

# Industry Spotlights Webinar Series: Wage & Hour Developments

**Hospitality and Home Health Care Industries**

**Thursday, September 13, 2018**

# Presented by

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# Hospitality

# Hospitality Wage Order

## Helpful Definitions

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How does the Hospitality Wage Order define a food service worker, a service employee, and a non-service employee?

A **food service worker** is any employee who is primarily engaged in the serving of food or beverages, who also regularly receives tips


- This includes employees such as:
  - Wait staff
  - Bartenders
  - Captains
  - Bussing personnel
  - Does not include delivery persons

A **service employee** is an employee, other than a food service worker, who customarily receives tips.

A **non-service employee** is any employee other than a service employee or a food service worker

# Hospitality Industry General Minimum Wage

## New York

 Non-exempt employees must not be paid less than the federal minimum wage for all hours worked.

- Federal minimum wage is \$7.25 per hour and has not changed since 2009

 New York State Hospitality Industry General Minimum Wage:


Location	12/31/17	12/31/18	12/31/19	12/31/20	12/31/21
NYC – Large employers (11 or more employees)	\$13.00	\$15.00			
NYC – Small employers (10 employees or less)	\$12.00	\$13.50	\$15.00		
Long Island & Westchester	\$11.00	\$12.00	\$13.00	\$14.00	\$15.00
Remainder of NY State	\$10.40	\$11.10	\$11.80	\$12.50	TBD

# Minimum Wage

## New York – Fast Food Workers

 Fast Food Workers located in:

Location	12/31/17	12/31/18	12/31/19	12/31/20	07/01/21
New York City	\$13.50	\$15.00			
Rest of State	\$11.75	\$12.75	\$13.75	\$14.50	\$15.00

 Fast food employees include any person employed at or for a Fast Food Establishment whose duties include customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning or routine maintenance

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# Tip Pooling and Tip Sharing

# Tip Pooling and Tip Sharing

## Overview

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**“Tip pooling”** – a practice in which the tip earnings of directly tipped employees are intermingled in a common pool and then redistributed among directly and indirectly tipped employees.

**“Tip sharing”** – a practice in which a directly tipped employee gives a portion of his or her tips to another service employee or food service worker who participated in providing service to customers and keeps the balance.

***Directly tipped employees*** = workers that receive tips from patrons or customers without any middle person

***Indirectly tipped employees*** = workers that do not receive tips directly from patrons or customers, but are eligible to receive shared tips or receive distributions from a tip pool



# Tip Pooling and Tip Sharing

## Requirements

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Directly tipped employees may mutually agree to pool their tips on a voluntary basis

- When employees form a “tip share” on their own, the employees may set the percentages of the tips shared.

When employers require tip sharing, the employer may set the percentages of tips shared among food service workers

- Only food service workers may receive distributions from the tip pool
- Employees must handle the transactions themselves.

Employers are not required to compensate employees for monies wrongfully withheld by a participant in a tip pooling arrangement.

An employee’s eligibility is based on the worker’s duties, not title.

- Must perform or assist in performing personal service to patrons at a level that is a regular part of their duties—cannot be merely occasional or incidental
- Managers are excluded from participation

# Tip Credit

## Notice Requirement

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At or before the time of hire, employers must give employees written notice that the employer will apply a tip credit or allowance toward their minimum wage.

This written notice should include the following:

- Employee's regular hourly pay rate,
- Overtime hourly pay rate,
- The amount of tip credit to be taken from the basic minimum hourly rate,
- The regular payday, and
- State that extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate.

Employers must provide notice in English and any other language that is the new employee's primary language.

A signed acknowledgment of receipt must be kept on file for six years

# Sample Notice



## Sample Pay Notice for the Hospitality Industry - Updated

More information is available in Part § 146-2.2.

**Please note:** It is unlawful for an employee to be paid less than an employee of the opposite sex for equal work. Employers also may not prohibit employees from discussing wages with their co-workers.

### Notice of Pay Rates and Pay Day

Company name and address \_\_\_\_\_

Preparer's name and title \_\_\_\_\_

Employee's name and address \_\_\_\_\_

Your regular rate of pay will be \$\_\_\_\_\_ per hour for the first 40 hours in a week.

Your overtime rate of pay will be \$\_\_\_\_\_ per hour for hours over 40.

Your designated pay day will be: \_\_\_\_\_

### For Tipped Employees Only:

The tip credit taken will be \$\_\_\_\_\_ per hour. (See page 2 for the maximum allowed amount.)

