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Winter 2019

***Legal Trends E-Update***

**"Avoiding Wage & Hour Claims and Costly Litigation"**

*by Hospitality Industry Attorney and Counselor-at-Law, James Henry Dunne, Esq.*

The New York State Hospitality Industry Wage Order has put a stranglehold on operators providing hourly employment opportunities at restaurants, hotels, caterers, and across the entire hospitality industry. The complexities of the Wage Order are particularly burdensome, confusing, and overwhelming when dealing with compliance related to tipped employee compensation and workplace conditions. Whether a disgruntled bartender or server, or a non-tipped member of the kitchen staff, predatory attorneys abound that are actively soliciting these employees on Facebook and all available social media platforms. What makes matters even more dreadful is that once your previous and/or current employees talk with one another (an inevitability), just ONE disgruntled employee can quickly spread the seed of discontent and generate a Class Action lawsuit against your operation. Any failure or mistake in complying with the Wage Order likely impacts each of your employees ... not just one of them ... so these employees are likely to band together if you are not proactive and in compliance with the NYS standards.

What follows is a synopsis of what I feel are the most prevalent "Top 10" vulnerabilities of the Wage Order for operators. I have also provided some thoughts and preventative measures for avoidance or minimization of penalties, financial awards, or settlements for past and current employees.

The list that follows is not intended as a summary of the entire Wage Order, so be sure to review it with your attorney to verify adherence to all of the requirements that you must meet.

### **#1 Tip Credit**

Operators may reduce the hourly pay of tipped employees by \$3.50 from the minimum wage. Be cautious of the pitfalls of the Tip Credit. Litigation abounds due to failure to properly comply. For example, penalties may include up to \$10,000 per employee plus \$3.50 paid to the adversely impacted employee for each and every hour ever worked at the place of employment simply for failure to notify them properly, even if you paid them accurately.

#### **✓ Preventative Measures**

Be sure to notify your employee, in writing, upon hire, of what a Tip Credit is. You must also notify them of several other required Wage Order standards in your written notification Wage Statement upon hire. A Wage Statement sample / template is available at the NYS DoL website. You must then re-notify each member of your staff, in writing, each and every time the hourly rate changes (usually at the start of the new year). Have each employee sign the Statement acknowledging that they are on notice each time they are notified (upon hire and each time the hourly rate changes). I encourage my clients to notify their employees daily. If your tipped employees are required to complete a Tip Report documenting their daily sales and claimed gratuities that you maintain (documenting cash tips and charge tips), include a statement about the Tip Credit on that document, which they then sign and submit to you daily.

### **#2 Overtime**

An employer shall pay an employee for overtime at a wage rate of 1.5 times the employee's regular rate for hours worked in excess of 40 hours per workweek. When an employer is taking a Tip Credit toward the basic minimum hourly rate, the overtime rate shall be the employee's regular rate of pay before subtracting any Tip Credit, multiplied by 1.5, minus the Tip Credit. It is a violation of the overtime requirement for an employer to subtract the Tip Credit first and then multiply the reduced rate by one and one half. I have seen operators mix this up, and I've repeatedly seen the CPA's they hire make the mistake too.

#### **✓ Preventative Measures**

For example, if the minimum wage in your county is \$12, 1.5 times that rate is \$18 per overtime hour. Subtract the \$3.50 Tip Credit from \$18, which equals \$14.50 per hour overtime for tipped employees. Many operators mistakenly take the hourly rate minus the Tip Credit, and times that by 1.5. So, in the example above, the employer would mistakenly pay the tipped employee \$8.50 per hour ( $\$12 - \$3.50$ ) and times that number by 1.5 to tabulate the overtime rate ( $\$8.50 \times 1.5 = \$12.75$  would not be the correct tabulation).

### **#3 Written Notice, Statements and Posting**

Prior to the start of employment, an employer must give each employee written notice of the employee's regular hourly pay rate, overtime hourly pay rate, the amount of Tip Credit, if any, to be taken from the basic minimum hourly rate, and the regular payday. The notice must also state that extra pay will be provided by the employer if the employees' tips are insufficient to bring the employee up to the basic minimum hourly rate. For example, if the basic minimum wage is \$12, and you are paying the tipped employee \$8.50, and the employee makes very little in tips (averaging less than \$12 per hour) during a week, then the employer must make up the difference and pay the employee enough for them to average at least make \$12 per hour for that workweek.

