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[Recently Enacted "Hospitality Wage Order" Imposes New Tip Rules](#)

The New York State Department of Labor's "Hospitality Wage Order" ("wage order") took effect on January 1, 2011. The wage order brings the restaurant and hotel industries under a single set of laws and abolishes the former orders which dealt with these industries separately. While the wage order modifies a number of current requirements relating to wages, uniforms and employee meals, as set forth below in more detail, it also subjects gratuities to regulations for the first time in New York State.

Tips Charged on Credit Cards

The wage order codifies the existing guidance from Department of Labor opinion letters regarding tips charged on credit cards, and provides that employers may process credit card tips through their payroll systems, and can retain the pro rata share of the charge incurred for running the credit card transaction. Thus, if a customer leaves a \$10 credit card tip on their \$50 restaurant bill, and the credit card company charges 5% to process the \$60 transaction, the employer may retain 50 cents of the \$10 tip (5% of \$10), and must provide the employee \$9.50. Employers may not retain any amount in excess of the employee's pro rata share of the processing fee.

All deductions that employers take from employees' tips for credit card tip processing fees must be included in employees' weekly wage statements.

Tip Pooling

Employees who are directly tipped by customers may voluntarily agree to pool their tips and redistribute them among other employees who are both directly tipped and indirectly tipped. Only employees that regularly engage in personal service with customers are eligible to receive tips from a tip pool or a tip share (see below). The wage order provides the following examples of eligible employees:

- wait staff;
- counter personnel who serve food or beverages to customers;
- bus persons;
- bartenders;
- service bartenders;
- barbacks;
- food runners;
- captains who provide direct food service to customers; and
- hosts who greet and seat guests

Additionally, the wage order now allows employers to require food service workers to enter a tip pool in which the employer sets the distribution percentage for each occupation within the pool.

Tip Sharing

Employees who are directly tipped by customers may voluntarily agree to share their tips with food service

workers and service employees who engage in service to customers. While an employer may require the sharing of tips among directly tipped employees, employees must personally conduct all transactions related to the tip share.

Tipping Records

The wage order provides that employers who require tip pooling or sharing must maintain detailed records of the operation for at least six years, including a daily log of tips collected, occupations eligible for tips, the percentage of tips allocated to each occupation, and the amount each employee receives from the tip share or pool.

Employees Working in Tipped and Non-Tipped Positions

Food service workers and service employees who spend more than 2 hours in one day, or more than 20% of a shift in a non-tipped position, may not be subject to a tip credit for the entire day's work. For example, an employer may not take a tip credit from an employee on a day in which the employee spends 2.5 hours washing dishes and 6 hours waiting on tables (more than 2 hours non-tipped work), or who spends 1.5 hours washing dishes and 5 hours waiting tables (more than 20% non-tipped work).

Administrative Charges

The wage order requires that employers clearly distinguish between charges for the administration of a banquet, special function, or package deal, and gratuities. Accordingly, employers are required to provide special function customers with a statement in their agreement, and on any menu and bill listing prices, which categorizes administrative charges that will not be distributed as gratuities as "administrative," and separately delineates charges for gratuities.

Wages for Food Service Workers and Service Employees

In addition to the tipping rules detailed above, the wage order also raises the minimum wage for tipped food service workers (e.g. wait staff, bartenders, captains, bussing personnel) from \$4.90 to \$5.65 per hour and for tipped service employees (i.e. employees other than food service workers who regularly receive \$1.60 or more of tips per hour such as coat check workers) from \$4.65 to \$5.00 per hour. While the overall minimum wage remains at \$7.25 per hour, the new wage rates actually reduce tip credits. Thus, the maximum tip credit for food service workers is now \$2.25, and for service employees, \$1.60.

Employers must also take note that the wage order now requires that employees be given written notice of their tip credit eligibility prior to hiring. This written notice must also state that employees will receive additional pay when tips are insufficient to bring their minimum hourly rate (either \$5.00 or \$5.65) up to the minimum wage (\$7.25).

Effective Date

Employers required to revise their current wage and tipping policies based on the wage order have until February 28 to do so, as the Department of Labor has allowed for an "implementation period" in order for employers to make necessary payroll and bookkeeping changes. However, all employees covered by the order must still be paid the wages owed to them under the new regulations computed retroactively to January 1. Furthermore, employers are required to keep records of all retroactive payments in addition to regular payroll records.

Conclusion

The Hospitality Wage Order imposes new requirements upon New York employers that we anticipate will be used by plaintiffs' counsel in a continued effort to ensnare New York employers in costly lawsuits. Accordingly, it is imperative that employers review their tipping practices to ensure compliance with the Hospitality Wage Order.

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