

Attention Restaurateurs And Hoteliers

New York Department Of Labor's Final Hospitality And Wage Order

BY KEVEN DANOW

The New York Department of Labor has issued a final New York Hospitality Wage Order which went into effect January 1st of the new year. The order applies to restaurants and hotels as defined in Section 146-3. The definition of "restaurant" and "hotel" respectively is very broad and encompasses most places which serve food, including box lunches, to the public, club members or employees, and places that offer lodging accommodations to the public. It is essential that businesses in the hospitality industry learn and apply the rules as well as federal wage and hour laws, rules and regulations.

The order establishes minimum wages and maximum tip credits:

- A "service employee" in New York must receive a minimum wage of \$7.25 per hour. A credit for tips, not exceeding \$1.60 per hour, may be applied where the total of tips received plus the wages equals or exceeds \$7.25 per hour.

- A "food service worker" in New York must receive a minimum wage of \$7.25 per hour. A credit for tips, not exceeding \$2.25 per hour, may be applied where the total of tips received plus the wages equals or exceeds \$7.25 per hour.

- Whenever the base wage and the actual tips do not equal the minimum hourly wage, the employer will have to pay the employee the difference. An employee's wages must be set based on an hourly rate. Attempts to provide for a weekly or monthly "salary" will result in the imposition of an hourly wage by the Department of Labor which will be calculated by dividing the salary by 40 hours.

- The employee must receive overtime wages at the rate of 1.5 times the employee's regular rate for hours worked in excess of 40 hours per week. In making this calculation, the employee's regular hourly rate is multiplied by the overtime rate before subtracting the tip credit. As an example, 50 hours in a work week would receive wages calculated as follows:

Overtime rate
 $\$7.25 \times 1.5 = \10.875 per hour
 Wages rate for 40 hours
 $\$7.25 - \$2.25 = \$5$
 Wages rate for 10 hours
 $\$10.875 - \$2.25 = \$8.625$ per hour

- The order requires the employer to give written notice to an employee of his or her regular hourly pay rate, overtime hourly pay rate, the amount of any tip credit to be taken from the basic minimum hourly pay rate and the regular payday. The notice, which must be given in English as well as the employee's primary language, must also state that extra pay is required if tips are insufficient to bring the employees up to the basic minimum hourly rate.

Before the employee's wages are changed, a new notice must be given to the employee. The employer has the burden of proving that the notice was given.

- Only authorized deductions and expenses may be withheld from an employee's wages. The order prohibits deductions for such things as spoilage, breakage, non-payment by a customer, cash shortages or losses. The order also prohibits fines and penalties for lateness or misconduct. Similarly, the employer may not extract a penalty if the employee quits without notice.

The order contains strict rules which apply when the employer charges the employee for meals, lodging and expenses relating to uniforms and uniform cleaning as well as rules which require additional pay and other benefits where the interval between the beginning and end of an employee's work day exceeds 10 hours.

- An employee who receives a tip may agree or be required to pool or share the tip with eligible employees. The terms of such a split or pooling arrangement must be reasonable and customary. To be eligible to receive a share or tips or to participate in a tip pool, an employee must perform personal services for patrons as a principal and regular part of his or her duties.

- Pursuant to Section 196-d of the New York State Labor Law, employers are prohibited from demanding, accepting or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity. The order creates a presumption that any charge in addition to charges for food, beverages, lodging and other specified materials or services is intended to be a gratuity. Consequently, any charge for "service" or "food service" will be considered to be tips. The employer must maintain records as to how much money is collected and how it is distributed.

The full order can be found at www.ogletreedeakins.com. All New York employers in the hospitality industry should read and understand it.

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