

# WAGE & HOUR LAW

## for the New York Hospitality Employer

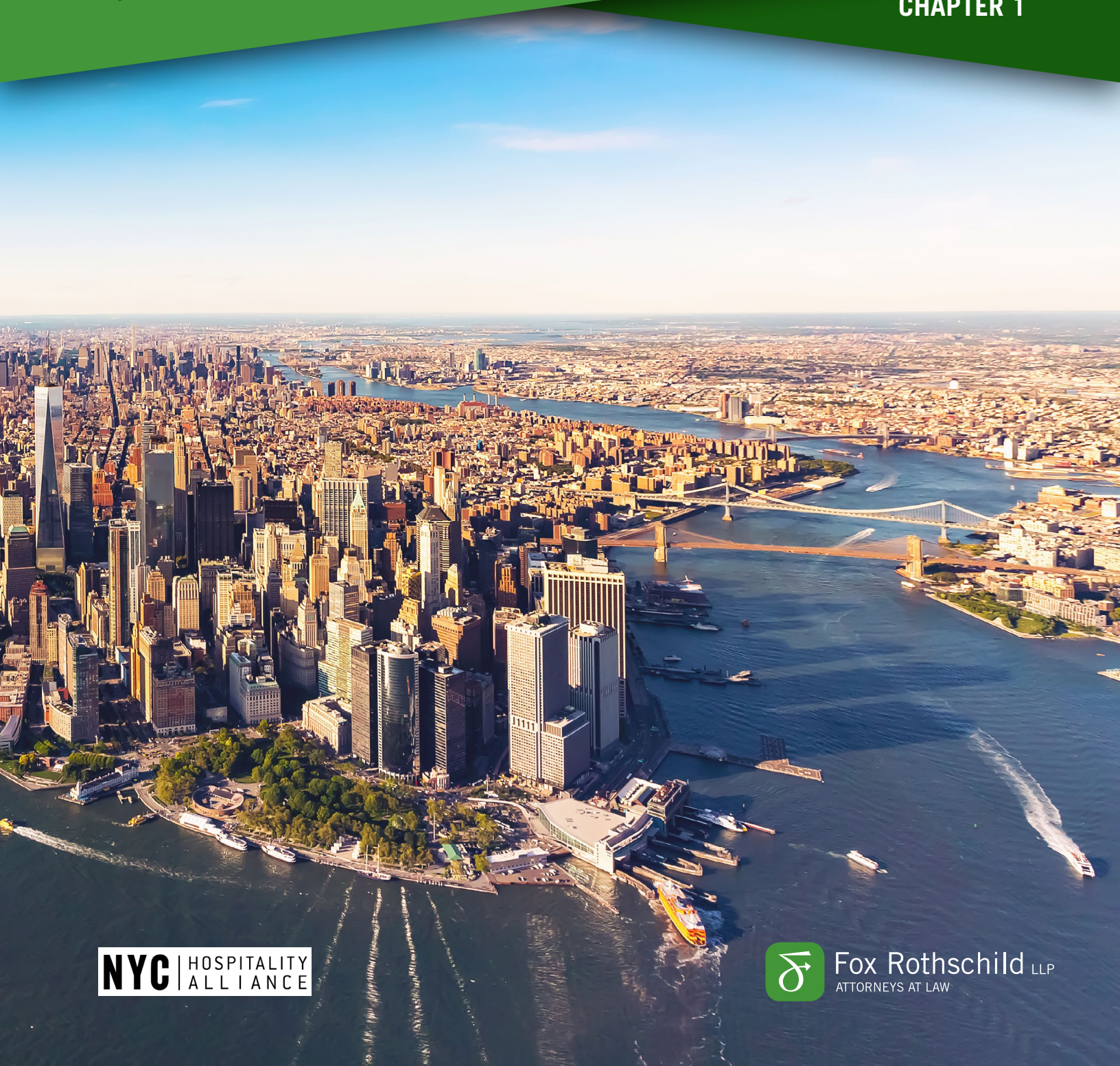
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### CHAPTER 1



When I began practicing law in 1994, among my first two cases that fall was a truly tough hotel union campaign in Midtown and a nasty termination of a general manager at a popular New Jersey restaurant. Within that first year, I also had the pleasure to begin working with Shelley Fireman and began to learn just how special this industry was. It took three more years until I met my mentor, Steve Hanson. One very snowy President's Day in 1998 sitting in his office (technically on the floor amidst piles and piles of paper), he introduced me to New York's arcane tipping rules and Restaurant Wage Order. As many of you have heard, Steve had a manual and procedure for everything. It took up two file drawers in my office. We were a match made in heaven. I spent the next 13 years with him putting out a prodigious amount of handbook pages and policies. I learned at the feet of a master, and together we can still claim that we never had a single employment law or wage class action suit in all of our time together.

