



LABOR & EMPLOYMENT DEPARTMENT

# ALERT

## PROPOSED WAGE ORDER CONTAINS SIGNIFICANT CHANGES TO THE WAGE AND HOUR REGULATIONS AFFECTING THE HOSPITALITY INDUSTRY

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Following much anticipation from the hospitality community, the New York State Department of Labor (NY DOL) finally published its proposed wage order affecting the hotel and restaurant industries (Wage Order). If adopted, the proposed Wage Order will require employers to review and modify their current wage and hour policies in such areas as tipped minimum wage, tip pooling and tip sharing, record keeping, private event contracts, spread of hours pay and other related practices.

While some of the proposed changes will impose additional costs and burdens on industry operators, the NY DOL did include several positive changes long requested by the restaurant industry. Though the changes are in no way a panacea for the industry, some of the changes in the proposed Wage Order clarify or eliminate significant ambiguities in previous versions of the Wage Order that often resulted in countless lawsuits and administrative agency attacks on the industry.

A summary of some of the more important changes to the proposed Wage Order follow.

### **Increased Minimum Wage for Food Service Workers**

Currently, restaurant employers are permitted to apply a tip credit of \$2.60 against the standard minimum hourly wage of \$7.25 per hour for employees who are primarily engaged in the service of food and beverages to guests (food service employees). Consequently, employers must pay these food service employees at least \$4.65 per hour (with an overtime rate of \$8.28). Similarly, employers are

currently permitted to apply a tip credit of \$2.35 per hour to the wages of delivery, coat check, bathroom attendant and other employees who customarily earn tips but are not engaged in the service of food or beverages. Employers must pay these employees a direct wage of at least \$4.90 per hour.

If adopted, the proposed Wage Order will increase the amount of direct wages employers will need to pay tipped employees. Specifically, if the Wage Order is adopted before 2011, employers will now be required to pay food service employees a direct wage of at least \$4.75 per hour until the end of 2010 (decreasing the tip credit from \$2.60 to \$2.50 per hour worked). On January 1, 2011, the food service employee minimum wage would increase to \$5 per hour. (The tip credit would be further reduced to \$2.25 per hour worked.)

The minimum wage rates would also increase for non-food service employees who customarily earn tips. The proposed Wage Order mandates that these employees receive a direct wage of at least \$5.65 per hour. (The tip credit would be reduced to \$1.60 per hour.) Service employees who work at resort hotels would be required to receive at least \$4.90 per hour, and the tip credit could not exceed \$2.35 per hour.

If the proposed Wage Order becomes law, tipped employees' overtime rates will also increase. For food service employees, the overtime rate, corresponding with the hourly rate of \$4.75, would be \$8.38 per overtime

hour, and at a rate of \$5.00, would be \$8.63 per overtime hour. For non-food service employees who customarily receive tips, the overtime rate would be \$9.28 per overtime hour.

The proposed Wage Order would also require any employer that wants to apply a tip credit to an employee's wages to first notify the employee in writing. This notice requirement is currently mandated under federal law but not under New York law.

### Tip Pooling and Tip Sharing

Presently, New York State employers may not require employees to pool their tips. In a significant victory for the hospitality industry, the proposed Wage Order will now permit employers to require tip pooling and will even allow employers to set the parameters of the tip pool.

Currently, tip sharing, which the NY DOL has defined as the practice of sharing tips between directly tipped employees and other personnel who participate in the service of food and beverages to guests (i.e., bus persons, runners and bartenders), may be mandated by an employer. Tip sharing remains permissible under the proposed Wage Order.

### Tipped Occupations

The current Wage Order does not specifically identify the types of food service employees who may receive a share of a guest's tip. The proposed Wage Order tries to eliminate some of this ambiguity by identifying "examples of eligible occupations." The categories of eligible tipped 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

The proposed Wage Order implies that this list is not exhaustive, and that food service employees who perform services similar to the jobs identified in the proposed Wage Order may also be eligible to receive a share of a guest's tip.

### Record Keeping

The proposed Wage Order imposes several record keeping burdens on industry employers. As described above, the proposed Wage Order requires employers to furnish employees with a written notice of pay before the commencement of employment and anytime a rate of pay changes. 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) When extra pay is required if the actual tips earned are insufficient to bring the employee up to the basic minimum hourly rate.

The proposed Wage Order also requires employers to provide an employee with a written notice anytime the employer modifies the employee's wages.

This rate of pay notice must be made available in English and in the employee's primary spoken language. The employer must also retain a copy of a statement signed by the employee acknowledging receipt of the notice.

The proposed Wage Order also requires employers to keep detailed tipping records including:

- (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 proposed Wage Order grants food service employees the right to inspect the tip records concerning themselves. However, food service employees do not have the right to inspect records concerning any other employee.

The proposed Wage Order also mandates that every employer establish, maintain and preserve 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.

With respect to executive, administrative and/or professional employees, the proposed Wage Order requires only that employers maintain records that include:

- (1) Employee name and address;
- (2) Employee Social Security number or other employee identification number;
- (3) Description of the employee's occupation; and
- (4) For individuals who work in an executive or administrative capacity, their total wages and the value of meal and lodging credits, if any, for each payroll period.

Finally, if a hotel or restaurant employs a student, the employer must maintain a statement from the school indicating whether or not the student:

- (1) Is a student whose course of instruction is one leading to a degree, diploma or certificate; or
- (2) Is completing residence requirements for a degree; and
- (3) Is required to obtain supervised and directed vocational experience to fulfill curriculum requirements.

