Proskauer

New York's Hospitality Industry Wage Order Takes Effect January 1, 2011

December 29, 2010

In mid-December, after one year of study and deliberations following proposed rulemaking, the New York State Department of Labor ("NYDOL") filed its long awaited wage and hour order affecting employees working in the restaurant and hotel industries (the "Wage Order"). The Wage Order now consolidates the two separate, but similar, wage orders that covered the restaurant and hotel industries into the Hospitality Wage Order. The new Wage Order contains some significant changes from the prior rules and affords Hospitality Industry employers but a short window of time to come into compliance.

As of January 1, 2011, employers in the Hospitality Industry will need to review and modify their current wage and hour policies regarding the tipped credit minimum wage, tip pooling and tip sharing, record keeping, private event contracts, spread of hours pay and other related practices. However, there will be an "implementation period," under which employers have roughly two months, until February 28, 2011, to reflect the changes required by the new Wage Order in their payroll systems. Employers availing themselves of this implementation period must, by March 1, 2011, retroactively pay any additional wages owed under the new Wage Order for the period from January 1, 2011 until such payments are made. Also, the NYDOL has committed to issuing "model" forms to assist employers with the notice and recordkeeping provisions required under the new Wage Order. Below are some highlights of the Wage Order.

Pay Rates

The current minimum wage in New York is $7.25 per hour. Effective January 1, 2011, the minimum hourly wage rate for tipped food-service employees will increase to $5.00 from $4.65, thereby having the effect of *reducing* the tip credit wage to $2.25/hour. The minimum wage for service employees earning tips will increase to $5.65 from $4.90/hour, again, having the effect of *reducing* the tip credit wage to $1.60/hour. Finally, the minimum wage for tipped service employees in the hotel industry will increase to $4.90/hour from $4.35/hour and, therefore, the tip credit cannot be reduced below $2.35/hour for such employees. The minimum wage remains at $7.25 per/hour and overtime will remain at 1½ times the regular rate above 40 hours. However, it should be noted that service employees or food service workers who work a non-tipped occupation for two hours or more, or for more than 20% of their shift, whichever is less, shall not be subject to the tip credit for the day.

Importantly, the new Wage Order requires employers who apply a tip credit to an employee's wages to notify the employee in writing of their tip credit wage, regular pay rate, and pay date at the commencement of their respective employment. This will require an employer to review an employee's wages with all new hires. While such a provision existed under the Fair Labor Standards Act, there was no similar provision, until now, under New York law. Frankly, so as to avoid any misunderstandings, this is probably a good practice to adopt for even existing employees.

Notice Provisions

The Wage Order requires employers to provide employees with a written notice of their pay prior to the commencement of their employment *and anytime a rate of pay changes*. This information must be made available to the worker in English *and* in the employee's primary spoken language. Further, the employer must also retain a copy of a statement signed by the employee acknowledging receipt of the notice. Evidence of such notices and acknowledgments should be kept for a minimum of six years. 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) The notice must explain to the employee when extra pay is required if the actual tips earned are insufficient to bring the employee up to the basic minimum hourly rate.

Tip Pool

Employers in the Hospitality Industry can now require a tip pool – for "eligible employees." Examples of eligible 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

Employers must also keep detailed tipping records, for at least six years, which include:

(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 share of tips from the tip sharing or tip pooling program.

The Wage Order also permits an employee the right to inspect his/her tip records – not the tip records concerning any other employee.

Charges Purported to be a Gratuity or Tip

Under the Wage Order there will now be a rebuttable presumption that any charge made by a customer, in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for “service” or “food service,” is a charge purporting to be a gratuity.

Administrative or Service Charge

The Wage Order provides that in order for an employer to retain a charge for the administration of a banquet, special function, or package deal, the employer must clearly identify the charge as an “administrative” charge and notify the customer that the charge is *not* a gratuity or tip and that it will not be distributed as a gratuity to the employees who provided services. This disclosure must be in “ordinary language readily understood” and appear in a font size similar to surrounding text and be no smaller than “12 point font”. We note that this is in accordance with interpretations of the New York Labor Law which hold that an employer cannot retain any portion of what appears to be the employees’ gratuity.

Tip Credit Card Fees

The Wage Order permits an employer to deduct, from the tip left an employee on a charge card, the amount of credit card processing fees actually incurred on that charge for employee tips on a pro-rata basis.

Payroll Records

Employers must establish, maintain and preserve for at least six years, 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; and

(12) Student classification.

These records should also indicate whether the employee has uniforms maintained by the employer.

Uniforms

Under the Wage Order, in order to now qualify for the so-called “wash and wear” exemption, such that the employer does not have an obligation to pay the cleaning allowance if the uniform can be washed by the worker with his/her other garments, the employees’ required uniform must be made of wash and wear materials; may be routinely washed and dried with other personal garments; does not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment; and uniforms are furnished to the employee in sufficient numbers – consistent with the average number of days per week worked by an employee.

Additionally, where an employer does not maintain required uniforms for any employee, the employer shall pay the employee, in addition to the employee’s agreed rate of pay, uniform maintenance pay of:

$9.00 per week if employee works over 30 hours;

$7.10 per week if employee works more than 20 hours but less than 30 hours; and

$4.30 per week if employee works less than 20 hours.

Spread of Hours

Under the Wage Order any employee whose workdays last longer than 10 hours (between the start of the first shift and the end of the last shift) shall be paid an extra hour at the full minimum wage rate - $7.25/hour.

Meal Credits

Under the Wage Order, the meal credit would be increased to $2.50 per meal.

Call-In Pay

The Wage Order requires employers to pay employees who report to work at the "request or permission" of the employer:

> (1) At least three hours of pay (or the number of hours in the regularly scheduled shift, whichever is less) at the employee's applicable wage rate;
>
> (2) 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, whichever is less);
>
> (3) At least eight hours for three shifts totaling eight hours or less (or the number of hours in the regularly scheduled shift, whichever is less).

Food Service Worker and Service Employees

Under the Wage Order, a food service worker is defined as any employee who is primarily engaged in the servicing of food or beverages to guests, patrons or customers in the Hospitality Industry, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers. Food service workers do not include delivery workers.

A service employee is an employee, other than a food service worker, who customarily receives tips at the rate of $1.60 or more per hour.

Related Professionals

- **Michael J. Lebowich**
  Partner
- **Nigel F. Telman**
  Partner

- **Elise M. Bloom**
  Partner
- **Mark W. Batten**
  Partner