While restaurants always had employment law disputes and discrimination claims came with some regularity, wage and hour disputes were virtually nonexistent in the 1990s, and I do not think I handled a single one. In the early 2000s that all changed for a number of legal, industry and societal reasons. In brief, New York City's once-thriving garment industry disappeared. In Albany, New York Department of Labor investigators, who were previously assigned to the garment industry transitioned to enforcement of wage and hour laws in the hospitality industry. Investigators began conducting surprise inspections throughout the five boroughs, asking about meal breaks, overtime and spread of hours. In addition, the plaintiffs' bar decided that individual discrimination cases required far too much work for the "small reward" and began shifting to wage and hour class action suits. Almost overnight, beginning in California and then washing like a tsunami across the country, costly class action suits were filed against hospitality establishments, alleging tip pool and service charge violations. On top of that, in 2004, the Bush Administration enacted new regulations that significantly impacted the FLSA and brought attention to its requirements. Finally, in 2010, New York revamped the wage and hour rules affecting the industry by enacting the Hospitality Wage Order. Game over..

At the same time that these legal change were occurring, social justice groups became very active in New York, assisting individuals in filing lawsuits, organizing employees and demanding significant amendments to wage and hour laws at the local, state and federal level. This resulted in an all-out legal assault on the industry

By 2020, New York employers had to navigate a maze of often conflicting, unintuitive laws and regulations. The COVID-19 pandemic simply piled more on top of that: PPP, FFCRA, PPE, paid family leave and more. A common refrain I heard was, "There should be one place where I can find all the answers." My colleagues and I agreed. While we cannot provide all the answers, we can guide you to the most important ones. We began drafting a book that would at least provide some clarity and an overview of the employment laws about which a New York hospitality employer needs to be aware. After hundreds of hours and multiple drafts, we are proud to give to the industry our guidebook. Given the enormity of issues to cover, we decided to serialize our work product. Over the next six months, my partner Glenn Grindlinger and I will release a different chapter every month or so, all prepared by my extraordinary colleagues, Jason Jendrewski, Bryn Goodman, Alex Bogdan and Matt Berger. First up, Wage & Hour Law for the New York Hospitality Employer. Please find the time to review it and keep it nearby. It is still only a guideline, and we encourage you to speak with your own counsel if there are particular issues of concern. Enjoy!



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Carolyn D. Richmond



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# OVERVIEW

## What are the minimum wage laws in NY?

The minimum wage in New York depends upon where the employee physically works, whether the employee works in the fast food industry, and, in some cases, the number of employees employed by the employer within the City of New York. Further, the minimum wage rate for some areas of the State will increase on a yearly basis. The below chart indicates the current and future minimum wage rates around New York:

Effective Date	Minimum Wage Rates (all rates are hourly rates)					
	Employers with More Than 10 Employees in New York City	Employers with Less Than 11 Employees in New York City	Nassau, Suffolk, and Westchester Counties	Rest of New York	Fast Food Employees in New York City	Fast Food Employees in Rest of New York
<b>Dec 31, 2019</b>	\$15.00	\$15.00	\$13.00	\$11.80	\$15.00	\$13.75
<b>Dec 31, 2020</b>	\$15.00	\$15.00	\$14.00	\$12.50	\$15.00	\$14.50
<b>July 1, 2021</b>	\$15.00	\$15.00	\$14.00	\$12.50	\$15.00	\$15.00
<b>Dec 31, 2021</b>	\$15.00	\$15.00	\$15.00	\$12.50	\$15.00	\$15.00

A “Fast Food Employee” is any employee who works at a “Fast Food Establishment” regardless of the individual’s job duties. A “Fast Food Establishment” is an establishment which:

- (1) has as its primary purpose serving food or drink items;
- (2) patrons order or select items and pay before eating and such items may be consumed on the premises, taken out, or delivered to the customer’s location;
- (3) offers limited service;
- (4) is part of a chain; and
- (5) is one of thirty (30) or more establishments nationally, including: (i) an integrated enterprise which owns or operates thirty (30) or more such establishments in the aggregate nationally; or (ii) an establishment operated pursuant to a Franchise where the Franchisor and the Franchisee(s) of such Franchisor owns or operate thirty (30) or more such establishments in the aggregate nationally.

“Fast Food Establishment” shall include such establishments located within non-Fast Food Establishments, such that they are considered an “integrated enterprise.” For purposes of determining if the establishment is a “Fast Food Establishment,” an “integrated enterprise” is defined as two or more entities sufficiently integrated so as to be considered a single employer as determined by application of the following factors: (i) degree of interrelation between the operations of multiple entities; (ii) degree to which the entities share common management; (iii) centralized control of labor relations; and (iv) degree of common ownership or financial control.

## When do I have to pay overtime?

Under federal and New York law, an employee is entitled to overtime, regardless of the employee's rate of pay (or whether the employee is paid a salary or above minimum wage), when the employee works more than forty (40) hours during the workweek, unless the employee is legally exempt from overtime requirements as discussed below. Most employees are entitled to overtime. Any overtime that is owed must be paid at the same time that the employee's regular wages for the week at issue are paid.

