

## **New York's Hospitality Industry Wage Order's Compliance Deadline Nears**

**February 18, 2011**

On December 15, 2010, the New York State Department of Labor (NYDOL) announced that it had finalized the state's Hospitality Industry Minimum Wage Order (the Wage Order). The Wage Order consolidates two separate but similar wage orders that covered the restaurant and hotel industries. The new Wage Order contains some significant changes from the prior rules and affords hospitality industry employers just a short window of time to comply with its provisions.

As of January 1, 2011, employers in the hospitality industry were required to review and modify their current wage and hour policies regarding the tipped credit minimum wage, tip pooling and tip sharing, recordkeeping, private event contracts, spread of hours pay, and other related practices. Employers were allowed an "implementation period" through February 28, 2011 to make necessary payroll system changes to reflect the changes required by the new Wage Order. However, by March 1, 2011, employers availing themselves of this implementation period must retroactively pay any additional wages owed under the new Wage Order for the period from January 1, 2011 until such changes are made. Below are highlights of the Wage Order.

### **Notice Provisions**

The Wage Order requires employers to provide each employee with a written notice of pay prior to the commencement of employment *and at any time there is a change to their rate of pay*. This information must be made available to the worker in English *and* in the employee's primary spoken language. This notice must identify the following: (1) the employee's hourly rate of pay, (2) the employee's overtime hourly rate of pay, (3) the amount of the tip credit being taken (if applicable), (4) the employee's regular payday, and (5) when extra pay is required if the actual tips earned are insufficient to bring the employee up to the basic minimum hourly rate. Employers must retain a copy of the notices and the employee's signed acknowledgment of receipt of the notice for a minimum of six years.

### **Payroll Records**

Employers must establish, maintain, and preserve, for at least six years, weekly payroll records that identify each employee's (1) name and address; (2) Social Security number or other employee identification number; (3) occupational classification; (4) number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10; (5) regular and overtime hourly wage rates; (6) amount of gross wages; (7) deductions from gross wages; (8) amount of net wages; (9) tip credits, if any, claimed as part of the minimum wage;

(10) meal and lodging credits, if any, claimed as part of wages; (11) money paid in cash; and (12) student classification. These records should also indicate whether the employee has been issued uniforms maintained by the employer.

### **Pay Rates and Tip Credits**

The minimum wage in New York remains \$7.25 per hour and overtime pay remains at 1½ times the regular rate for hours worked in excess of 40 hours per week. The Wage Order, however, clarifies that hourly rates of pay are required for all nonexempt employees, and nonexempt employees cannot be paid on a daily, weekly, salary, piece rate, or other nonhourly basis.

The Wage Order also decreases the allowable tip credit and increases the wage that tipped employees must receive when a trip credit is taken. Effective January 1, 2011, the minimum hourly wage rate for tipped food-service employees will increase to \$5.00 from \$4.65, thereby having the effect of *reducing* the tip credit wage to \$2.25. The minimum hourly wage for service employees earning tips will increase to \$5.65 from \$4.90, similarly having the effect of *reducing* the tip credit wage to \$1.60 per hour. Finally, the minimum hourly wage for tipped service employees in the hotel industry will increase to \$4.90 from \$4.35 and, therefore, the tip credit cannot be reduced below \$2.35 per hour for such employees. The Wage Order also provides that a service employee or food-service worker who works a nontipped occupation for two hours or more, or more than 20% of his or her shift, whichever is less, shall not be subject to the tip credit for the day.

Importantly, the new Wage Order requires employers who apply a tip credit to an employee's wages to notify the employee in writing of his or her tip credit wage, regular pay rate, and pay date at the commencement of employment.

### **Spread of Hours**

Under the Wage Order, an employee whose workday lasts longer than 10 hours (between the start of the first shift and the end of the last shift) must be paid an extra hour at the full minimum wage rate of \$7.25 per hour. The additional hour of pay cannot be offset by any credits for meals or lodging.

### **Tip Pool**

Employers in the hospitality industry can now require a tip pool—for “eligible employees.” Examples of eligible employees include wait staff, counter personnel who serve food or beverages to customers, bus persons, bartenders, barbacks, food runners, captains who provide direct food service to customers, and hosts who greet and seat guests.

Employers that operate these types of tip-sharing or tip-pooling arrangements must, however, keep detailed tipping records for at least six years. Such records must include (1) a daily log of all cash and credit card tips received by each employee from guests; (2) a list of occupations the employer deems eligible to receive tips through a tip-sharing or tip-pooling program; (3) the share of tips each occupation is scheduled to receive from the tip-sharing or tip-pooling program; and (4) the amount in tips each employee receives from the tip share or tip pool, by date.

The Wage Order also permits an employee the right to inspect his or her own tip records—but not the tip records of any other employee.

## **Charges Purported to Be a Gratuity or Tip**

Under the Wage Order there will now be a rebuttable presumption that any charge made to a customer that is not specifically enumerated as being for food, beverage, or lodging, including any charge for “service” or “food service,” is a gratuity.

