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The New York State Department of Labor is preparing new wage regulations that will mean significant changes for hospitality employers.

Here's A Tip: New York is Overhauling the Restaurant and Hotel Industry Wage Orders

By Gerald T. Hathaway and Lisa M. Brauner

The New York State Department of Labor ("NY DOL") is in the process of combining the existing Restaurant and Hotel Industry Minimum Wage Orders into a single Wage Order to be called the Hospitality Industry Wage Order. Although the NY DOL has not yet finished its regulations for the new, consolidated Wage Order, a Labor Commissioner Order dated November 5, 2009 indicates what major changes will occur for non-exempt employees in the hospitality industry.¹ The changes will have broad effect in areas including:

- The minimum cash wage for tipped food service employees;
- Notice requirements with regard to tip allowances;
- Tip pooling and tip sharing;
- Gratuities for banquet and special functions;
- Uniform maintenance allowances, meal and lodging allowances, and other special payments.

Below is a summary of all of the changes to be implemented to New York's wage orders for the hospitality industry, following the NY DOL's issuance of its regulations:

Consolidation of Wage Orders

Currently, there are separate wage orders for the hotel and restaurant industries. When the NY DOL issues its new regulations based on the Commissioner's Order, there will be a consolidated "Hospitality Industry Wage Order."

Wages for Customarily Tipped Employees and Tipped Food Service Employees and Eventual Consolidation of Multiple Rates into One Tipped Employee Classification

Beginning on the effective date of the new regulations interpreting the Commissioner's Order, the cash minimum wage for tipped food service workers will increase from \$4.65

per hour to \$4.75 per hour (a ten cent increase for New York employers, resulting in a cash wage that is much more than the federal cash wage of \$2.13 for tipped food service employees). The minimum cash wage will increase again, effective January 1, 2011, to \$5.00 per hour.² Similarly, beginning on the effective date of the new regulations, the minimum cash wage for other tipped employees (non-food-service workers) will be \$5.65 per hour, notwithstanding the January 1, 2010 effective date in the Commissioner's Order.

The NY DOL's intended purpose is to bring food service workers' pay closer to wage rates for other service workers and eventually to consolidate these multiple rates into a single tipped employee classification. This decision to consolidate multiple rates appears to be in response to feedback articulated at the Wage Board's public meetings that employers found the numerous classifications of tipped employees confusing.

Gratuities and Tips

Clarification of Overtime Rate Calculations

The Commissioner's Order adopts the Wage Board's recommendation for a clarification of how overtime rates are calculated for tipped and non-tipped employees, and, hopefully, the NY DOL regulations, once issued, will provide this clarification.

Requirement to Notify Tipped Employees of Tip Allowances/Credits

Just as employers must do under federal law when taking a tip credit, an employer will be required to notify its tipped employees that they are getting a reduced minimum wage based on the receipt of tips (*i.e.*, a tip allowance) in order for the employer to claim the tip allowance.³

Mandatory Tip Pooling

The NY DOL is expected to clarify the often-confusing distinction between tip-sharing (where an employer may direct food service employees to share their tips with other food service workers who customarily receive tips providing service to the same table) and tip pooling (where food service employees agree to pool their tips with a larger group of employees and manage the disbursement of those tips among food service workers).

Significantly, pursuant to the Commissioner's Order, employers will be able to require tip pooling. This is a sea change for the hospitality industry, for tip pooling previously was supposed to be voluntary. The regulations will hopefully give guidance concerning whether and to what extent the employer can control the percentage participation in the tip pool and whether the employer can handle the money for the tip pool.

Presumption That Any Charge Associated with a Banquet or Special Function Is a Gratuity Unless Employer Provides Clear Written Notice to Customers Otherwise, with Limited Exceptions

Once the NY DOL's regulations have been implemented, there will be a presumption that any charge associated with a banquet or special function, on top of food and beverage costs, is a gratuity, which must be distributed to employees, *unless the employer provides clear, written notice to customers that the charge is not a gratuity*. The form and content of the notice to customers must be sufficient to ensure that the reasonable patron would understand that the charge is not a gratuity. Charges for lodging and other specified materials and services, however, are not presumed to be gratuities. This change is in reaction to the 2008 decision of New York's highest court that service charges are to be treated as gratuities intended for receipt by service workers.⁴

Elimination of Phase-Outs Above the Minimum Wage

The Commissioner's Order eliminates the existing phase-outs of certain extra payments required by the prior wage orders, as wages increase above the minimum hourly wage (uniform maintenance allowance, spread of hours, call-in pay) and certain credits allowed to employers (for meals and lodging), regardless of whether the employee is earning more than the minimum wage.

Uniforms

The NY DOL will provide more specific guidance about what constitutes a uniform or “ordinary wardrobe.” Currently, New York employers must reimburse employees for the cost of uniforms purchased by employees. Employers must also pay a weekly uniform maintenance allowance to non-exempt employees if that minimum-wage-earning non-exempt employee is required to launder or maintain a uniform.⁵ That allowance varies depending upon an employee’s weekly number of hours worked. The uniform maintenance allowance phases out if an employee is paid more than the minimum wage. This phase-out will end. Now all non-exempt employees will be entitled to the additional payment of a uniform maintenance allowance, regardless of whether they earn more than the minimum wage, and the allowance amounts will be stated in the new regulations.