## How do you calculate overtime?

For every hour (or portion thereof) worked over forty (40) hours during a workweek, overtime is calculated at one and one-half times the employee's regular rate of pay:

$$\text{Overtime} = (\text{Hours over 40}) \times 1.5 \times \text{Regular Rate of Pay}$$

An employee's "regular rate of pay" is an hourly rate of pay generally calculated by aggregating all remuneration paid by the employer to the employee for time worked, subtracting out certain statutory deductions, and dividing that figure by the hours worked during the week. Payments which are subtracted out in calculating the regular rate include: (i) payments made to insurance and related entities on the employee's behalf such as employer contributions to medical, retirement, and other benefits plans; (ii) pay for expenses incurred on the employer's behalf; (iii) premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays; (iv) discretionary bonuses; (v) gifts and payments in the nature of gifts on special occasions; (vi) payments for occasional periods when no work is performed due to vacation, holidays, or illness; and (vii) tips and gratuities paid by customers.

When an employee is paid only an hourly wage rate, the calculation of overtime is simply the wage rate multiplied by 1.5 multiplied by the number of weekly hours (or portion thereof) in excess of forty (40) hours. When employees receive commissions, bonuses, revenue shares, and other forms of compensation, the calculation can get complex.



## How do you calculate overtime if an employee works more than one job?

In multi-job (or multi-rate) situations, the employee's regular rate of pay for a workweek is the weighted average of all of the rates divided by the number of hours worked at all jobs.

The best way to explain how to calculate a blended overtime rate is by example:

**In a New York City Restaurant, Employee A worked a total of 49 hours in a single workweek. He worked 23.5 hours as a dishwasher (paid at \$15.00 per hour) and 25.5 hours as a line cook (paid at \$19.00 per hour):**

- (1) Multiply the number of hours Employee A worked in the first position (Dishwasher) by the minimum wage rate:  
**23.5 hours x \$15.00 (minimum wage) = \$352.50**
- (2) Multiply the number of hours Employee A worked in the second position (Cook) by his direct wage for that position:  
**25.5 hours x \$19.00 (wage as cook) = \$484.50**
- (3) Employee A's "gross blended compensation" is the sum of the wages in both positions:  
**\$352.50 + \$484.50 = \$837.00**
- (4) Thus his "gross blended regular rate of pay" is the total gross blended compensation divided by the total number of hours worked:  
**\$837.00 ("gross blended compensation") ÷ 49 (total hours) = \$17.08**

**To calculate the gross blended overtime premium owed to Employee A:**

- (5) Multiply the "gross blended regular rate of pay" by one-half times  
**\$17.08 x 0.5 = \$8.54**

*It is only multiplied by ½ rather than 1.5 because the fulltime has already been calculated above and thus only ½ is left to be paid*

- (6) Multiply the number of overtime hours worked by the blended overtime premium rate:  
**(49 total hours – 40 hours) = 9 hours x \$8.54 = \$76.86**

**To calculate the total gross wages owed to Employee A:**

- (7) Add the overtime premium amount to the gross blended compensation:  
**\$76.86 + \$837.00 = \$913.86**

*Employee A will be owed \$913.86 for working 25.5 hours at a rate of \$19.00 per hour and 23.5 hours at a rate of \$15.00.*

## Does it matter what corporate entity actually pays an employee?

If the corporate entities are related and the same individuals control the day-to-day affairs of the corporate entities, then it does not matter which entity pays the employee. Further, if an employee works for two related entities, and in the aggregate works more than 40 hours in a week, the employee will be entitled to overtime even if the employee did not work more than 40 hours for any single entity.

## What is the “Tip Credit” and when does it apply?

Under limited and specific circumstances, an employer may be able to take a tip credit towards its minimum wage obligations towards its service and food service employees. Thus, under these limited circumstances, the employer can use a portion of the employee’s tip to count towards the minimum wage and therefore pay an employee a lower cash wage. However, if an employee’s cash wage and tips do not equal the minimum wage for all hours worked, the employer must make up the difference. Further, for some employees, New York requires that in order to take a tip credit, a tip threshold is met, meaning that an employee must earn a certain amount in tips each hour. The tip threshold plus the cash wage is more than the applicable minimum wage.

If a tip credit is lawfully taken, the following chart shows the various tip credits and cash wages that can be paid to employees:

### Employers with More Than 10 Employees in New York City

Effective Date	Minimum Wage Rates and Tip Credits (all rates are hourly rates)						
	Minimum Wage	Cash Wage (Food Service)	Tip Credit (Food Service)	Cash Wage (Service)	Tip Credit (Service)	Tip Threshold (Service)	Tip Threshold (Resorts)
<b>Dec 31, 2019</b>	\$15.00	\$10.00	\$5.00	\$12.50	\$2.50	\$3.25	\$8.40
<b>Dec 31, 2020</b>	\$15.00	\$10.00	\$5.00	\$12.50	\$2.50	\$3.25	\$8.40
<b>Dec 31, 2021</b>	\$15.00	\$10.00	\$5.00	\$12.50	\$2.50	\$3.25	\$8.40