#### **√ Preventative Measures**

You must provide the statement in the employee's native language and in English. Templates in various languages are available at the NYS DoL website. As stated in #1 above, have the employee sign the statement, and re-issue the statement each and every time the hourly rates change. You should also note that "every employer shall post, in a conspicuous place in his or her establishment, notices issued by the Department of Labor about wage and hour laws, tip appropriations, illegal deduction provisions and any other labor laws that the Commissioner shall deem appropriate." These posters are available for free at the NYS DoL website.

### **#4 Call-in Pay**

If an employee is scheduled and shows up for work, but business is slow and you want to send them home, you must pay them the applicable wage rate: (1) for at least three hours for one shift, or the number of hours in the regularly scheduled shift, whichever is less; (2) for at least six hours for two shifts totaling six hours or less, or the number of hours in the regularly scheduled shift, whichever is less; and (3) for 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.

#### **√ Preventative Measures**

Sending an employee home when things are slow, whether they enthusiastically accept the offer, or frustratingly leave after being asked, should be avoided as much as possible. Keep a close eye on scheduling. If you expect a downturn in business, try to anticipate this in advance so that you can notify employees before they arrive for work. If weather impacts your guest traffic, then check the weather forecast days in advance to plan on any necessary changes in staffing levels in advance, before staff arrives for their shift. Otherwise, be prepared to pay the employee for the minimums above or find some alternative duties within their job description to maximize productivity for the compensation you are required to pay.

## **#5 Uniforms**

If you require your employee to wear a uniform or require them to make the purchase of particular clothing, you must reimburse them for the purchase and you must provide a cleaning service or compensate them for cleaning. The dollar amounts for compensation vary by NY county, and are outlined in the Wage Order.

### **√ Preventative Measures**

Consider "wash and wear" clothing for your staff (a uniform that can be routinely washed with an employee's other laundry and does not require ironing, ex. t-shirts, polos, khaki pants, iron-free apparel, etc.). Be sure to provide enough for each day of each employee's average work week. For example, if you provide a t-shirt, and the employee normally work 4 days per week, then provide them with 4 shirts upon hire. By doing this, you avoid the need for ongoing reimbursement for cleaning.

## **#6 Meal Credit**

Meals and/or lodging provided by an employer to an employee may be considered part of the wages paid to the employee but shall be valued at no more than the amounts outlined in the Wage Order and vary by NY county. Employers may take a Credit if providing meals and/or lodging. Refer to the Wage Order for Credit amounts, based on where your operation is located.

### **√ Preventative Measures**

Employees have the right to refuse meals. If so, you cannot take the Credit! Most restaurants feed staff a 'family meal'. If you take a Credit, you must consistently provide a meal. Be sure to note and follow the Wage Order guidelines on the food being provided, since attorney's may request documentation on this when representing a client. "A meal shall provide adequate portions of a variety of wholesome, nutritious foods and shall include at least one of the types of food from all four of the following groups: (1) fruits or vegetables; (2) grains or potatoes; (3) eggs, meat, fish, poultry, dairy, or legumes; and (4) tea, coffee, milk or juice." It should be noted that you can opt not to take the Credit, and still feed your staff. This approach can certainly help alleviate issues with staff and show good faith.

## **#7 Tip Sharing / Pooling**

"Eligibility of employees to receive shared tips, or to receive distributions from a tip pool, shall be based upon duties and not titles. Eligible employees must perform, or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental." Examples of who are considered tipped employees are wait staff, counter personnel who serve food or beverages, bus persons, bartenders, bar-backs, food runners, captains who provide direct food service, and hosts who greet and seat guests. An employer may require directly tipped food service workers to share their tips and may set the percentage to be shared by each.

However, remember that employees must handle the transactions themselves. Directly tipped employees may share their tips on a voluntary basis with other service employees or food service workers who participated in providing service to customers.

