

PRACTICAL ADVICE

FROM THE LABOR & EMPLOYMENT DEPARTMENT



Fox Rothschild LLP
ATTORNEYS AT LAW

NEW YORK HOSPITALITY INDUSTRY CHECKLIST FOR COMPLIANCE WITH FEDERAL AND STATE LABOR LAWS (AS OF JANUARY 1, 2011)

In light of the new wage order issued for the hospitality industry in New York (effective January 1, 2011) and other recent changes in state and federal law, we have prepared this checklist that employers in the hospitality industry can use to help ensure their general compliance with the applicable federal and state wage and hour laws. The list below is not intended to be comprehensive and does not cover all of the wage and hour requirements under federal and state law. Rather, this list covers the most problematic areas for employers that have historically been — and will continue to be — the subject of many lawsuits and/or governmental investigations. Thus, compliance with the items listed below will help minimize (but not eliminate) the employer's risk of any potential litigation over these wage and hour matters.

1. Written Notification of Rate of Pay

The employer must provide all new employees with a written notice of the employee's rate of pay and the employer's name, address, telephone number and regularly scheduled pay date. Any employees eligible for overtime must also be provided notice of their overtime rate of pay, and any employees who receive a tip credit must also be advised of the amount of the tip credit (as well as the fact their

wages will be supplemented if they do not receive sufficient tips in any given week to reach the applicable minimum wage rate). The restaurant must also receive and maintain on file a written acknowledgement form from each new employee stating he/she has received such written notice. Another version of this notice must be provided (and another written acknowledgement form received) annually prior to February 1 of each year and again whenever the employee's rate of pay changes during the course of his/her employment. This notice must be provided in English **and** in the employee's primary language (if not English). We have prepared a standard template you can use for this purpose.

2. Employee Classifications

All employees must be classified as nonexempt and receive overtime pay (as discussed in Section 6 below), **unless** the employee is paid a guaranteed weekly salary of at least \$543.75 **and** falls within one of the few narrowly construed exceptions to the applicable overtime laws (e.g., administrative, executive or professional). If classified as exempt (i.e., ineligible for overtime), the employer must prepare and maintain a description of the employee's title, duties and responsibilities. We can review any job titles/positions with

you to ensure employees are properly classified.

3. Posters

Employers in the hospitality industry must post in a prominent location the standard required posters issued by the federal and New York State Departments of Labor within each of their establishments, including the posters covering the following topics:

- Equal Employment Opportunity;
- The Fair Labor Standards Act;
- The Family Medical Leave Act;
- OSHA – Job Safety and Health Protection;
- The Employee Polygraph Protection Act;
- The New York State Human Rights Law on Discrimination;
- The New York State Labor Law on Criminal Conviction Records;
- The New York State Labor Law on Minimum Wage Requirements;
- The New York State Unemployment Insurance Law; and
- The New York State Workers Compensation/Disability Benefits Law.

Information on how to acquire copies of these posters may be obtained through the federal and New York State Department of Labor web sites.

4. Tip Credit Requirements

Employers must ensure they have explicitly advised all current employees earning sub-minimum wage rates of the fact the establishment is taking a tip credit in paying their wages. (New employees should be covered by Section 1 above.) It is not sufficient to simply tell employees what their wage rate is; the employer should specifically inform employees it is taking a tip credit in paying their wages, and in what amount. The employer cannot simply “assume” employees are aware of this because it is an industry standard. Ideally, each current employee should sign a form acknowledging he/she has been advised about the tip credit, similar to the form referenced in Section 1 above, even before such a notice is required. A reference to the tip credit being taken should also be contained in the employer’s employee handbook. It is also important to note however, a tip credit may **not** be utilized in any given work day in which the employee works in a “non-tipped” capacity (e.g., food preparation) for at least two hours or for at least 20 percent of his/her shift, whichever is less. During any such days, the employees must be paid at least \$7.25 per hour – the standard hourly minimum wage rate.

5. Minimum Wage Rate

As noted above, the standard minimum wage rate is \$7.25 per hour. However, assuming the employer properly implements the tip credit (as discussed in Sections 1 and 4 above), all food service workers may be paid a minimum hourly wage rate of at least **\$5.00 per hour** (with a tip credit of \$2.25 per hour). Food service workers are considered employees who are primarily engaged in the serving of food and beverage (e.g., servers, bartenders, bussers and runners) and

who regularly receive tips from customers. Service employees may be paid a minimum hourly wage rate of at least **\$5.65 per hour** (with a tip credit of \$1.60 per hour). Service employees are other employees (besides food service workers) who are engaged in providing direct personal service to customers (e.g., delivery persons, coat check personnel, etc.) All other employees must be paid at least **\$7.25 per hour**.