### Employers with Less Than 11 Employees in New York City

Effective Date	Minimum Wage Rates and Tip Credits (all rates are hourly rates)						
	Minimum Wage	Cash Wage (Food Service)	Tip Credit (Food Service)	Cash Wage (Service)	Tip Credit (Service)	Tip Threshold (Service)	Tip Threshold (Resorts)
<b>Dec 31, 2019</b>	\$15.00	\$10.00	\$5.00	\$12.50	\$2.50	\$3.25	\$8.40
<b>Dec 31, 2020</b>	\$15.00	\$10.00	\$5.00	\$12.50	\$2.50	\$3.25	\$8.40
<b>Dec 31, 2021</b>	\$15.00	\$10.00	\$5.00	\$12.50	\$2.50	\$3.25	\$8.40

## Employers in Nassau, Suffolk, and Westchester Counties

Effective Date	Minimum Wage Rates and Tip Credits (all rates are hourly rates)						
	Minimum Wage	Cash Wage (Food Service)	Tip Credit (Food Service)	Cash Wage (Service)	Tip Credit (Service)	Tip Threshold (Service)	Tip Threshold (Resorts)
<b>Dec 31, 2019</b>	\$13.00	\$8.65	\$4.35	\$10.85	\$2.15	\$2.80	\$7.30
<b>Dec 31, 2020</b>	\$14.00	\$9.35	\$4.65	\$11.65	\$2.35	\$3.05	\$7.85
<b>Dec 31, 2021</b>	\$15.00	\$10.00	\$5.00	\$12.50	\$2.50	\$3.25	\$8.40

## Rest of New York

Effective Date	Minimum Wage Rates and Tip Credits (all rates are hourly rates)						
	Minimum Wage	Cash Wage (Food Service)	Tip Credit (Food Service)	Cash Wage (Service)	Tip Credit (Service)	Tip Threshold (Service)	Tip Threshold (Resorts)
<b>Dec 31, 2019</b>	\$11.80	\$7.85	\$3.95	\$9.85	\$1.95	\$2.55	\$6.60
<b>Dec 31, 2020</b>	\$12.50	\$8.35	\$4.15	\$10.40	\$2.10	\$2.70	\$7.00
<b>Dec 31, 2021</b>	\$12.50	\$8.35	\$4.15	\$10.40	\$2.10	\$2.70	\$7.00

There are no tip thresholds for food service employees. A food service employee is any employee who is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers. The term food service worker shall not include delivery workers. An individual may not be classified as a food service worker on any day in which the employee has been assigned to work in an occupation in which tips are not customarily received for 2 hours or more or for more than 20 percent of her or his shift, whichever is less.

A service worker is an employee, other than a food service worker or fast food employee, who customarily receives tips at or above the tip threshold rates.

A “resort” is a hotel which offers lodging accommodations of a “vacation” nature to the public or to members or guests of members, and which: (i) operates for not more than seven months in any calendar year; or (ii) being located in a rural community or in a city or village of less than 15,000 population, increased its number of employee workdays during any consecutive four-week period by at least 100 percent over the number of employee workdays in any other consecutive four-week period within the



preceding calendar year; or (iii) being located in a rural community or in a city or village of less than 15,000 population, increased its number of guest days during any consecutive four-week period by at least 100 percent over the number of guest days in any other consecutive four-week period within the preceding calendar year.

A tip credit cannot be taken toward the minimum wage obligations of fast food employees.

### **What do I have to do to protect my restaurant's right to take the tip credit?**

In order to lawfully take a tip credit in New York, at the commencement of employment and any time there is a change in the employee's rate of pay, the employee must be informed in writing in English and the employee's primary language (if not English) about the employee's:

- Regular hourly pay rate,
- The cash wage that will be paid,
- Overtime hourly pay rate,
- The amount of tip credit, if any, to be taken from the basic minimum hourly rate,
- The regular payday,
- Information that in the event the employee's cash wage and tips do not equal the minimum wage for all hours worked, the employer will pay the difference, and
- That all tips received by the employee will be retained by the employee except for tips contributed to a valid tip out or tip pool system.

Further, if the employer requires directly tipped employees to tip out other employees or participate in a tip pool, the employer must ensure that such tip out and tip pool system only involve food service employees. Service employees, such as coat check personnel and delivery workers, cannot be required to tip out or participate in a tip pool. In the

event a non-food service worker participates in a tip pool with a food service worker, the employer may lose the tip credit (and be required to pay it back to the employees) for all employees who participate in the tip pool or tip out arrangement. In addition, employees can never be required to share tips with managers.

### **How do I calculate overtime when I take a tip credit?**

When an employer takes a tip credit towards its minimum wage obligations to an employee and that employee works more than forty hours during the week, the overtime rate shall be the employee's regular rate of pay before subtracting any tip credit, multiplied by 1½, 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.

