



Management Alert

New York Amends Wage Rule for the Hospitality Industry

On December 15, 2010, the New York State Department of Labor (“DOL”) adopted a major change to the State’s wage rules affecting the restaurant and hotel industries. The new rule seeks to clarify existing wage orders by creating a single, more straightforward Minimum Wage Order for the Hospitality Industry (the “Order”). Its changes include increasing the minimum hourly wages for tipped and resort hotel employees, adopting new rules on tip sharing and tip pooling, providing mandatory hourly rather than salary wages, as well as other changes.

Below is a summary of the key provisions of the Order

1. Restructured minimum wage rules for the hospitality industry

New York’s existing wage orders for the hospitality industry are currently contained in separate rules addressing restaurants, 12 NYCRR 137, and hotels, 12 NYCRR 138. The Order merges the existing wage rules into a single rule that will be contained in 12 NYCRR 146. For the first time, the Order also provides certain examples to demonstrate the wage rules with a stated purpose to assist employers with compliance.

2. Effective date

The Order’s effective date is January 1, 2011. In response to industry concerns about the practical hardship to payroll and bookkeeping practices, the DOL will permit employers until March 1, 2011 to come into compliance. However, any additional wages due under the Order must be paid retroactively.

3. Increased hourly wages for tipped employees

The Order increases the required wages for some workers through the elimination of certain exceptions and tiered job definitions. The Order imposes the following minimum hourly wages:

- For tipped food-service employees: \$5 (from \$4.65) with a tip credit of no more than \$2.25;
- For service employees who earn tips: \$5.65 (from \$4.90) with a tip credit of no more than \$1.60; and
- For employees working in resort hotels: \$4.90 (from \$4.35) with a tip credit of no more than \$2.35.

4. Hourly pay rate is mandatory

Under the existing rules, employers are permitted to pay employees on a piece rate, salary, or other basis provided that the wage rules are met on an hourly basis. The Order specifically eliminates this discretion and requires that *all* hospitality employees be paid on an hourly basis.

5. Overtime hourly rates

The Order emphasizes that hospitality employees must be paid overtime at a wage rate of 1½ times the employee's regular rate for hours worked in excess of 40 hours in one workweek. Although this rule is standard under New York law, the Order eliminates an exception for residential employees of hotels that required overtime after 44 hours per workweek. The Order also sets forth examples to emphasize that the tip credit (discussed below) remains constant even when the employee is paid overtime wages.

6. Notification of tip credits

As under the existing rules, the Order provides that an employer may take a credit toward the basic minimum hourly rate if the service employee or food service worker receives tips. However, the Order now mirrors federal wage laws and requires that employees be notified in writing of any tip credits that are taken against the minimum wage.

7. “Spread of hours”

As under the existing rules, an employee who works more than 10 hours in a single day is entitled to one extra hour of pay at minimum wage. However, under the Order, this rule applies to all employees working in restaurants and all-year hotels, regardless of their wages. Further, the additional hour of wages may not be considered part of overtime pay, and the extra hour of wages may not be offset by a meal credit.

8. Tip sharing and tip pooling permitted

“Tip sharing” is defined under the Order as the practice where a directly tipped employee gives a portion of his or her tips to another service employee or food service worker. “Tip pooling” is defined as the practice where tips are commingled and redistributed among employees. Unlike the existing law, the Order now mirrors federal wage laws and permits both tip sharing and tip pooling on either a voluntary basis in all industries, or on a mandatory basis but only in the food service industry. Eligibility for tip sharing and tip pooling is determined on the basis of job duties and not title, and includes wait staff, counter personnel, bus persons, bartenders, and other similarly defined categories.

Employers that use either a tip sharing or tip pooling system must keep records for at least six years, including a daily log of gratuities collected by every employee on every shift, occupations that are subject to the system, the percentage each occupation is to receive under the system, and the amount that each employee receives by date.

9. Service charges at banquets and special functions are presumed to be gratuities

The Order addresses the decision in *Samiento v. World Yacht*, 10 N.Y.3d 70 (2008), in which the New York Court of Appeals held that mandatory charges for banquet services may not be retained by an employer when customers have reason to believe that the charges are gratuities for employees. The Order requires that a charge for the administration of a banquet, special function, or package deal must be clearly identified and customers must be notified that the charge is not a gratuity or tip. Employers bear the burden of proving that such a notification was sufficient by clear and convincing evidence, and it must be given in writing in the agreement or contract in ordinary language and text size.

10. Required uniforms

As under the existing rules, the Order requires that employers pay employees for required uniform maintenance at the rates of: \$9 per week, for work weeks more than 30 hours; \$7.10 per week, for work weeks between 20 and 30 hours; and \$4.30 per week, for work weeks of 20 hours or less. However, the Order now creates an exception to this requirement if the required uniforms: (1) are made of “wash and wear” materials, (2) may be routinely washed and dried with other personal garments, (3) do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment, and (4) 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.

11. Allowance rate for meals and lodging

As under the existing law, employers are permitted to deduct from wages some cost of meals and lodging provided to employees. The Order now sets the allowance rate for meals at no more than \$2.50 (from \$2.10) for food service employees. The allowance rate for lodging in restaurants remains \$1.50 per day or \$9.60 per week for food service workers, and \$1.75 per day or \$11.30 per week for all other workers. However, lodging credits in all-year hotels may now be no more than \$0.35 per day. In resort hotels, the allowance rate for lodging and three meals per day furnished to a residential employee is \$13.75 per day for food service workers, and \$16.25 per day for all other workers. Meals furnished to a non-residential employee at a resort hotel is \$2.75 per meal for food service workers and \$3.25 per meal for all other workers.

12. Credit card fees

The Order explicitly permits employers to deduct credit card service fees from tips on a pro rata basis.

13. Written notice of pay upon hire and rate change

The Order requires that employees be provided with written notice of wages upon hire and prior to any change in wages. As under existing rules, employers are required to keep a written acknowledgement on file for six years. The Order provides an updated sample acknowledgment form that is consistent with the amended rules.

14. Notice

The press release regarding the Order indicates that the DOL will be creating a new notice that will be required to be posted by all hospitality employers. However, the notice has not yet been provided on the DOL's website.

For more information, please contact the Seyfarth attorney with whom you work, or any Labor and Employment attorney on our website.



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