

## **New York Department of Labor Issues New Wage-Hour Regulations Covering the Hospitality Industry—Restaurants, Hotels and Clubs**

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On December 16, 2010, the New York State Department of Labor issued a sweeping new minimum wage order for restaurant and hospitality establishments operating in the state. Effective January 1, 2011, the minimum direct wage required to be paid tipped food service employees will increase from \$4.65 to \$5.00. Although employers in the hospitality industry have a grace period until February 28, 2011 to implement the increases, they must retroactively provide back pay to January 1, 2011.

### **The Increased Minimum Wages for Tipped Employees**

Under the new wage order (subpart 146-1.3), employers are entitled to take a credit towards the state and federal minimum wage of \$7.25 per hour for tips actually received, as follows:

1. \$1.60 per hour for tips received by tipped non-food service employees in the hospitality industry (hotels, clubs, etc.). If the credit is taken, the direct hourly rate can be no lower than \$5.65 per hour.
2. \$2.25 per hour for food service workers. If the credit is taken, the direct hourly rate can be no lower than \$5.00 per hour; and
3. \$2.35 per hour for service workers in resort hotels. If the credit is taken, the direct hourly rate can be no lower than \$4.90 per hour.

### **Mandatory Tip Pooling Is Specifically Permitted**

The new regulation (Section 146-2.16(b)) states: “An employer may require food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool.”

But the regulation makes clear that “Only food service workers may receive distributions from the tip pool ... Eligible employees must perform, or assist in performing, personal

service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental.” The regulation offers the following examples of eligible occupations:

- 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.

Neither management nor kitchen staff may participate in a tip pool.

The regulations do not permit management imposed tip pools for tipped non-food service employees or tipped service workers in resort hotels. But such employees may voluntarily agree to pool or share their tips with other employees who participated in providing the service. Section 146-2.14, 146-2.15 and 146-2.16.

### **Recordkeeping**

Under Section 146-2.17 (a) “employers who operate a tip sharing or tip pooling system must establish, maintain and preserve for at least six years records which include:

- 1) A daily log of the tips collected by each employee on each shift, whether in cash or by credit card;
- 2) A list of occupations that the employer deems eligible to receive tips through a tip sharing or tip pool system;
- 3) The shares of tips that each occupation is scheduled to receive from tip sharing or tip pooling; and
- 4) The amount in tips that each employee receives from the tip share or tip pool, by date.”

### **Overtime Calculations for Tipped Employees**

The regulations require employers to pay tipped employees time and one half (1 and ½) their “regular rate” of pay for all hours worked over forty in a work week minus the amount of the tip credit taken to bring the regular rate to the minimum wage, currently \$7.25 per hour in New York.

For example if a tipped employee is paid the direct hourly wage of \$5.00 per hour and receives at least \$2.25 per hour in tips (bringing his total compensation to the \$7.25 per hour minimum wage) and the employee works 50 hours in a workweek, the employee must be paid:

- 40 hours times \$5.00 per hour or \$200 for 40 hours, plus,
- 10 hours overtime at 1 and 1/2 times \$7.25 or \$10.875 per hour minus the \$2.25 per hour tip credit or \$8.625 per hour multiplied by 10 hours worked over 40 or \$86.25. for the overtime hours,
- The total is thus \$200 for the first 40 hours and \$86.25 for the 10 overtime hours, for a total of \$286.25 for that week. (Tips received in excess of the amount necessary to reach the minimum wage of \$7.25 are not calculated in the overtime rate.)

If a tipped employee's regular rate is less than the minimum wage but more than the \$5.00 regulatory minimum, the tip credit amount is limited to the difference between the employee's direct hourly rate and the minimum wage, currently \$7.25 per hour. For example; if the direct wage paid is \$6.00 per hour and the employee works 50 hours in a workweek, the employee must be paid:

- 40 hours times \$6.00 per hour or \$240, plus
- 10 hours times \$9.00 per hour less a tip credit of \$1.25 per hour or \$7.75 per hour multiplied by 10 hours or \$77.50,
- The total is thus \$240 for the first 40 hours plus \$77.50 for the 10 overtime hours, for a total of \$317.50.

Of course if the employee's "regular rate" is higher than the minimum wage, no tip credit can be deducted. Thus if the tipped employee's direct hourly wage is \$10 per hour, the pay for 50 hours is:

- 40 hours multiplied by \$10.00 per hour or \$400, plus
- 10 hours multiplied by \$15 per hour or \$150. Thus, the total is \$400 for the first 40 hours, plus \$150.00 for the 10 overtime hours, or total pay for the week of \$550.00.

### **Other Requirements for Tipped and other Employees**

The Regulations provide guidance on the following additional areas:

- Call-in pay minimums. (Section 146-1.5)
- Additional pay for spread of hours over 10 in a workday. (Section 146.1.6)
- Uniform maintenance pay and reimbursement for the cost of required uniforms. (Sections 146-1.7 and 1.8)
- Employer credits for meals and lodging. (Sections 146-1.9 and 146-2.8)

- Employer requirement to keep certain records for at least six years. (Section 146-2.1)
- Requirement that new employees receive notice of pay rates, tip credit and pay day. (Section 146-2.2)
- Withholding credit card company fees when tips are charged on credit cards and the credit card company charges a fee for processing the charge. (Section 146-2.20)
- Rule for notifying patrons to clearly prevent an “administrative fee” or “service charge” added to a banquet or other bill from being treated as a gratuity which must be distributed to food service workers, and cannot be distributed to management or food preparation staff, or kept by an employer. (Section 146-2.18 and 2.19) and
- Requirements for excluding from overtime pay a bona fide executive, administrative or professional employee whose salary is at least \$543.75 per week.

### **What Employers Should Do:**

- 1) Be prepared to implement the new increased direct minimum wage rates effective January 1, 2011 (or, if not implemented before February 28, 2011, to pay the additional compensation at that time, retroactive to January 1, 2011).
- 2) Maintain a log of daily tips collected and dispensed to food servers and be sure to keep it for at least six years.
- 3) Give food servers written notice of how the tip pool is to be allocated.
- 4) Although tips paid through credit and debit cards are clearly identifiable, instruct food service employees to put cash tips received into the employer mandated pool.
- 5) Ensure that the tip pool is not shared with individuals who are not eligible.
- 6) Review contracts and other communications with patrons regarding mandatory service charges or administrative fees to be sure that they clearly reflect what is a gratuity to food service employees, and what amount, if any, is distributed to the employer, kitchen workers or management.
- 7) Become familiar with the other detailed requirements in the wage order.

*If you have any questions about these new regulations, or any other subject, please contact the individuals identified below who prepared this Action Alert.*

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