**For example, for a large employer in New York City, the employer takes a tip credit of \$5.00 towards its minimum wage obligations to Employee B.**

**Employee B works 43 hours during the week, earns \$700.00 in tips and earns no other remuneration.**

Overtime is calculated as follows:

$$(1) \$15.00 \times 1.5 \times (43-40) = \$67.50$$

Overtime Payment made after the tip credit is taken is:

$$(2) \$67.50 - (3 \text{ hours} \times \$5.00 \text{ credit}) = \$22.50$$

## What wage and hour documents do I need?

### W-4

This is the standard IRS form that all employees must complete in order for the employer to determine how much in taxes the employer needs to withhold from employee wages.

### Rate of Pay Form

At the time of hire an employer must provide an employee notice in English and the employee's primary language (if not English) containing the following information:

- the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other;
- allowances (also called "credits"), if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances/credits;
- the regular pay day designated by the employer;
- the name of the employer;
- any "doing business as" names used by the employer;
- the physical address of the employer's main office or principal place of business, and a mailing address if different; and
- the telephone number of the employer.

Whenever there is a change in the above information the employer must provide the employee with a new notice in both English and the employee's primary language (if not English) at least 7 days in advance of any such changes. Rate of pay forms can be obtained from the website of the New York State Department of Labor. If the New York State Department of Labor has not created a Rate of Pay form in a specific employee's primary language, then the notice only needs to be provided in English to such employee.

### Tip Pool Agreement

If an employer requires its food service employees to pool their tips, then the employer should have a document that the employee signs detailing how the tip pool operates, including how each individual employee's share of the tip pool is calculated. Further, if the employer is taking a tip credit, it is advisable for this document to notify the employee of the information required in order for the employer to lawfully take a tip credit.

### Tip Credit Acknowledgement

This is an acknowledgment that the employee has been provided, in writing, with the information required in order for an employer to take a tip credit. This acknowledgment could be set forth in the Rate of Pay Form, the Tip Pool Agreement (if applicable), or the Employee Handbook. In fact, it is a best practice to have all three documents reference the information necessary for the employer to lawfully take a tip credit.

## What wage and hour records do I have to maintain and for how long?

In New York, an employer is required to maintain all employee time records and payroll records for at least six years. Further, additional documents such as Rate of Pay Forms, Tip Credit Acknowledgments, and Tip Pool Agreements should be maintained for as long as the individual is employed by the employer and for six years following the separation of employment, regardless of the reason for separation or whether the separation was voluntary or involuntary.

## Are my employees entitled to meal breaks?

New York meal break rules are complicated. Under New York law, technically, meal breaks must be provided as follows:

- (1) Every person employed in or in connection with a factory shall be allowed at least sixty minutes for the noon day meal.
- (2) Every person employed in or in connection with a mercantile or other establishment or occupation coming under the provisions of this chapter shall be allowed at least thirty minutes for the noon day meal, except as in this chapter otherwise provided. The noon day meal period is recognized as extending from eleven o'clock in the morning to two o'clock in the afternoon. An employee who works a shift of more than six hours which extends over the noon day meal period is entitled to at least thirty minutes off within that period for the meal period.
- (3) Every person employed for a period or shift starting before eleven o'clock in the morning and continuing later than seven o'clock in the evening shall be allowed an additional meal period of at least twenty minutes between five and seven o'clock in the evening.
- (4) Every person employed for a period or shift of more than six hours starting between the hours of one o'clock in the afternoon and six o'clock in the morning, shall be allowed at least sixty minutes for a meal period when employed in or in connection with a factory, and forty-five minutes for a meal period when employed in or in connection with a mercantile or other establishment or occupation coming under the provisions of this chapter, at a time midway between the beginning and end of such employment

The statute also allows the Commissioner of Labor to revise the above requirements. The Commissioner has done so, in a number of significant ways. First, in #3, the period has been extended from 20 minutes to 30 minutes. Second, in #4, the period for mercantile and other establishments has been decreased from 45 minutes to 30 minutes. Third, for hospitality employers, the New York Department of Labor has a policy that employees should be given a 30 minute meal break for every 6 hours that an employee works. If possible, the meal break should be provided during the middle of the shift, although this is not required.

Generally, the meal break cannot be voluntarily waived by the employee. Therefore, it is prudent for employers to make sure that employees take their required meal breaks, even if they do not want to do so.

## Are my employees entitled to smoking or other breaks?

There is no legal requirement to provide smoking breaks or any other breaks to employees in New York with the exception that lactating mothers, must be provided breaks at reasonable periods in order to express breast milk.



## What is the Spread of Hours and when do I have to pay it?

In New York, an employee's "spread of hours" is defined as the period between when the employee commences work (i.e., clocks in) at the start of the day until the employee finishes work (i.e., clocks out) at the end of the day, inclusive of all breaks, whether paid or unpaid.

In the hospitality industry, if an employee's spread of hours on any given day is greater than ten (10), the employee is entitled to one hour of pay paid at the applicable minimum wage rate even if the employee's regular hourly wage is greater than the minimum wage. If an employer takes a tip credit towards its minimum wage obligations for an employee and that employee is entitled to a spread of hours payment, the payment is made at the regular minimum wage applicable to the employee and not at the cash wage paid to the employee.