#### ✓ Preventative Measures

Employers who operate a tip sharing or tip pooling system must establish, maintain, and preserve daily records for at least six years. A list of the requirements of this documentation is available in the Wage Order. Also remember to keep the tip sharing and pool participants to tipped employees. Managers, owners, kitchen staff, and other non-tipped employees cannot be included.

### **#8 Administrative Fees and "Service Charges"**

A charge purported to be a gratuity must be distributed in full as gratuities to the service employees or food service workers who provided the service. Anything that appears to the guest to be a tip must be distributed to your tipped employees. Establishments fall victim to this in their event contracts, and on menus too. A charge for the administration of a banquet, special function, or package deal must be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip.

#### ✓ Preventative Measures

If you have a "Service Fee" on your event contract, be sure it is distributed entirely to your tipped staff.

Otherwise, identify it as an "Administrative Charge" and then clearly explain in the contract that it is not to be interpreted as a gratuity for service staff.

### **#9 Spread of Hours**

The Spread of Hours is the length of the interval between the beginning and end of an employee's workday. The Spread of Hours for any day includes working time plus time off for meals plus intervals off duty. Examples of a Spread of Hours greater than 10 hours are: 7 a.m. - 10 a.m. + 7 p.m. - 10 p.m. = 6 hours worked but a 15 hour "spread" between the start and end of their shift. On each day on which the Spread of Hours exceeds 10 hours, an employee must receive one additional hour of pay at the basic minimum hourly rate.

#### ✓ Preventative Measures

When paying a tipped employee the extra hour, be sure that you are paying them the basic minimum wage rate, not the tipped employee rate. If they are normally being paid \$8.50 per hour (\$12 - 3.50 Tip Credit), be sure to pay them \$12 for that hour.

### **#10 Deductions, Expenses, Penalties**

Employers may not make any deductions from wages for spoilage or breakage, non-payment by a guest, deductions for cash shortages or losses, or fines or penalties for lateness, misconduct, or quitting by an employee without notice.

### Preventative Measures

You may coach and counsel an employee by giving a formal write-up for ongoing issues. However, you may not deduct from their pay for such matters.

As a final note, remember that if your operation is accused of any shortfalls in adherence to any of the policies discussed above (or any other policies not mentioned above but included in the Wage Order), the employer has the burden of proving compliance with these standards and adherence to the notification provisions for each. Most predatory law firms simply "kitchen sink" their accusations and demand settlement. Once a disgruntled tipped employee seeks their legal counsel, the firm will simply contact the employer, notify the employer that they are representing the current or past employee, and request documentation validating all of the Wage Order standards. Any failure to adhere to any of these standards, or provide documented proof thereof, warrants a settlement, penalties, or litigation.

Employers have an uphill battle once an accusation is made. Avoid this by paying your staff fairly, treating them respectfully, adhering to pay minimums, workplace conditions, and notification requirements, and document all required components of the Wage Order and your efforts to adhere to the required standards.

To review the NYS Hospitality Industry Wage Order in its entirety, go to the following link:

<<https://www.labor.ny.gov/formsdocs/wp/CR146.pdf>>

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*James Henry Dunne, Esq. is available to provide a comprehensive risk assessment and review of your organization to ensure legal compliance across a broad spectrum of areas, from the NYS Hospitality Industry Wage Order / payroll review, to the new NYS mandatory sexual harassment training requirements, responsible alcohol service, employee manual drafting, event / catering contracts, partnership agreements, and much more.*

Disclaimer: The synopsis above is not exhaustive. Each employer has unique needs and operates differently. You should consult with your attorney for a comprehensive review and analysis of whether or not you are in compliance with the NYS Hospitality Industry Wage Order and the measures you should take to avoid costly litigation.



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Are you being counseled with the service-oriented diligence you deserve?  
Are your personal legal needs in order?


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My thanks and regards for your valuable time and thoughtful consideration.

A handwritten signature in dark ink, appearing to read "James Dunne". The signature is fluid and cursive, with a large initial "J" and "D".

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