

To: Our Clients and Friends

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New York Restaurant Employer Briefing – Wage Payment Requirements

New York restaurateurs operate in one of the most regulated employment environments in the country. In addition to the federal, state, and local laws applicable to all employers, such as those prohibiting employment discrimination, governing the payment of wages, workplace safety, and leaves of absence, New York-based restaurants also must comply with regulations applicable only to the restaurant industry. This extensive maze of regulation can be exploited by plaintiffs' lawyers who search for unwitting violations. This has led recently to many lawsuits that are costly to defend, and which seek not only damages for employees, but also fees and costs for the attorneys who bring these suits. The threat of litigation is compounded by the fact that many lawsuits are brought as collective actions on behalf of several employees, which can greatly add to potential damages and to the complexity of defense.

New York state also has authority to independently investigate allegations of underpayments of wages and to seek back pay and penalties. For example, in March of this year, the Department of Labor announced it recovered \$2.3 million from just one investigation involving nine restaurants.

This briefing provides an introduction to the laws relevant to the payment of wages to workers in the New York restaurant industry.

Wage Payment Laws

The main laws involved are the federal Fair Labor Standards Act (FLSA) and the New York Labor Law. In addition, the New York State Department of Labor has issued a Minimum Wage Order for the Restaurant Industry (the "Wage Order"), which adds a further layer of regulation.

FLSA

Under the FLSA, employers generally must pay workers at least the minimum hourly wage (\$7.25 as of July 24, 2009), must pay "time and a half" for each hour worked in excess of forty in a workweek, and must keep records of hours worked. Some workers are exempt from overtime pay requirements if they

perform certain functions - usually higher level tasks - and are paid a set salary regardless of how many hours they work in a week.

Damages for violations of the FLSA usually are an amount equal to double the wages that should have been paid. If the employer can demonstrate that it had good reason to believe it was making appropriate payments, the measure of damages will be just the amount that should have been paid, not double.

New York Labor Law

The New York Labor Law also now mandates a \$7.25 hourly minimum wage, requires overtime payment, and recordkeeping. Among other things, it defines when employers must pay wages and it strictly limits the instances in which employers may withhold money from a worker's wages. Of particular interest to restaurant employers, the New York Labor Law governs the payment of tips, and limits which workers may share in the receipt of tips. While employers may keep mandatory service charges, recent authority forbids employers from keeping such charges if patrons are led to believe they are in fact gratuities to employees.

Damages under the New York Labor Law include the amount that should have been paid, plus a 25% penalty. Because most plaintiffs often bring actions under both the state and federal laws, this 25% penalty amount will be added to the "double damages" recoverable under the FLSA.

Tip Credits

Employers may pay less than the minimum wage to workers who regularly and customarily receive tips. Such employees still must receive at least \$7.25 per hour, but that amount may be reached by combining cash received in tips with pay from the employer. The amount derived from tips in arriving at the hourly rate of pay - the so called "tip credit" - is different under the FLSA and the New York Labor Law. Under the FLSA, employers may take a maximum tip credit of \$5.12 per hour. Under the New Your Labor Law, employers may take a maximum tip credit of \$2.60 per hour.

Employers may be stripped of the ability to rely on tip credits if they are not careful. Voluntary employee agreements to distribute pooled tips are a common and permissible practice. But employers who use money from a tip pool to pay other expenses, such as salaries to employees who normally do not receive tips, will forfeit the ability to rely on tip credits.

Also, under the FLSA, employers may not rely on tip credits unless they 1) first inform the tipped employees that tip credits will be applied in reaching the minimum wage, and 2) distribute all of the tips to the employees who received the tips, or to those participating in a lawful tip pooling agreement.

Minimum Wage Order for the Restaurant Industry

The Wage Order, which is presently under review and is likely to be modified soon, provides more detail concerning New York Labor Law requirements. It also provides for "Spread of Hours" compensation. Under this requirement, employees who work more than ten hours in a work day must

receive an extra one hour's pay at the minimum wage. This requirement is in addition to any other overtime the employee may receive, and the minimum wage paid may not be reduced by any credits for tips or meals provided.

Suggestions

Now is the time to conduct an internal audit to determine whether your business complies with the relevant laws and regulations. Restaurant industry employers should become comfortable that they comply with the legal requirements before a lawsuit or state inquiry is commenced.

For example:

- Do you have a poster containing employees' rights under state and federal laws
- Does this poster contain information about workers' rights, including the right to be paid at least the minimum wage and to receive overtime pay?
- If you take tip credits, do you have records that workers have been advised of their related statutory rights?
- Are you comfortable that you are taking the appropriate amount of tip credit under federal and New York law?
- Can you confirm that all tips distributed pursuant to a pooled tip agreement are distributed to employees who regularly and customarily receive tips?
- Do you maintain records of the hours your employees work, and the amounts paid to them?

We are ready to assist you with all of your employment law needs. If you have any questions, please contact Dermot J. Sullivan at (212) 541-2135.