6. Overtime

All nonexempt employees must receive time and a half their regular rate of pay for all hours worked over 40 during each workweek. Where applicable, the tip credit may only be taken **after** the employee’s overtime rate is calculated based on the standard \$7.25 per hour rate. Thus, food service workers earning \$5.00 per hour and properly subject to the tip credit must be paid overtime at a rate of **\$8.63 per hour** (as opposed to 1.5 x \$5.00 per hour, or \$7.50 per hour); nonfood service workers earning \$5.65 per hour and properly subject to a tip credit must be paid overtime at a rate of **\$9.28 per hour** (as opposed to 1.5 x \$5.65 per hour, or \$8.48 per hour). Please note, however, these overtime rates must be increased to account for situations where, during the applicable workweek: (1) the employees receive additional compensation (e.g., non-discretionary bonuses, commissions, etc.); or (2) the employees work in a second position with a different rate of pay, in which case a blended rate is calculated. We can help you calculate the applicable overtime rate for any other individuals, as needed.

7. Spread-of-Hours Pay

All employees must receive an additional hour’s pay at the basic minimum hourly wage rate (i.e., \$7.25 per hour) whenever their hours on any given workday are spread over 10 or more hours. This applies both to employees who work at least 10 consecutive hours, as well as employees

who work two different shifts in one day that are spread over a 10-hour period (e.g., noon to 4 p.m. shift and a 7 p.m. to 11 p.m. shift).

8. Uniform Reimbursements

Those employees who must purchase a required uniform must be reimbursed for such expenses by the employer no later than the next pay period. Note, however, uniforms do not include clothing made of “wash and wear” materials or clothing that “may be worn as part of an employee’s ordinary wardrobe.” We can review with you whether any required uniform purchases are likely to fall within either of these exceptions.

9. Uniform Laundering Expenses

Those employees who are required to wear uniforms (not laundered by the employer) must be paid an additional **\$9.00 per week** for laundering expenses if they are regularly scheduled to work at least 30 hours per week; **\$7.10 per week** must be paid to employees working between 20–30 hours per week; and **\$4.30 per week** must be paid to employees working less than 20 hours per week. Note however, the same exclusions for uniforms described above applies here.

10. Meal Credits

Employers are permitted to take one meal credit per shift (up to two per day) in the amount of **\$2.50 per meal** for all employees.

11. Tip Pool / Tip Share Participation

Employees’ participation in a tip pool may be mandated by employers or otherwise voluntarily agreed to by the service staff. Only those employees who perform, or assist in performing, personal service to customers as part of their primary duties may participate in the tip pool. Managers and “back of the house” employees may not participate in or receive any monies from a tip pool. We can review with you whether the restaurant’s tip pool participants are all lawfully included.

Employers may also mandate servers share a certain percentage of their tips with other food service workers and may set the specific percentages to be so distributed.

12. Service Charges

To avoid any claims that any mandatory charges (for banquets, large parties, etc.) should be deemed gratuities (and thus required to be distributed in their entirety to the service staff), the employer must: (1) avoid labeling such charge as one for service and instead label the charge as an administrative charge; (2) expressly state in its event contracts and other written communications (in at least a 12-point font size) the administrative charge is for the administration of the event/banquet and is **not** purported to be and will **not** be distributed as a gratuity for the service staff; and (3) ensure its sales staff makes no statements, promises or communications inconsistent with the above-referenced statement. We can help you draft the appropriate language to be included in your event contracts. Additionally, to further protect itself, the employer should always charge sales tax on any such charges and count the revenues received from such service charges as income to the employer.

13. Wage Deductions

Other than required tax withholdings, employers may only impose wage deductions that are authorized in writing by the employee **and** are for “the benefit of the employee” (e.g., payments for insurance premiums, pension or health and welfare benefits,

etc.). Employers **cannot** impose deductions to recoup any overpayment in wages, losses due to spoilage/breakage, losses due to cash shortages or as a disciplinary measure.

14. Paychecks

With every paycheck, the employer must issue the employee a statement setting forth for each pay period:

- The hours worked during the pay period;
- The rate(s) paid to the employee (including any applicable overtime rate);
- The gross wages paid;
- Any credits taken (e.g., tip credit, meal credits, etc.);
- All deductions; and
- The net wages paid.

15. Record-Keeping Obligations

Employers are required to maintain the following administrative and payroll records for each employee dating back at least **six years**:

- Name and address;
- Social Security number;
- Pay rate acknowledgement forms (discussed in Section 1 above);
- Job classification;
- Wage rate;
- Number of hours worked on a daily and weekly basis (e.g., time cards, attendance records, etc.);
- The amount of gross wages received;

- The amount and types of deductions imposed on all wages received;
- The amount and types of credits taken (e.g., tip credit, meal credits, etc.);
- The amount of net wages received;
- Uniform reimbursement/laundry expenses paid by the restaurant;
- Any money paid to the employees in cash; and
- Student classification, if any.

16. Tip Pooling/Sharing Records

Employers are required to maintain the following tip pooling/sharing records for at least **six years**:

- A list of the job titles eligible to participate in the tip pooling/sharing system;
- A description/breakdown of how tips are to be shared among the eligible employees;
- A daily log of the tips collected by each employee; and
- A daily log of the tips distributed to and received by each employee.

Note, however, the collection and distribution of the proceeds from the tip pool must be administered solely by the service staff. The employer’s only responsibility is to maintain the records referenced above regarding such transactions.



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