If you do not receive enough tips over the course of a week to bring you up to the minimum hourly rates for the first 40 hours and 1½ times that amount per hour for hours over 40, you will be paid additional wages that week to make up the difference. See page 2 for the minimum hourly wage amounts.

### For Service Employees in Resort Hotels Only (if different from rates given above):

If your weekly average of tips received is at least the minimum threshold for tips per hour (see page 2 for a listing of the minimum threshold tips), your regular rate of pay will be \$\_\_\_\_\_ per hour and your overtime rate of pay will be \$\_\_\_\_\_ per hour. The tip credit taken will be \$\_\_\_\_\_ per hour.

Preparer's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

I have been notified of my pay rate, overtime rate, tip credit if applicable, and designated pay day on the date given below.

Employee's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

# Minimum Wage

## New York State – Tipped Food Service Workers

- Cash wage paid by employer:

Location	12/31/17	12/31/18	12/31/19	12/31/20	12/31/21
NYC – Large employers (11 or more employees)	\$8.65	\$10.00	\$10.00	\$10.00	\$10.00
NYC – Small employers (10 employees or less)	\$8.00	\$9.00	\$10.00	\$10.00	\$10.00
Long Island & Westchester	\$7.50	\$8.00	\$8.65	\$9.35	\$10.00
Remainder of NY State	\$7.50	\$7.50	\$7.85	\$8.35	TBD

- Credit for tips received:

Location	12/31/17	12/31/18	12/31/19	12/31/20	12/31/21
NYC – Large employers (11 or more employees)	\$4.35	\$5.00	\$5.00	\$5.00	\$5.00
NYC – Small employers (10 employees or less)	\$4.00	\$4.50	\$5.00	\$5.00	\$5.00
Long Island & Westchester	\$3.50	\$4.00	\$4.35	\$4.65	\$5.00
Remainder of NY State	\$2.90	\$3.60	\$3.95	\$4.15	TBD

# Minimum Wage

## New York – Tipped Service Employees

- Cash wage paid by employer:

Location	12/31/17	12/31/18	12/31/19	12/31/20	12/31/21
NYC – Large employers (11 or more employees)	\$10.85	\$12.50	\$12.50	\$12.50	\$12.50
NYC – Small employers (10 employees or less)	\$10.00	\$11.25	\$12.50	\$12.50	\$12.50
Long Island & Westchester	\$9.15	\$10.00	\$10.85	\$11.65	\$12.50
Remainder of NY State	\$8.65	\$9.25	\$9.85	\$10.40	TBD

- Credit for tips received:

Location	12/31/17	12/31/18	12/31/19	12/31/20	12/31/21
NYC – Large employers (11 or more employees)	\$2.15	\$2.50	\$2.50	\$2.50	\$2.50
NYC – Small employers (10 employees or less)	\$2.00	\$2.25	\$2.50	\$2.50	\$2.50
Long Island & Westchester	\$1.85	\$2.00	\$2.15	\$2.35	\$2.50
Remainder of NY State	\$1.75	\$1.85	\$1.95	\$2.10	TBD

# Service Charges

## Banquets, Special Functions, and Package Deals

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- New York Labor Law prohibits employers from demanding, accepting, or retaining any part of an employee's gratuity or any charge purported to be a gratuity
- A rebuttable legal presumption exists that any charge not for food and drink is a tip.
  - Charges for banquets, special functions, or package deals must be clearly identified and customers must be notified that the charge is not a gratuity or tip.
  - Employers carry the burden of demonstrating that the notification was sufficient to ensure that a reasonable customer would understand such charge was not purported to be a gratuity.
- Adequate notification includes a statement in the contract or agreement and on any menu and bill listing prices. Must indicate that the charge is for:
  - Administration of the banquet, special function, or package deal
  - Is not purported to be a gratuity
  - Will not be distributed as gratuities to the employees who provided service to the guests

# Service Charges

## Litigation Risks

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Unpaid service charge claims are often litigated as class action suits

- Employers potentially liable for the total amount of service charges collected over a period of several years
- Can include additional fees such as attorney's fees and liquidated damages

Recent settlements include:

- 2015: NYC restaurant Per Se settled a case for \$500,000 for portraying operational charges for private dining events as gratuities for employees
- 2017: Gramercy Tavern agreed to pay \$695,000 to Restaurant workers for wage theft violations that included allegations of service charges of 20% for private events in which none of the gratuities were distributed to the event's workers
- Outside of New York, states with similar laws have seen class action settlements as high as \$2.5 million

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# Spread of Hours and Call-In Pay