Outside the hospitality industry, if an employee's spread of hours on any given day is greater than ten (10) and the employee is paid at or very near the minimum wage, then the employee is entitled to one hour of pay paid at the applicable minimum wage rate. If the employee is paid in excess of the minimum wage, then no spread of hours payment is required.

Regardless of the industry, managerial, administrative, professional, and outside salespersons who are exempt from overtime are not entitled to spread of hours payments when they work a spread of hours of more than ten (10) on a given day.

## What is Call-In pay and when do I have to pay it?

In the hospitality industry, if an employee who by request or permission of the employer reports for duty on any day, whether or not assigned to actual work, shall be paid at 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.

In all other industries, if an employee who by request or permission of the employer reports for duty on any day, whether or not assigned to actual work, shall be paid at the applicable wage rate for at least four hours.

The term "applicable wage rate" means: (1) payment for time of actual attendance calculated at the employee's customary rate of pay, minus any customary and usual tip credit; (2) payment for the balance of the period calculated at the basic minimum hourly rate with no tip credit subtracted.

A regularly scheduled shift is a fixed, repeating shift that an employee normally works on the same day of each week. If an employee's total hours worked or scheduled to work on a given day of the week change from week to week, there is no regularly scheduled shift. For example, if an employer requires employees to come in on their day off for a one-hour training session, the employees are entitled to call-in pay, as the one-hour training session is not a "regularly recurring shift". If, on the other hand, all employees are required to report to work for a two-hour training session every Monday at noon every week, that weekly training session is a regularly recurring shift for which call-in pay is not required.





## Who can be exempt from overtime?

Depending on their job duties and payment scheme, certain employees may be exempt from overtime requirements. The most common overtime requirements are as follows:

### Executive/Managerial Employees

In order to be exempt as an Executive/Managerial employee, the employee must satisfy (i) a salary test and (ii) a duties test.

- i. Salary Test: The individual must be paid on a salary basis and earn at least the amount set forth in the below chart.

Effective Date	New York Salary Thresholds for Executives/Managers (all figures are per week)			
	Employers with More Than 10 Employees in New York City	Employers with Less Than 11 Employees in New York City	Nassau, Suffolk, and Westchester Counties	Rest of New York
<b>Dec 31, 2019</b>	\$1,125.00	\$1,125.00	\$975.00	\$885.00
<b>Dec 31, 2020</b>	\$1,125.00	\$1,125.00	\$1,050.00	\$937.50
<b>Dec 31, 2021</b>	\$1,125.00	\$1,125.00	\$1,125.00	\$937.50

While federal law allows employers to pay up to 10% of the salary threshold set forth above through non-salary income, such as commissions or bonuses, New York law does not. As such, in order to be exempt as an Administrative Employee, the employee must earn a salary in an amount set forth in the above chart. A salary is defined as a predetermined amount paid each pay period that does not vary based on the quality or quantity of the work performed.

- ii. Duties Test: In order to satisfy the Administrative Employee exemption, the employee must have the following duties as their primary duties:
- Management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
  - Customarily and regularly directs the work of two or more other employees;
  - Have the authority to hire or fire other employees or give suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight; and
  - Customarily and regularly exercise discretionary powers.

## Administrative Employees

In order to be exempt as an Administrative Employee, the employee must satisfy (i) a salary test and (ii) a duties test.

- i. Salary Test: The individual must be paid on a salary basis and earn at least the amount set forth in the below chart.

Effective Date	New York Salary Thresholds for Administrative Employees (all figures are per week)			
	Employers with More Than 10 Employees in New York City	Employers with Less Than 11 Employees in New York City	Nassau, Suffolk, and Westchester Counties	Rest of New York
Dec 31, 2019	\$1,125.00	\$1,125.00	\$975.00	\$885.00
Dec 31, 2020	\$1,125.00	\$1,125.00	\$1,050.00	\$937.50
Dec 31, 2021	\$1,125.00	\$1,125.00	\$1,125.00	\$937.50

While federal law allows employers to pay up to 10% of the salary threshold set forth above through non-salary income, such as commissions or bonuses, New York law does not. As such, in order to be exempt as an Administrative Employee, the employee must earn a salary in an amount set forth in the above chart. A salary is defined as a predetermined amount paid each pay period that does not vary based on the quality or quantity of the work performed.

- i. Duties Test: In order to satisfy the Administrative Employee exemption, the employee must have the following duties as their primary duties:
- Performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
  - Includes the exercise of discretion and independent judgment with respect to matters of significance.

The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. Examples include work in functional areas such as tax; finance; accounting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; human resources; employee benefits; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and

resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term “discretion and independent judgment” does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review.

## Professional Employees

In order to be exempt as a Professional employee, the employee must satisfy (i) a salary test (except for doctors, lawyers, and teachers who do not have to meet a salary test) and (ii) a duties test.

- i. Salary Test: The individual must be paid on a salary basis and earn at least the amount set forth in the below chart.