Employers must keep all of these records for six years.

### **Service Charges**

In recent years, the hospitality industry has been plagued with litigation concerning the distribution of mandatory "service charges." Employees commonly

allege that these mandatory service charges constitute gratuities, or charges that purport to be gratuities, that must be distributed entirely to food service employees. Employers, on the other hand, typically deny their service charges constitute or purport to be gratuities.

The current Wage Order provides virtually no guidance on this issue. However, the proposed Wage Order is far more specific. Under the proposed regulations, there is a rebuttable presumption that any charge in addition to charges for food, beverage or other specified materials, including any charge for "service," is a charge purporting to be a gratuity. Nevertheless, the proposed Wage Order specifically provides that a charge that is clearly identified as a charge for the administration of a banquet, special function or package deal is not a charge that purports to be a gratuity. The notification must be included on the banquet contract or on any menu or bill listing prices and state that the administrative charge is used to offset administrative costs associated with the event, it is not a gratuity and will not be distributed as gratuities to service employees who work during the event. According to the NY DOL, this statement must be written in a font size similar to the surrounding text, but no smaller than 12-point font.

If an employer institutes a mandatory service charge or mandatory gratuity in connection with a banquet or special event, it must also maintain and preserve records for at least six years demonstrating the amount of mandatory service charges or mandatory gratuities collected and the nature of distribution of these proceeds. These records must be made available to the employer's food service employees for inspection.

### **Spread of Hours**

Pursuant to current law, restaurant employers must pay minimum wage employees whose workdays last longer than 10 hours (between the start of the first and the end of the last shift) an extra hour at the full minimum wage rate. Employees whose wages are high enough that their actual total wages exceed the wages a minimum wage employee who worked one more hour than the employee would have earned, are currently not entitled to receive spread-of-hours pay.

The proposed Wage Order eliminates this exception to the spread-of-hours regulation and expressly provides the spread-of-hours rule applies to all nonexempt employees who work in restaurants and all-year hotels, regardless of an employee's regular rate of pay. The spread of hours is to be paid at the regular minimum wage rate regardless of an employee's regular rate of pay.

**Call-In Pay**

Oftentimes, employers send employees home from work early because of a disciplinary action or a slow business day. The proposed Wage Order requires employers to pay employees who report to work at the request or permission of the employer at least three hours of pay (or the number of hours in the regularly scheduled shift if that is less) at the employee's applicable wage rate. Additionally, an employer is obligated to pay an employee for 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 if that shift is less). Finally, the proposed Wage Order requires an employer to pay an employee for at least eight hours for three shifts totaling eight hours or less (or the number of hours in the regularly scheduled shift, if that shift is less).

**Meal Credits**

The proposed Wage Order continues to allow employers to apply a meal credit against employees' wages. In fact, the proposed Wage Order increases the amount of the credit for food service employees. If the proposed Wage Order takes effect prior to 2011, then the credit shall be increased to \$2.25 per meal (up from \$2.10 per meal). On January 1, 2011, the meal credit would be increased to \$2.50 per meal. For non-service tipped employees, the meal credit remains at \$2.50 per meal.

**Uniforms**

Presently, employers must supplement their employees' wages if employees are required to wear a uniform. A set-off currently applies, and no uniform allowance is due to any employee whose actual weekly wages exceed the minimum wages due for those hours plus the uniform allowance.

The proposed Wage Order indicates that employers are no longer obligated to pay the uniform allowance if the uniform can be laundered with other garments and does not require dry cleaning or other special treatment. This follows the federal "wash and wear" rule, and employers that require employees to wear uniforms that consist merely of a logo-crested t-shirt are no longer required to pay the uniform maintenance allowance. The proposed Wage Order also eliminates the current set-off and would

apply to all employees who are required to wear uniforms regardless of the amount of wages they earn.

**Credit Card Fees**

The proposed Wage Order memorializes the NY DOL's position that an employer may deduct the amount of credit card processing fees actually incurred by "cashing-out" credit card gratuities.

**Side Work**

In a significant change to the proposed Wage Order, the NY DOL has limited the amount of side work a food service employee may do in any day while still subject to a tip credit. Specifically, if a food service employee performs either two or more hours of non-tip producing duties, or performs non-tip producing duties for more than 20 percent of his or her shift, then the employer may not take the tip credit with respect to that employee for that day.

This provision poses significant record keeping and management burdens on employers. Employers may now be required to constantly track tipped employees' duties and responsibilities throughout the course of the day and make a determination of whether or not the employees are performing tip-producing duties. Employers may also be required to record employees' time spent on tip-producing activity and non-tip producing activity in a single shift, which can lead to additional logistical issues.

**Comment Period**

The public has the opportunity to comment on the changes contained in the proposed Wage Order until December 4, 2010. In the meantime, hotel and restaurant employers should begin preparing for these changes as the final Wage Order is unlikely to vary significantly from this proposed Wage Order.

This summary is only intended to provide an overview of the proposed Wage Order and does not address every item contained therein. For more information about this Alert, please contact Carolyn D. Richmond at 212.878.7983 or [crichmond@foxrothschild.com](mailto:crichmond@foxrothschild.com), or a member of Fox Rothschild LLP's New York Labor & Employment Department. Visit us on the web at [www.foxrothschild.com](http://www.foxrothschild.com).



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