# Spread of Hours

## What is it?

- **“Spread of hours”** refers to the duration of time between the beginning and end of an employee’s workday.
  - For example: a shift from 7 a.m. to 10 a.m. and 7 p.m. to 10 p.m. is 6 hours worked, but a spread equaling 15 hours.
- Occurs when the “spread of hours” exceeds 10 hours.
  - Applies to all employees in restaurants and all-year hotels (hotels that do not qualify as a resort).
- Under the Hospitality Wage Order, employers must **always** pay employees for a spread of hours that exceeds 10 hours.
  - Unlike other industries, there is **no offset** for employees in the hospitality industry who earn more than minimum wage.
- The “spread of hours” for any day will include:

**Working time + time off for meals + intervals off duty**

- Each day that the spread of hours exceeds 10 hours, the employee must receive an additional one hour of pay at the basic minimum hourly rate
  - The additional hour may not be offset by credits for meals or lodging
  - The additional hour does not need to be included in the employee’s regular rate for calculating overtime pay

# Call-in Pay Requirements

## What is it?

**Call-in pay** refers to wages owed to employees for reporting to work on a given day even if they are sent home early. Employees must be paid for his or her regularly scheduled shift, or a minimum of:

- Three hours for one shift
- Six hours for two shifts totaling six hours or less
- Eight hours for three shifts totaling eight hours or less

All non-exempt employees are entitled to call-in pay whether or not they receive pay at or near the minimum hourly wage rate. Employers must pay call-in pay in the same manner and at the same time as any other pay earned during the pay period.

- Call-in pay cannot be offset by credits for meals or lodging provided to employee
- Employees that voluntarily leave work early are not entitled to call-in pay, unless the employer influences the employee to leave work.

A **“regularly scheduled shift”** refers to a fixed, repeating shift that an employee normally works on the same day each week.

- No “regularly scheduled shift” will apply where an employee’s total hours worked or scheduled to work change week to week

# Uniform Maintenance Pay

## Overview

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**Uniform-maintenance pay** covers the cost to an employee of maintaining required uniforms worn on the job.

- A “uniform” is clothing the employer requires an employee to wear at work that would not normally be considered part of an ordinary wardrobe.
- Does not have to be a complete outfit
- Employers that do not maintain employees’ uniforms must provide employees with uniform-maintenance pay.

What is maintenance?

- Includes washing, ironing, dry cleaning, alterations, repairs, etc. for required uniforms.
- To determine the amount of uniform-maintenance pay due to an employee, employers must take actual hours of work into account, but call-in pay and spread of hours pay do not need to be considered.

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# Home Health Care

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# Home Care Workers Under the FLSA

# Home Care Workers Under the FLSA

## General Wage and Hour Issues

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Wage and Hour claims by home care workers on the rise due in part to:

- Questions regarding “sleep-in” and “live-in” home care workers
- Determination of employee and employer classifications

Under the FLSA, most home care workers are employees, NOT independent contractors.

- In-home caregivers are considered “Live-in” caregivers if they live with a client for more than 120 hours per week.
- DOL takes the position that 8 hours per night of sleep time can be excluded from hours paid.
- Employers must pay if there is an interruption to the employee’s regular sleeping hours. Cannot deduct sleep time if the caregiver gets less than 5 hours of sleep

# Home Care Workers Under the FLSA

## General Wage and Hour Issues

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In limited circumstances, an exemption from the wage requirements may exist for consumers and their families, referred to as the “companion services exemption.”

Companionship Services Exemption applies if:

- Home care worker spends no more than 20% of his or her total working time in a workweek assisting with personal care, such as bathing, dressing, toileting, grooming, cooking, cleaning, etc.;
- The worker does not perform any medically related tasks, which are tasks that are usually done by a nurse or certified nursing assistant, such as tube feeding or catheter care; or
- The worker does not perform any general household work that is mostly for members of the household other than the consumer, such as doing laundry or cooking meals for the entire household.

# Home Care Workers under the FLSA

## General Wage and Hour Issues - Examples

### Example: Live-in hired through agency

Stanley needs home care services, so he calls Local Home Care Agency (Local), which sends Mary to work for him. Mary moves out of her apartment and into Stanley's home, and she provides daily personal care services to Stanley. Stanley and Mary agree on her work schedule, and Stanley tells Mary what tasks he would like her to perform. Local sets Mary's pay rate at \$10 per hour.

In this situation, Local is Mary's employer under the FLSA and Stanley is Mary's employer under the FLSA. Both Local and Stanley are responsible for making sure Mary receives at least the federal minimum wage. Only Local is responsible for making sure that Mary receives overtime pay, because Stanley, and only Stanley, can use the live-in domestic service employee exemption.