## **Administrative or Service Charge**

Consistent with the rebuttable presumption described above, the Wage Order provides that in order for an employer to retain a charge for the administration of a banquet, special function, or package deal, the employer must clearly identify the charge as an “administrative” charge and notify the customer that the charge is *not* a gratuity or tip and that it will not be distributed as a gratuity to the employees who provided services. This disclosure must be in “ordinary language readily understood” and appear in a font size similar to surrounding text and be no smaller than “12-point font.”

## **Tip Credit Card Fees**

The Wage Order permits an employer to deduct, from the tip left for an employee on a credit card, the amount of credit-card processing fees actually incurred on that charge for employee tips on a pro rata basis.

## **Meal Credits**

Under the Wage Order, whenever an employee’s shift is long enough to invoke the meal period law, employers must either allow employees to bring their own food or give them a meal at no more than the meal credit amount. The Wage Order continues to allow employers to apply meal credits against employees’ wages. However, the Wage Order increases the meal credit to \$2.50 per meal. Consistent with prior wage orders, a credit for more than one meal is not permitted for any employee working fewer than five hours on any given day.

## **Call-In Pay**

The Wage Order requires employers to pay the following to employees who report to work at the “request or permission” of the employer:

- At least three hours of pay (or the number of hours in the regularly scheduled shift, whichever is less) at the employee’s applicable wage rate
- At least six hours if he or she reports for two shifts totaling six hours or less (or the number of hours in the regularly scheduled shift, whichever is less)
- At least eight hours for three shifts totaling eight hours or less (or the number of hours in the regularly scheduled shift, whichever is less)

## **Uniforms**

Under the Wage Order, in order to qualify for the so-called “wash and wear” exemption, such that the employer does not have an obligation to pay the cleaning allowance if the uniform can be washed by the worker with his or her other garments, the employees’ required uniform must be made of wash-and-wear materials; must be able to be routinely washed and dried with other personal garments; must not require

ironing, dry cleaning, daily washing, commercial laundering, or other special treatment; and should be furnished to the employee in sufficient numbers—consistent with the average number of days per week worked by an employee.

Additionally, where an employer does not maintain required uniforms for any employee, the employer shall pay the employee, in addition to the employee’s agreed-upon rate of pay, the following uniform maintenance pay:

- \$9.00 per week if employee works more than 30 hours
- \$7.10 per week if employee works more than 20 hours but fewer than 30 hours
- \$4.30 per week if employee works fewer than 20 hours

## **Conclusion**

The new Hospitality Industry Minimum Wage Order requires employers in that industry to carefully review their policies, particularly those regarding the tipped credit minimum wage, tip pooling and tip sharing, recordkeeping, and spread of hours pay. While employers have been afforded a two-month period of time from January 1 in which to make any necessary changes, any additional wages owed on account of the new rules will be computed retroactively to January 1, 2011, so employers that are able to implement the wage increases prior to March 1, 2011 should take steps to do so.

If you have additional questions about the impact of the legislation discussed in this Morgan Lewis LawFlash on your policies and procedures, please contact any of the following Morgan Lewis attorneys:

### **New York**

David A. McManus	212.309.6824	<a href="mailto:dmcmanus@morganlewis.com">dmcmanus@morganlewis.com</a>
Christopher A. Parlo	212.309.6062	<a href="mailto:cparlo@morganlewis.com">cparlo@morganlewis.com</a>
Ira G. Rosenstein	212.309.6960	<a href="mailto:irosenstein@morganlewis.com">irosenstein@morganlewis.com</a>
Andrew J. Schaffran	212.309.6380	<a href="mailto:dschaffran@morganlewis.com">dschaffran@morganlewis.com</a>
Samuel S. Shaulson	212.309.6718	<a href="mailto:sshaulson@morganlewis.com">sshaulson@morganlewis.com</a>
Kenneth J. Turnbull	212.309.6055	<a href="mailto:kturnbull@morganlewis.com">kturnbull@morganlewis.com</a>

### **About Morgan Lewis’s Labor and Employment Practice**

Morgan Lewis’s Labor and Employment Practice includes more than 265 lawyers and legal professionals and is listed in the highest tier for National Labor and Employment Practice in *Chambers USA 2010*. We represent clients across the United States in a full spectrum of workplace issues, including drafting employment policies and providing guidance with respect to employment-related issues, complex employment litigation, ERISA litigation, wage and hour litigation and compliance, whistleblower claims, labor-management relations, immigration, occupational safety and health matters, and workforce change issues. Our international Labor and Employment Practice serves clients worldwide on the complete range of often complex matters within the employment law subject area, including high-level sophisticated employment litigation, plant closures and executive terminations, managing difficult HR matters in transactions and outsourcings, the full spectrum of contentious and collective matters, workplace investigations, data protection and cross-border compliance, and pensions and benefits.

## **About Morgan, Lewis & Bockius LLP**

With 23 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at [www.morganlewis.com](http://www.morganlewis.com).

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

**© 2011 Morgan, Lewis & Bockius LLP. All Rights Reserved.**

