable provisions are included below.

Increased Hourly Wages for Tipped Employees

Like many other jurisdictions, New York has historically allowed employers to pay a reduced minimum wage to tipped employees who receive a certain amount in tips (in other words, take a tip credit). The new wage order increases the hourly wage employers must pay tipped employees, in effect decreasing the tip credit available to employers.

Under the new wage order, food service workers (those employees primarily engaged in serving food and beverages, typically including wait staff, bartenders, captains, and bussers) must receive a minimum wage of at least \$5.00/hour, and credit for tips shall not exceed \$2.25/hour, so long as the total of tips and wages equals or exceeds the minimum wage of \$7.25/hour.

Service employees (those employees, other than food service workers, who typically receive tips, such as coat checks, bellhops and bathroom attendants) must now receive a minimum wage of at least \$5.65/hour, and credit for tips shall not exceed \$1.60/hour, so long as the total of tips and wages equals or exceeds the minimum wage of \$7.25/hour. Service employees working in resort hotels must receive a minimum wage of at least \$4.90/hour, and credit for tips shall not exceed \$2.35/hour, provided that tips earned on a weekly basis average out to at least \$4.10/hour.

Notification of Tip Credit

Following the federal law, employers must notify employees in writing of their intent to take a tip credit against an employee's wages.

Non-Tipped Work

Employers may not take a tip credit for any day in which an employee spends at least 2 hours or 20 percent of the shift, whichever is less, working in a non-tipped occupation.

Service Charges

The wage order addresses the New York Court of Appeals' decision in *Samiento v. World Yacht*, 10 N.Y.3d 70 (2008), which held that employers may not retain mandatory service charges for banquet services unless the employer communicates to patrons in advance that it intends to withhold all or a portion of the charges from the wait staff or other service workers. Under the new wage order, employers may retain charges for the administration of a banquet, special function, or package deal, provided that customers are notified that the charge is not a gratuity or a tip. Adequate notification includes a statement in a customer contract and any menu or bill listing prices, that the "administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and will not be distributed to the employees who provided service to the guests." The statement must appear in ordinary language and in a font size similar to surrounding text, but no smaller than 12-point font.

The wage order permits employers to split a mandatory charge among administration and gratuities provided that employers break down for patrons in writing the percentage to be retained by the employer for administration and to be distributed to employees as gratuities.

Tip Pooling and Sharing

Under the new wage order, employers may now require tip pooling (which is the pooling and redistribution of tips amongst service workers/employees) and set the percentage to be distributed to each occupation from the tip pool. Only food service workers, however, may receive tips from a mandatory tip pool.

Employers may also require tip sharing (which is where a tipped service worker gives a portion of his/her tips to another service worker/employee) among food service workers and may set the percentage to be distributed to each occupation, but employees must handle the tip sharing transactions themselves.

Employers that use a tip pooling or sharing system must maintain, for a period of 6 years, a daily log of the tips collected by each employee on each shift; a list of occupations that the employer deems eligible to receive tips through a tip sharing or pool system; the shares of tips that each occupation is scheduled to receive from tip sharing or pooling; and the amount in tips that each employee receives from the tip share or pool, by date.

Spread of Hours

Where an employee's workday (as opposed to shift) extends over a period of more than 10 hours, employers must pay that employee an additional hour of pay at the minimum wage. By way of example, an employee working 7 am to 10 am, and then again from 7 pm to 10 pm, works 6 hours over a 15-hour spread and would be entitled to one additional hour of pay at the basic minimum hourly rate. Offsets to "spread of hours" pay that were previously available when employees received wages in excess of what would have been received with the additional spread of hours payment(s) are no longer available under the new wage order.

Meal Credits

Employers are permitted to continue counting qualifying meals as part of employees' wages. Under the new wage order, the meal allowance is increased to \$2.50 for all workers. Employers may not take a credit for more than one meal for those employees working less than 5 hours on any day.

Uniform Maintenance Pay

The wage order creates a "wash and wear" exception to the requirement that employers pay employees for uniform maintenance. The exception applies if uniforms are made of "wash and wear" materials; may be routinely washed and dried with other personal garments; do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment; and are furnished to the employee in sufficient number, or the employee is reimbursed by the employer for the purchase of a sufficient number of uniforms, consistent with the average number of days per week worked by the employee.

Employers are also exempt from paying uniform maintenance pay where an employer launders required uniforms free of charge and with reasonable frequency; ensures the availability of an adequate supply of clean, properly-fitting uniforms; and informs employees individually in writing of such service, and the employee chooses not to use the employer's service.

Deductions for Credit Card Fees

The wage order incorporates the Department's prior position, set forth in a series of opinion letters, that employers are permitted to deduct a pro-rata charge of the credit card fee from any tips left on credit cards. Employers need only return to employees the full amount of the tip charged on the credit card, minus the pro-rated portion of the tip taken by the credit card company.

Hourly Rates Required

The new wage order expressly prohibits employers from paying any non-exempt employees on a daily, weekly, salary, piece-rate or other non-hourly rate basis. With the exception of commissioned salespersons, all hospitality industry employees must be paid on an hourly rate.

Written Notice of Pay Rates, Tip Credit and Pay Day

The new wage order now requires that employers issue to each of their employees, prior to the start of employment, written notices containing the employee's regular hourly rate of pay; overtime hourly pay rate; the amount of any tip credit to be taken from the basic minimum hourly rate; and the regular pay day. The notice must also state that extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate. The employer must provide the notice in English and any other language spoken by the new employee as his/her primary language, so long as the Department has made the foreign-language notice available to employers on the Department's website, www.labor.ny.gov.

The notices are also required prior to any change in an employee's hourly rate of pay. Employers must maintain an acknowledgement of receipt signed by the employee on file for 6 years.

The new wage order also addresses the payment of call-in pay to employees who report to duty on any day, whether or not assigned to actual work; lodging credits; the cost for employees to purchase required uniforms; prohibited deductions; and recordkeeping requirements.

Although the wage order is effective January 1, 2011, employers have through March 1, 2011 to comply with the requirements of the new wage order. As of March 1, 2011, or the next regularly scheduled payday following March 1, 2011, all employees covered by the wage order must be paid any additional wages owed to them on account of the new wage order retroactively to January 1, 2011. Employers must maintain payroll records that clearly identify the retroactive payments along with regular wage payments.

Employers availing themselves of the grace period must also post for covered employees a notice regarding the grace period and the employees' entitlement to retroactive payment of wages under the new wage order. The Department will develop a notice for this purpose and post it on its website for download prior to the effective date of the wage order.

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