Because Mary is a live-in worker, it might be that Stanley and Local can count the value of the housing she receives toward the wages he is required to pay.

### Example: Live-in hired directly

Stanley needs home care services, so he calls a registry, which gives him a few names of potential workers to interview. Stanley meets Mary and hires her. They agree that Mary will move out of her apartment and into Stanley's home, and she will provide daily personal care services to Stanley there. Stanley and Mary create a written work schedule for Mary and agree that Mary's pay rate will be \$10 per hour.

In this example, because Mary is a live-in home care worker whose only employer is Stanley, she must receive at least the minimum wage, but the FLSA does not require that she receive overtime pay.

Because Mary is a live-in worker, it might be that Stanley can count the value of the housing she receives toward the wages he is required to pay.



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# 24 Hour “Sleep time” Issues

# 24 Hour Sleep Time Issues on Appeal

## Overview and NYDOL's Established Practice

Home care agencies have historically paid “live-in” home care aides 13 hours of a 24-hour shift in accordance with the NYDOL's well-established policy and guidance.

**“13 Hour Rule”** - Permitted employers of home care aides working 24-hour shifts to pay aides for **13 hours** so long as the aides are afforded **8 hours of sleep**, 5 of which are **uninterrupted**, and **3 uninterrupted hours for meals**.

- Regardless of whether “residential” or “non-residential” home care aides
- Established for “live-in employees” in a state DOL opinion letter

Trio of New York State Appellate Division decisions refused to give deference to the long-standing NYDOL policy and guidance

- Ruled that non-residential home care aides employed by third-party agencies must be paid for every hour of a 24-hour shift, regardless of sleep and meal periods.

NYDOL issued a new amendment stating that *bona fide* meal periods and sleep times may be excluded from the home care aide’s hours worked when working a 24-hour shift or longer, in accordance with federal Fair Labor Standards Act regulations.

# 24 Hour Sleep Time Issues on Appeal

## Key Court Decisions

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The Appellate Divisions found that the exception in the Wage Order does not apply to home care aides working for a third-party agency because they are “non-residential,” as they do not “live on the premises of the employer.”

- *Tokhtaman*, 2017 NY Slip Op 02759 (1st Dept. Apr. 11, 2017):
  - Held that non-residential live-in home care aides must be paid for every hour of a 24-hour shift regardless of any sleep or meal periods taken.
- *Andryeyeva v. New York Home Attendant Agency*, 2017 NY Slip Op 06421 (2d Dept. Sept. 13, 2017):
  - Refused to give deference to NYDOL policy.
  - Upheld the trial court’s decision which certified a class of over 1,000 non-residential home care attendants who worked 24-hour shifts. Affirmed that sleep and meal periods of home care aides not residing in the home of their clients must be paid.
- *Moreno v. Future Care*, 2017 NY Slip Op 06439 (2d Dept. Sept. 13, 2017):
  - Second Department Reversed the lower court’s decision, which gave deference to the NYDOL “13-hour rule” policy and denied class certification.
  - Resulted in class certification of home care aides who were not paid for sleep and meal periods.
- March 7, 2018, the Second Department issued Decisions and Orders in *Andryeyeva* and *Moreno* granting leave to appeal to the Court of Appeals.

# 24 Hour Sleep Time Issues on Appeal

## NYDOL's Amendment to the Wage Order

The Appellate Division decisions raised concerns that home care agencies would be unable to survive potential liability resulting from these decisions.

NYDOL amended Wage Order, § 142-2.1(b), which went into effect as of October 6, 2017. It provides:

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee—one who lives on the premises of the employer—shall not be deemed to be permitted to work or required to be available for work:

- (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or
- (2) at any other time when he or she is free to leave the place of employment.

**Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.**

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# General Wage and Hour Issues

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# Independent Contractor Classifications

# DOL “Guidance” on Independent Contractors

## Withdrawal and Recent Bulletin

In July 2015, the Obama Administration's DOL issued Administrator's Interpretation (No. 2015-1), which narrowed the definition of “independent contractor”

- Presumption that “most workers are employees”
- Goal of the “economic realities” test is to determine whether a worker is “economically dependent” on the putative employer, or is really in business for himself or herself
- Signaled increased enforcement and investigation efforts

In June 2017, the Trump Administration's DOL withdrew Administrator's Interpretation No. 2015-1, but did not replace with other guidance.

On July 13, 2018 the Wage and Hour Division of the DOL issued a Field Assistance Bulletin (FAB) titled “Determining Whether Nurse or Caregiver Registries are Employers of the Caregiver.”

