

ALERTS AND UPDATES

New York State Orders Increases in Base Wages for Hospitality Industry's Service Employees, and Other Significant Changes

February 9, 2011

The New York State Department of Labor (DOL) has issued a new wage order for workers in the hospitality industry ("Wage Order"), which contains significant changes from certain long-standing industry rules. Although the Wage Order is effective as of January 1, 2011, the DOL has provided employers with an implementation period lasting through February 28, 2011, to make necessary payroll system changes to comply with the rule's requirements. It is important to note that all additional wages owed to employees as a result of the Wage Order must be computed retroactively to January 1, 2011. Key provisions of the Wage Order are summarized below.

Pay Rates

The basic minimum hourly rate for employees remains the same. They are to be paid at least the basic minimum hourly rate of \$7.25 per hour. However, the Wage Order raises the minimum base wage and changes the maximum tip credit for three classes of employees. The minimum wage for food-service workers increases to \$5.00 from \$4.65 per hour, thereby reducing the credit for tips to \$2.25 per hour. The minimum wage for service employees in all establishments rises to \$5.65 from \$4.90 per hour, thereby reducing the tip credit wage to \$1.60 per hour. Finally, the minimum wage for service employees at resort hotels will increase to \$4.90 from \$4.35 per hour (credit for tips shall not exceed \$2.35 per hour).

Tip Pool

The Wage Order allows employers to require tip sharing for eligible employees, whereby a directly tipped food-service employee gives a portion of his or her tips to another employee who participated in providing service to the customer. The employer may set the percentage to be given to each occupation; however, employees are required to handle the transaction themselves.

The Wage Order also allows employers to require tip pooling, in which the tip earnings of directly tipped employees are intermingled in a common pool and then redistributed among directly and indirectly tipped employees. An employer may require food-service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the pool. Only food service workers may receive distributions from the tip pool.

Under the new rules, only those employees who "perform or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental" are eligible to receive shared tips or to receive distributions from a tip pool. Examples include: (a) wait staff, (b) counter personnel who serve food or beverages to customers, (c) bus persons, (d) bartenders, (e) service bartenders, (f) barbacks, (g) food runners, (h) captains who provide direct food service to customers and (i) hosts who greet and seat guests.

Spread of Hours

Any employee who works more than 10 hours in a day must be paid an extra hour at the full minimum-wage rate of \$7.25 per hour. This additional hour of pay may not be offset by credits for meals or lodging.

Payroll Records

Employers are required to maintain and preserve for at least six years the following information for each employee:

1. name and address;
2. Social Security number or other employee identification number;
3. occupational classification;
4. the 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 hours;
5. regular and overtime hourly wage rates;
6. the amount of gross wages;
7. deductions from gross wages;
8. the 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; and
12. student classification.

Notice Provisions

Prior to the start of employment, employers are required to give each employee written notice of the employee's regular hourly pay rate; overtime hourly pay rate; the amount of tip credit, if any, to be taken from the basic minimum hourly rate; and the regular payday. The notice shall also state that extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate. The notice must be provided in (1) English and (2) any other language spoken by the new employee as his or her primary language if such a notice is available from the DOL's website.

Uniforms

Employers will not be required to pay uniform maintenance pay where the employer provides employees with a sufficient number of uniforms to get through the workweek and the uniforms are made of "wash and wear" materials and may be routinely washed and dried with other personal garments. Employers are still responsible for furnishing the required uniforms to employees or for reimbursing employees for the purchase of the uniforms.

Service Charge

In order for an employer to retain a charge for administration of a banquet, special function or package deal, it has to clearly identify the charge as "administrative" and notify the customer that the charge is not a gratuity or tip. The statement must use ordinary language readily understood and must appear in a font size similar to surrounding text,

but no smaller than a 12-point font.

Credit Cards

When tips are charged on credit cards, an employer can deduct from the tip a pro-rata portion of the credit card fee.

What This Means for Employers

Employers in the hotel and restaurant industry may want to become familiar with these rules promptly, as they must be implemented by February 28, 2011. Employers should consider reviewing and updating their employment documents and recordkeeping practices to ensure they satisfy the new Wage Order's requirements.

For Further Information

If you have any questions about the information addressed in this *Alert*, please contact any [member](#) of our [Employment, Labor, Benefits and Immigration Practice Group](#), or the attorney in the firm with whom you are regularly in contact.

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