KD Alert: New NY State Department of Labor Wage Order for Restaurant and Hotel Workers Takes Effect on Jan. 1, 2011

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The New York State Department of Labor has issued new wage regulations for the restaurant and hospitality industries that will take effect on January 1, 2011. Previously, the restaurant and hospitality industries were covered by separate wage orders. However, the newly issued Hospitality Industry Wage Order will now cover hotels and restaurants, amongst others. The long awaited Wage Order makes significant changes to the rules governing payment of wages, employee wage notification requirements and permissible deductions for all employees in an industry that has been inundated with class and collective action lawsuits as well as Department of Labor investigations in recent years.

The most significant change resulting from the new Wage Order affects the minimum wage rates for tipped employees. Effective January 1, 2011, minimum hourly wages will increase while the maximum tip credit will be decreased. Currently, food service workers must receive at least $4.65 per hour with a permissible tip credit of no more than $2.60 per hour. However, under the new Wage Order, employers must pay their employees no less that $5.00 per hour with a maximum tip credit of $2.25 per hour. Similar changes have been made for other employees covered by the Wage Order. Notably, delivery persons are explicitly excluded from the lower "food service" minimum wage and must now be paid a minimum of $5.65 per hour with an allowable tip credit of only $1.60 per hour.

Similarly, all non-exempt industry employees must now be paid pursuant to an hourly rate of pay and not on a daily, weekly, salary, piece rate or other non-hourly rate basis. Failure to pay industry employees on an hourly basis will result in an employee's hourly rate of pay being calculated by dividing their weekly pay by either (i) 40 hours, or (ii) the number of hours actually worked in a workweek, whichever is less. Employers will be deemed to have not paid employees any wages for hours worked over 40. The effect of this calculation method will be to substantially increase an employee's actual hourly rate of pay and require employers to pay employees at a time and half rate for all hours over 40 rather than just the "half rate" for overtime.

The notification requirements in the revised Wage Order have also been amplified. Prior to the start of employment, employers must now provide written notice to all employees covered by the Wage Order of their regular hourly pay, overtime hourly pay rate, amount of tip credit, if any, and the regular payday. Employees previously did not need to be formally advised of the tip credit. However, under the combined Wage Order, if employers do not advise new hires of the tip credit, they may not take advantage of same. An employee's acknowledgement of receipt of this notice must be retained for six years.

The new Wage Order also includes a change with respect to the availability of the tip credit. Any food service employee that works at a non-tipped occupation for two hours or more in any given day or for more than 20 percent of their shift may no longer avail themselves of the tip credit for that day. This new standard is stricter than the one applied under federal law.
Employers are also obligated to pay all industry employees, regardless of their hourly rate of pay, an additional hour of pay at minimum wage to those employees whose work shift (inclusive of breaks) exceeds 10 hours. The former rule only applied to employees making at or close to the minimum wage.

Steps to Take Now

In order to minimize the risk of noncompliance, and the hefty financial penalties that go with it, hotel and restaurant employers must revise their rates of pay for tipped employees and provide written notice to their employees regarding same. Employers should also ensure that their workplace policies and procedures are in compliance with the new regulations.