



New York's Hospitality Wage Order In Full Effect

May 3, 2011

After four months of waiting, the implementation period for the New York Department of Labor's ("NYDOL") Hospitality Wage Order has now come to an end. On January 1, 2011, the NYDOL repealed NY Labor Law Parts 137 and 138 and added Part 146,^[1] which made changes to the laws governing New York's hotel and restaurant industries.^[2] Part 146, titled "Hospitality Wage Order" ("Wage Order"), requires employers to review and modify their current wage policies for tipped employees^[3], tip pooling and sharing, record keeping, uniform maintenance pay, and other related practices.

In order to help adjust to the new regulations, the NYDOL issued a notice to all employers, which stated that employers had until March 1, 2011 to implement the wage changes in their payroll systems and bookkeeping operations,^[4] thus, giving employers a three month implementation period from the original date of enactment. If the employer chose to wait until March 1, 2011, to implement these new wages, all wages not paid to employees covered by the new rule between January 1 and March 1 are required to be computed retroactively,^[5] and paid to the employee on March 1 or the next regularly scheduled pay period. In order to assure compliance, employers were to display a notice to their employees that discussed this implementation period and the employee's entitlement to the aforementioned back-pay.^[6]

Tipped Employee Wage Changes

The wage changes made by the Wage Order did not make any substantial change to the hourly rate paid to employees in the hotel and restaurant industries, but rather, decreased the amount of tip credit an employer is allowed to apply to an employee's pay. The tip credit allows employers to pay tipped employees less than the state or federal minimum wage, as long as the employee receives enough money in tips to make up the difference.^[7] Accordingly, the following wage changes were required to be implemented no later than March 1, 2011:

Food service workers

- Prior to January 1, 2011, the minimum wage was \$4.65 per hour and the maximum tip credit an employer could apply towards an employee's pay was \$2.60 per hour. The total hourly pay – the sum of the minimum wage and tip credit – was \$7.25 per hour.
- As of January 1, 2011, the minimum wage is now \$5.00 per hour and the maximum tip credit an employer can apply towards an employee's pay is \$2.60 per hour. The total hourly pay remained the same at \$7.25 per hour.

Service employees in all establishments

- Prior to January 1, 2011, the minimum wage was \$4.90 per hour and the maximum tip credit an employer could apply towards an employee's pay was \$2.35 per hour. The total hourly pay was \$7.25 per hour.
- As of January 1, 2011, the minimum wage is now \$5.65 per hour and the maximum tip credit an employer can apply towards an employee's pay is \$1.60 per hour. The total minimum hourly pay remained the same at \$7.25 per hour.

Service employees in resort hotels if tips are at least \$4.10/hour

- Prior to January 1, 2011, the minimum wage was \$4.35 per hour and the maximum tip credit an employer could apply towards an employee's pay was \$2.90 per hour. The total hourly pay was \$7.25 per hour.
- As of January 1, 2011, the minimum wage is now \$4.90 per hour and the maximum tip credit an employer can apply towards an employee's pay is \$2.35 per hour. The total hourly pay remained the same at \$7.25 per hour.

Chambermaids in resort hotels

- As of January 1, 2011, chambermaids in resort hotels are no longer a separate category. As such, all chambermaids are merged into the service employees in resort hotels category.

As you can see, the total amount of money that must be received by the employee has remained the same, but the amount of tip credit the employer can use towards calculating an employee's total pay has decreased.^[8]

In addition, the NYDOL has tried to deter employers from requiring excessively long work hours by prohibiting non-exempt employees in the hotel and restaurant industries from being paid based on salaries, weekly rates, day rates, piece rates, or any other non-hourly rate basis.^[9]

Tip Pooling, Tip Sharing, and Charge Card Processing Fees

The Wage Order allows for both voluntary and employer-mandated sharing and pooling of tips among "eligible employees." (See footnote 10 for a definition of "eligible employee")^[10] In order for an employer to mandate tip pooling or tip sharing, the employer must give written notice to the employees regarding the tip policies.^[11]

Moreover, the employer must also keep detailed tip records, for at least six years. The tip record must include:

- (1) A daily log of all cash and credit card tips received by each employee from guests;
- (2) A list of occupations that the employer deems eligible to receive tips through a tip sharing or tip pooling system;
- (3) The shares of tips each occupation is scheduled to receive from the tip sharing or tip pooling program; and
- (4) The amount in tips that each employee receives from the tip share or tip pool, by date.^[12]

Once the employer has recorded the tip information, the Wage Order permits an employee the right to inspect his/her own tip records. Furthermore, any tip left to an employee on a credit card is now subject to the amount of credit card processing fees incurred on that individual charge, and thus, are deducted from the employee's actual tip.^[13] In other words, every time a consumer leaves a tip for an employee on a charge card, that tip is now reduced to make up for the credit card charges the employer is forced to undergo to process it.

Uniform Maintenance Pay

Finally, under the new Wage Order, employers are now required to pay employees a uniform maintenance allowance. The Wage Order loosely defines a “uniform” as any clothing that an employer requires to be worn at work, except for clothing that may be worn as part of an employee’s ordinary wardrobe.^[14] Thus, ordinary “wash and wear” clothes, such as black slacks, white shirts, black shoes, and undergarments, do not appear to be covered by the maintenance pay requirement.^[15] As such, employers must pay the following maintenance pay to employees for all uniforms that do not fall under the “wash and wear”^[16] exception or are not provided and maintained by the employer:

- \$9.00 per week for work weeks over 30 hours per week;
- \$7.10 per week for work weeks that are less than 30 hours, but greater than 20 hours; and
- \$4.30 per week for work weeks up to 20 hours per week.^[17]

The uniform maintenance pay cannot be offset by any credit for meals or lodging paid to the employee, nor can tips earned by the employee be used as a credit against the uniform pay. Further, the uniform maintenance pay is to be paid in addition to the employees’ agreed rate of pay.^[18]

1. ^[1]See 12 NYCRR Part 146.
2. ^[2]See *Hospitality Industry Minimum Wage Order. ID Number LAB-42-10-00005-P*, New York State Department of Labor, <http://www.labor.ny.gov/sites/legal/laws/hospitality-industry-wage-order.page> (last visited April. 22, 2011).
3. ^[3]Section 146-1.3 defines “tipped employee” as an employee whose employer has taken a credit towards the employee’s basic minimum hourly rate, “receives enough tips” as to match the required tip credit, and “has been notified of the tip credit”.
4. ^[4]See *Notice to Employers Regarding Implementation of Wage Order*, New York State Department of Labor, <http://www.labor.ny.gov/sites/legal/laws/hospitality-industry-wage-order.page> (last visited April. 22, 2011).
5. ^[5]See *id.*
6. ^[6]See *id.*
7. ^[7]See *Tips, Tip Pooling, and Tip Credits: What Service Employees Need to Know*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/tip-pooling-credits-service-employees-29804.html> (last visited April. 24, 2011).
8. ^[8]See 12 NYCRR Part 146-1.3.
9. ^[9]See 12 NYCRR Part 146-2.5.
10. ^[10]See generally, 12 NYCRR Part 146-2.14(e)(stating “the employee must perform, or assist in performing, personal service to patrons at a level that is principal and regular part of their duties. Examples of eligible employees include wait staff; counter personnel who serve food or beverage to customers; bus persons; bartenders; bar-backs; food runners; captains who provide direct food service to customers; and hosts who greet and seat guests.”)
11. ^[11]See 12 NYCRR Part 146-2.14.
12. ^[12]See 12 NYCRR Part 146-2.17.
13. ^[13]See 12 NYCRR Part 146-2.18.

14. ^[14] See 12 NYCRR Part 146-1.7.
15. ^[15] See *id.*
16. ^[16] Under the “wash and wear” exemption, the employer does not have to pay the cleaning allowance if the clothing may be routinely washed and dried with other personal garments; does not require ironing, dry cleaning, daily washing, or other special treatment; and if the employer issues enough uniforms to equal the average amount of days the employee works per week.
17. ^[17] See 12 NYCRR Part 146-1.7.
18. ^[18] See *id.*