



NEW YORK DEPARTMENT OF LABOR DISHES OUT NEW REGULATIONS FOR RESTAURANTS AND HOTELS

The New York State Department of Labor (“NYDOL”) has issued final regulations (the “Wage Order”) for the hospitality industry, which consolidates the previously separate wage regulations for the restaurant and hotel industries. The Wage Order is effective as of January 1, 2011, and, among other things, makes the following changes and clarifications:

- Minimum Hourly Rates For Tipped Employees Increased. Although the Wage Order does not change New York’s minimum wage, which remains \$7.25 per hour, the Wage Order reduces the maximum tip credit employers may take toward satisfying the minimum wage. For food service workers, employers may take a maximum tip credit of \$2.25 per hour, down from \$2.60. As a result, employers must pay each food service worker no less than \$5.00 per hour, provided the employee’s total wages including tips equals or exceeds \$7.25. With respect to other service employees, the Wage Order permits employers to take a maximum tip credit of \$1.60 per hour, resulting in a minimum employer payment of \$5.65 per hour. (Rate changes are also in effect for certain service employees and chambermaids working in resort hotels.)
- No Tip Credit for Certain Tipped Employees. The Wage Order provides that on any day that a service employee or food service worker works at a non-tipped occupation (a) for two hours or more, or (b) for more than 20% of his or her shift, whichever is less, the wages of the employee will not be subject to any tip credit for that whole day.
- Hourly Rates Required. Except with respect to exempt employees and commissioned salespersons, employers must compensate employees covered by the Wage Order on an hourly basis – i.e., salaries, weekly rates, per diem rates and piece rates are no longer acceptable for these employees even if in excess of the minimum wage.
- Elimination of Spread of Hours Pay Phase Out. The Wage Order provides that “spread of hours pay” (i.e., a required additional hour of pay at the minimum wage to any employee whose workday – not hours worked – begins and ends more than 10 hours apart) is due to all non-exempt employees, not just those paid at or near the minimum wage. Consequently, spread of hours pay will no longer “phase out” as an employee’s wage rate rises.
- Strict Regulations Relating to Service Charges. The Wage Order creates a presumption that any charge in addition to charges for food, beverage and lodging,

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including any charge for “service,” is a charge purported to be a gratuity. Any charge for the administration of a banquet, special function or package deal that is not to be distributed as a gratuity must be clearly identified as such and customers must be clearly notified that the charge is not a gratuity or tip.

- Written Notice of Pay Rates, Tip Credits and Pay Date. Employers must now give each employee written notice of the employee’s regular payday, regular hourly pay rate and overtime hourly pay rate, as well as the amount of any tip credit to be taken from the minimum hourly rate. The notice must also state that extra pay is required if tips are insufficient to bring the employee up to the minimum wage (\$7.25). The employer must provide this notice in English and any other language spoken by the employee as his or her primary language (provided the NYDOL has made the notice available to employers in such language on its website). This written notice must be provided prior to the start of employment and prior to any change in an employee’s hourly rates of pay. The employer must keep the employee’s signed acknowledgement of receipt of the notice on file for six years.
- Credit Card Tips. The Wage Order clarifies that in the event of tips charged on credit cards, an employer is not required to pay the employee the portion of the processing fee charged by the credit card company that is applicable to the tip. Thus, the employer must remit to the employee the amount of the tip charged on the credit card, less the pro-rated portion of the tip taken by the credit card company.
- Other Provisions. Call-in and uniform maintenance pay will be due to all non-exempt employees without regard to their rates of pay. The Wage Order also contains additional provisions regulating the sharing and pooling of tips, recordkeeping, wage deductions and meal allowances.

In order to facilitate changes in payroll systems and bookkeeping operations, the NYDOL has provided employers with a relatively short grace period within which to implement the Wage Order. Specifically, employers must make the necessary changes to their systems and operations by February 28, 2011, and pay all covered employees any additional wages owed as a result of the new rules, *computed retroactively to January 1, 2011*, no later than March 1, 2011, or their next regularly scheduled payday thereafter. Employers must maintain payroll records that clearly identify the retroactive payments and must post in their workplaces, in a location frequented by employees, a notice regarding this implementation period and the employees’ entitlement to retroactive wages. The form of this notice may be found at <http://www.labor.ny.gov/formsdocs/wp/LS209.pdf>.

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Considering the NYDOL’s rulemaking activity discussed above, employers may find that the New Year marks an appropriate time to conduct a review of their wage payment and other employment policies.

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We will be hosting a seminar on legal issues affecting the restaurant industry in the spring. If you would like to be added to our mailing list for this seminar please e-mail Stacey Usiak at usiak@thsh.com. If you have any questions regarding the Wage Order or other issues of

employment law, please contact any of the following attorneys in our Employment Law Group, or other attorney at THSH with whom you work:

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