- FAB is this administration's first substantive guidance on Independent Contractor classifications

# Economic Realities Test: Federal Court Standard

## Factors to Consider for Independent Contractors Under the FLSA

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1. The extent to which the work performed is an integral part of the employer's business.
  - If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer.
  - For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.
2. Whether the worker's managerial skills affect his or her opportunity for profit and loss.
  - Does this individual have hiring and supervision responsibilities of workers or by investment in equipment?
  - If so, do these skills affect that worker's opportunity for both profit and loss?
3. The relative investments in facilities and equipment by the worker and the employer.
  - The worker must make some investment compared to the employer's investment (and bear some risk for a loss) to support an independent contractor status.
  - Investment in tools and equipment to perform the work is not necessarily indicative of IC status if the tools and equipment are required to perform the work for the employer.



# Economic Realities Test: Federal Court Standard

## Factors to Consider for Independent Contractors Under the FLSA

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4. Worker's skill and initiative.
  - Both employees and independent contractors may be skilled workers, but the worker's skills should demonstrate an exercise of independent business judgment.
  - A worker who is in open market competition with others would suggest independent contractor status.
5. Permanency of the worker's relationship with the employer.
  - Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee.
  - Lack of a permanent relationship with the employer does not necessarily suggest IC status, particularly if the impermanent relationship is due to industry-specific factors or frequent use of staffing agencies.
6. The nature and degree of control by the employer.
  - Who sets pay amounts and work hours for the worker?
  - Who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers?

# 2018 Field Assistance Bulletin

## Determining Whether Caregiver Registries are Employers under the FLSA

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**Conducting Background and Reference Checks:** Conducting background checks, confirming credentials, and performing reference check measures do not, by itself, indicate that the registry is an employer of the caregiver.

**Hiring and Firing:** Although registries may participate in the initial determination of threshold requirements, the ultimate decisions regarding hiring and firing decisions should rest with the client.

- A registry's exercise of control over hiring or firing decisions may indicate the registry is an employer.

**Scheduling and Assigning Work:** Registries may facilitate initial communications between the caregiver and clients, but cannot control the caregiver's schedules and assignments.

- Schedules and assignments should be determined by the caregiver and client.

**Controlling the Work:** The exercise of control over a caregiver indicates the existence of an employment relationship.

- The client and caregiver must manage the services provided.

# 2018 Field Assistance Bulletin

## Determining Whether Caregiver Registries are Employers under the FLSA

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**Setting the Pay Rate:** Registries can act as a liaison and advise on typical market rates, but caregivers and clients must set the pay rates.

**Receiving Continuous Payments for Caregiver Services:** Charges for administrative or ministerial functions and one-time, upfront fees for matching a caregiver and client do not indicate that the registry is the caregiver's employer.

- Charging fees based on the number of hours a caregiver works may indicate an employment relationship exists between the registry and caregiver.

**Paying wages:** Registries can perform payroll-related functions for its clients, however, direct payment of a registry's funds to the caregiver may indicate an employer relationship.

**Tracking Hours Worked:** A registry does not typically create and confirm records of a caregiver's hours worked.

# 2018 Field Assistance Bulletin

## Determining Whether Caregiver Registries are Employers under the FLSA

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**Purchasing Equipment and Supplies:** A registry may invest in operational expenses and office space so long as the registry does not provide equipment or materials to the caregiver.

- Investment in training, professional licensing, or insurance suggest the registry is an employer.

**Receiving EINs or 1099s:** Acquiring an Employment Identification Number from the IRS, complying with state law by carrying liability insurance, and the issuance of an IRS 1099 form are not relevant to determining whether a caregiver is an employee for FLSA purposes.

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# Best Practices for Tracking Hours

# Tracking Accurate Hours

## Establish Timekeeping Methods Appropriate to the Workplace

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Ensure employee knows his/her schedule and send shift reminders

Implement a system that allows employees to track their time as they come and go

- Put sign in and out sheets by the employees' entrance
- If possible, require that employee clearly notifies the client that he/she has arrived and is on-duty
- Consider purchasing a mobile application that keeps track of employees' time.
- Mobile applications can be purchased and downloaded onto employees' smartphones to keep track of their work hours.

Implement an “off the clock” policy making clear that employees must report all work time and obtain approval to work during the lunch break or outside of scheduled shift

- Don't allow employees to clock in early
- Require employees to clock out for lunch – preserve evidence that lunch was taken

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Questions?

# Industry Spotlights Webinar Series: Wage & Hour Developments

**Hospitality and Home Health Care Industries**

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