Effective Date	Salary Thresholds for Professional (all figures are per week)			
	Employers with More Than 10 Employees in New York City	Employers with Less Than 11 Employees in New York City	Nassau, Suffolk, and Westchester Counties	Rest of New York
Dec 31, 2018	\$455.00	\$455.00	\$455.00	\$455.00

Employers may pay up to 10% of the salary threshold set forth above through non-salary, non-discretionary income, such as commissions or bonuses. A salary is defined as a predetermined amount paid each pay period that does not vary based on the quality or quantity of the work performed.

- i. Duties Test: In order to satisfy the Professional exemption, the employee must have the following duties as their primary duties:
- Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or
  - Original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training); and the result of which depends primarily on the invention, imagination or talent of the employee; and
  - Whose work requires the consistent exercise of discretion and judgment in its performance; or
  - Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work), and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

## Computer Professional Employees

In order to be exempt as a Computer Professional employee, the employee must satisfy (i) a compensation test and (ii) a duties test.

- i. Compensation Test: The individual must be paid at least \$27.63 per hour or on a salary basis of at least \$684 per week as of January 1, 2020.

Employers may pay up to 10% of the salary threshold set forth above through non-salary, non-discretionary income, such as commissions or bonuses. A salary is defined as a predetermined amount paid each pay period that does not vary based on the quality or quantity of the work performed.

- ii. Duties Test: In order to satisfy the Computer Professional exemption, the employee must have the following duties as their primary duties:
  - Whose work requires the consistent exercise of discretion and judgment in its performance; or
  - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  - A combination of the aforementioned duties, the performance of which requires the same level of skills.

## Outside Salesperson

An individual who is employed as an outside salesperson may be exempt from overtime. The term outside salesperson means an individual who is customarily and predominantly engaged away from the premises of the employer and not at any fixed site and location for the purpose of: (i) making sales; or (ii) selling and delivering articles or goods; or (iii) obtaining orders or contracts for service or for the use of facilities. In order to satisfy this exemption, the employee must spend at least 50% of time away from the employer's premises and the employee earns a commission or similar payment for the work performed.

## Inside Salesperson

Employees in the hospitality industry cannot satisfy the inside salesperson exemption under New York law. However, it may be applicable to employees outside of the hospitality industry. An individual employed by a retail or service establishment (other than in the hospitality industry) can be exempt from overtime if the employee's (i) regular rate of pay of is in excess of one and one-half times the minimum wage hourly rate, and (ii) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a *bona fide* commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.



## Do I have to give employees a pay stub and if so, what information needs to be on it?

Under New York law, all employees, including those exempt from overtime, must be given with each payment of wages a pay stub (also called a wage statement) that contains the following information:

- the dates of work covered by that payment of wages;
- name of employee;
- name of employer;
- address and phone number of employer;
- rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other;
- overtime rate of pay;
- regular hours worked;
- the amount of sick leave provided
- overtime hours worked;
- gross wages;
- deductions/withholdings;
- allowances/credits, if any, claimed as part of the minimum wage, including the rate of the allowance/credit (e.g., tip credit rate, meal credit rate, etc...), the number of units (e.g., hours for which a tip credit was taken, meal taken, etc...), and total allowance/credit taken; and
- net wages.

Furthermore, New York City's Earned Safe and Sick Time Act ("ESSTA") requires that every pay stub include (1) the amount of safe/sick time accrued and used during a pay period and (2) an employee's total balance of accrued safe/sick time shall be included on the employee's pay statement or other form of written documentation provided to the employee each pay period.

## Can I require employees to use automatic deposit and have a bank account?

No, under New York law, an employee cannot be required to have a bank account and an employer cannot require that an employee be paid via direct deposit.

## If I loan my employees money, can I get it back?

In New York, employers cannot loan money to employees unless it is a core part of the employer's business (e.g., banks, credit unions, etc...). Under certain circumstances, an employer may advance an employee money.

An employer and employee can voluntarily agree that the employer will advance the employee the employee's wages and the employee will repay the advance through payroll deductions. In order for this transaction to occur, the employee must voluntarily consent, in writing, to the advance. The written consent must also contain the following information:

- Amount of the advance;
- The amount to be deducted each pay period in order to repay the advance;
- A statement that the employer may recoup the entire outstanding amount of the advance should the employment relationship end prior to repayment in full (this is not required but recommended);
- The date(s) on which the advance repayment deductions will occur; and
- Notice to the employee that the employee may contest any deduction not taken in accordance with the written provisions of the authorization;

The written consent must be obtained before the advance is given by the employer. Further, the employer may not give an employee additional advances until the original advance has been repaid in full.

In addition, the employer must inform the employee in writing of the manner in which the employee can dispute the amount and frequency of a deduction that the employee believes is not in accordance with the terms of the authorization.

At a minimum, the mechanism to challenge a deduction must include:

- The ability of the employee to provide written notice of the employee's objection to the deduction.
- That the employer shall reply in writing to the employee's objection as soon as practical.
- Such reply shall address the issues raised by the employee's objection, and contain a clear statement indicating the employer's position with regard to the deduction, including whether the employer agrees with the employee's position(s) regarding the deduction or disagrees with the employee's position(s) and provide a reason why the employer agrees or disagrees.
- Should an employee avail themselves to these procedure, the employer shall cease deductions until such reply has been given and any appropriate adjustments made. Any delay in repayment caused by this procedure shall extend the authorized time frame within which the employer may recover the advance though deductions.

