

New York Hospitality Industry Wage Order Effective January 1, 2011

The New York State Department of Labor has issued its long-awaited final Hospitality Industry Wage Order applicable to hotels and restaurants, among others. The new Wage Order will be effective January 1, 2011. It makes substantial changes to the rules governing payment of wages to employees in the hospitality industry. It should clarify rules applicable to an industry that has been besieged with class action lawsuits for overtime pay and tip misappropriation. The December 15, 2010, final Wage Order is the culmination of nearly two years of administrative proceedings. A Wage Board held numerous public hearings throughout the State and issued recommendations to the Commissioner of the Department of Labor. The Department of Labor issued a Proposed Order on October 20, 2010. The final Wage Order is substantially similar. Highlights of the Wage Order include the following:

Consolidation of Prior Orders – The Wage Order covers the Hotel and Restaurant industries, which previously were covered by two separate, albeit substantially similar, orders.

Mandated Hourly Rates – All non-exempt industry employees must be paid on an hourly basis, and not by a weekly or other salary. Failure to provide an hourly rate of pay will result in calculation of an hourly rate by dividing the salary either by 40 hours or the number of hours worked in the workweek, whichever is less. In other words, the salary will be presumed to cover a maximum of 40 hours, not all hours worked in the workweek.

Increased Pay Rates – Tipped food service employees must receive a wage of not less than \$5.00 per hour, with a permissible tip credit no greater than \$2.25 per hour. Except for those in resort hotels, tipped non-food service employees, such as delivery persons, must receive at least \$5.65 per hour. Currently, tipped food service employees must receive at least \$4.65 per hour, and tipped non-food service employees must receive at least \$4.90 per hour. Slightly different rates apply for resort hotels.

Tip Credit Notification – In order to take advantage of the tip credit, a covered employer must notify the employee of any tip credit to be taken as part of its new hire notice. While a tip credit notification requirement existed previously under the Fair Labor Standards Act, there was no similar requirement under New York law.

New Hire Notices – New hires notices must include the notification of tip credit discussed above and must be provided in English and any other language spoken by the employee as his primary language (subject to the Commissioner developing templates). Further, the notice must be provided prior to any change in pay rates.

Tip Credit Availability – An employer may not take a tip credit for any day if an employee spends at least two hours or 20 percent of the shift (whichever is less) working in a non-tipped occupation. This standard is stricter than the one under federal law.

Meal Allowance – An employer may continue to consider meals as part of wages. Effective January 1st, the meal allowance will be \$2.50 per meal for all workers. Currently it is \$2.10 for

food service workers. The Final Order reiterates that the meal must be customarily eaten by the employee for the credit to be taken.

Spread of Hours Offset Eliminated – Employees remain obligated to pay an additional hour of pay at minimum wage to any employee whose workday (not hours worked) is more than 10 hours. However, the offset previously available in which an employer could set off this payment obligation by wages paid in excess of minimum wage has been eliminated. In other words, an additional hour at the minimum wage must be paid to any covered employee whose spread of hours in a day exceeds 10, regardless of his rate of pay. For example, if an employee makes \$15 per hour and has a workday of over 10 hours, an additional \$7.25 is due.

Uniforms – An employer is not required to pay for the cost of laundering “uniforms” that can be washed with other personal garments, do not require dry cleaning or other special treatment, and are given to the employee in adequate numbers (or the employee is reimbursed for buying a sufficient number of uniforms). Further, no allowance is required if the employer makes available frequent use of a free laundry service and informs employees of such in writing. The Wage Order provides that an item is not a “uniform” if it can be part of an employee’s “ordinary wardrobe,” which is defined as “basic street clothing selected by the employee where the employer permits variation in dress.”

Service Charges – Slightly modifying the language of the Proposed Order (presumably to clarify the Court of Appeals’ decision in *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70 (2008)), the Wage Order provides that in order for the employer to retain “a charge for the administration of a banquet, special function, or package deal,” the charge must “be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip” [and] “will not be distributed as gratuities to employees who provide services for guests.” The disclosure must be in “ordinary language readily understood” and “shall appear in a font size similar to surrounding text, but no smaller than a 12 point font.”

Tip Pooling – The Wage Order permits for the first time in New York State mandatory tip pooling among eligible tipped occupations (as long as detailed procedural requirements are satisfied by employers) and reiterates the legality of mandatory tip-sharing. The Wage Order provides that eligible tipped occupations include: (1) wait staff; (2) counter personnel who serve food or beverage to customers; (3) bus persons; (4) bartenders; (5) service bartenders; (6) barbacks; (7) food runners; (8) captains who provide direct food service to customers; and (9) hosts who greet and seat guests.

Credit Cards – The Wage Order memorializes the Department’s prior position, as expressed in opinion letters, that an employer can deduct a pro-rata charge of the credit card fee from tips left on credit cards.

Wage Deductions – The Wage Order reflects the Department’s narrow view of permissible wage deductions and explicitly limits deductions to those authorized or required by law.

While employers are encouraged to be in full compliance with Final Order as of January 1, 2011 the Department has indicated it will exercise discretion in enforcement during an implementation

period ending February 28, 2011. Employers can choose to delay implementation as long as they make all retroactive payments by March 1, 2011. Payroll records must reflect retroactive payments clearly and employers who avail themselves of this option will have to post an explanation. The posting has not yet been developed by the Department.

For More Information Contact:

Philip B. Rosen

Jackson Lewis LLP
59 Maiden Lane
New York, NY 10038
Email:
RosenP@jacksonlewis.com
Phone: (212) 545-4001
Fax: (212) 681-2801

Linda R. Carlozzi

Jackson Lewis LLP
59 Maiden Lane
New York, NY 10038
Email:
CarlozziL@jacksonlewis.com
Phone: (212) 545-4040
Fax: (212) 972-3213