The Commissioner’s Order exempts “wash-and-wear uniforms” from the uniform maintenance allowance where the employer meets certain conditions to be defined in the regulations. The Order also adopts the Wage Board’s recommendation that the DOL provide more specific guidance about what constitutes a required “uniform” and what the “ordinary wardrobe” exclusion entails. The DOL’s website currently states that “[o]rdinary clothing (such as black trousers and white shirts) are generally not considered ‘uniforms.’”⁶

“Spread of Hours” and Call-in Pay

Once the NY DOL’s regulations are implemented, the following rule will apply to “spread of hours” payments in the hospitality industry. Where a work day begins and ends over a period of ten hours or more, even with time off during the day, a “spread of hours” payment of one hour’s pay at the state minimum wage (currently \$7.25 per hour) must be paid to all employees, regardless of their hourly/regular rate of pay.⁷ Currently, the “spread of hours” payment phases out if hourly pay rates are above the minimum wage.

Commissioner Smith ordered this change because she questioned whether the “spread of hours” provision was achieving its intended result of discouraging excessive shift length and compensating a worker for the extra burden involved. The Commissioner’s Order clarifies that “spread of hours” pay is not payment for time worked or work performed, and, consequently, it is not included in the regular rate of pay for overtime purposes. However, it cannot be used as a credit toward meeting the employer’s overtime pay obligation.

Similarly, once the NY DOL issues implementing regulations, call-in pay⁸ will be required to be paid to all employees, regardless of the amount of wages earned. Currently, call-in pay is phased out if an employee earns above the minimum wage.

Meals and Lodging

Defining Terms

The Commissioner’s Order accepts the Wage Board’s recommendation to update the definition of a “meal” and simplify the definition of acceptable “lodging” to that which meets community standards and all applicable health and housing codes and laws, but employers must await issuance of the NY DOL’s regulations for those definitions.

Meal and Lodging Allowances Permitted as Part of Wages of Employees Who Are Paid Above the Minimum Wage

The current wage orders permit employers who provide meals or lodging to employees *earning just the minimum wage* to claim a credit toward the minimum wage based on the provision of such benefits, and, as a consequence, pay a lower regular rate to those employees. Significantly, once the NY DOL’s regulations are issued, the Hospitality Industry Wage Order will treat meal and lodging allowances as part of all employees’ wages regardless of whether the employee earns above the minimum wage. It appears that the impact of this change may be to include the allowance in calculating an employee’s regular rate of pay for overtime purposes, just as under federal law.⁹

Weekly v. Hourly Wages and Overtime

Under the Commissioner's Order, employers will be required to pay *all* covered hospitality employees an hourly rate rather than a weekly flat rate. This change was based on the Wage Board's reasoning that overtime calculations for those who are paid at a weekly or piecework rate are complicated and, as a consequence, may often be calculated incorrectly, resulting in loss of proper overtime pay for employees.

Conclusion

As noted above, the NY DOL has not yet issued implementing regulations, but expects to do so shortly. Those regulations will then be subject to a public comment period. Thereafter, the NY DOL should issue final regulations. (Littler will provide additional guidance on the fine points once the NY DOL issues its final regulations.)

Employers with New York employees in the hospitality industry should prepare now for the impending changes in their industry. The cost of operating a restaurant or a hotel in New York will be going up, and employers should revisit their business models to prepare for the rising cost.

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¹ In an Order of Commissioner of Labor M. Patricia Smith on the Report and Recommendations of the 2009 Wage Board, dated November 5, 2009 ("Order"), then-New York State Department of Labor Commissioner Smith (who recently assumed the position of Solicitor of the United States Department of Labor) issued rulings based upon a Report and Recommendation from a wage board the Commissioner had convened – called the 2009 Restaurant and Hotel Industry Wage Board ("Wage Board") – to review the existing minimum wage orders for the restaurant and hotel industries and report on them.

² These new rates increase the rates that went into effect in July 2009. On July 24, 2009, when New York State's minimum wage increased from \$7.15 per hour to \$7.25 per hour, the NY DOL amended its Minimum Wage Order rates and allowances for the restaurant and hotel industries proportionally. See N.Y. Comp. Codes R. & Regs. tit. 12, §§ 137, 138.

³ A recent statutory amendment to New York's Labor Law now requires newly hired New York employees to sign an acknowledgement of receipt of *written* notice of their hourly pay rate (and pay day, and overtime rate, if applicable). See N.Y. Lab. Law § 195.1. Employers should indicate on the notice and acknowledgement form they provide to new hires pursuant to Labor Law Section 195.1 the reduced minimum wage based on tips and the tip credit that will be taken by the employer.

⁴ See *Samiento v. World Yacht, Inc.*, 10 N.Y.3d 70 (2008).

⁵ See N.Y. Comp. Codes R. & Regs. tit. 12, §§ 137-1.8 (Rate for Required Uniforms – Restaurant Industry), 138-2.5 (Required Uniforms – Hotel Industry).

⁶ See <http://www.labor.state.ny.us/workerprotection/laborstandards/faq.shtm>.

⁷ See N.Y. Comp. Codes R. & Regs. tit. 12, §§ 137-1.7, 137-3.11 (Restaurant Industry), 138-2.6, 138-4.13 (Hotel Industry — all-year hotels).

⁸ Call-in pay is a payment made at the minimum hourly wage for a certain period of time to an employee who, by request or permission of the employer, reports for work, whether or not assigned to actual work. N.Y. Comp. Codes R. & Regs. tit. 12, §§ 137-1.6, 138-2.3. The payment must be made even if the employee is sent home.

⁹ See 29 C.F.R. § 531.37(b) ("Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made. Where board, lodging, or other facilities are customarily furnished in addition to a cash wage, the reasonable cost of the facilities to the employer must be considered as part of the employee's regular rate of pay.")