The failure of an employer to afford this process to the employee will create the presumption that the contested deduction was impermissible.

## What happens if my employees are overpaid? Can I get the money back?

If an employee was overpaid within the past 8 weeks due to a mathematical or clerical error, the employer may be able to recoup the overpayment through a payroll deduction. However, if the error was not due to a mathematical or clerical error or occurred more than 8 weeks ago, the employer may not recoup the money through a payroll deduction and the employer's only alternative is to ask for the money back or to file a claim against the employee in court. A misallocation of tips or gratuities are generally not monies from which an employer can recoup an overpayment; therefore, if an employer accidentally overpays an employee his or her tips, absent extraordinary circumstances, the employer will not be able to recoup the overpayment.

If the payroll error occurred within the prior 8 weeks, and the employer seeks to recoup the money through a payroll deduction, the employer must go through the following process:

- (1) Notice of Intent: The employer shall provide the employee with notice of the intent to commence the deductions to recover the overpayment. In such cases where the entire amount of the overpayment may be reclaimed in the next wage payment, notice shall be given at least three days prior to the deduction. In all other cases, notice shall be given at least three weeks before the deductions may commence. Such notice shall contain:
  - the amount overpaid in total and per pay period;
  - the total amount to be deducted and the date each deduction shall occur followed by the amount of each deduction;
  - Information about how the employee may contest the overpayment, provide the date by which the employee shall contest, and include the procedure by which the employee may contest the overpayment and/or terms of recovery, or provide a reference to where such procedure can be located.
- (2) Challenge Procedure. The employer shall implement a procedure by which the employee may dispute the overpayment and terms of recovery, and/or seek a delay in the recovery of such overpayment.
  - The employee may respond within one week from the date of the receipt of the notice of intent to recover overpayments.
  - The employer shall reply to the employee's response within one week of receipt of the employee's response.
  - Such reply shall address the issues raised by the employee in his or her response, and contain a clear statement indicating the employer's position with regard to the overpayment, including whether the employer agrees with the employee's position(s) regarding the overpayment or disagrees with the employee's position(s) and provide a reason why the employer agrees or disagrees.
  - The employer shall give the employee written notice of the opportunity to meet with the employer within one week of receiving the employer's reply to discuss any disagreements that remain regarding the deductions.

- The employer shall provide the employee with written notice of the employer's final determination regarding the deductions within one week of this meeting. In making a final determination regarding the existence of an overpayment, the employer shall consider the agreed upon wage rate paid to the employee and whether the alleged overpayment appeared to the employee to be a new agreed upon rate of pay. When making a final determination regarding the amount of the deduction to be made per pay period and the date such deduction(s) shall commence, the employer shall consider the issues raised in the employee's request regarding the amount of each deduction.

Should employees avail themselves of the procedure set forth above, the employer may not commence taking the deduction until at least three weeks after issuing the final determination.

### Are there special rules for employing minors?

Yes, there are specific rules concerning what jobs a minor (someone under 18 years of age) can perform and the hours that the minor can work. The types of jobs and hours that they can work vary depending upon the age of the minor and whether the minor is in school and if school is in session. Generally, a child under the age of 14 cannot work under any circumstances except in a family business. For more information about what jobs minors can and cannot perform and when they can and cannot work, employers should review the New York Department of Labor's website at: <https://labor.ny.gov/workerprotection/laborstandards/workprot/minors.shtm>

### Do I have to pay double time for work on holidays?

No, there is no legal requirement to pay employees double time for working on a holiday.

### Can I pay my managers shift pay?

Managers, who are exempt from overtime, cannot be paid shift pay; they must be paid a weekly salary. If the manager is not exempt from overtime, the manager could be paid shift pay unless the individual works in the hospitality industry in which case, under New York law, shift pay is prohibited.



# TIPS & SERVICE CHARGES

## What is a tip?

The definition of “tip” can vary depending on the statute or law at issue. Generally, a tip (or gratuity, the terms are used interchangeably) is a payment left for an employee by a customer for service provided to the customer. For most purposes, an automatic charge assessed by a business, whether it is called a “mandatory gratuity,” “automatic gratuity,” “service charge,” “administrative fee,” or something else is not a gratuity, even if the proceeds from such mandatory charge, in whole or in part, are given to service employees. In addition, under New York law there are certain mandatory charges that the employer is required to give to the employees even if they are not legally a tip.

## What is a service or other charge?

A service or other charge if mandatory is not a tip and therefore, if assessed, is subject to applicable sales tax. Further, if the proceeds from the mandatory charge are given to the employees, the monies are added into the calculation of overtime as discussed above.

Despite the fact that the service or other mandatory charge is not legally a tip, if the reasonable customer would think that the charge was a tip or purported to be a tip (even though it is not), the proceeds from the charge must be given to the service employees. The only way in which such monies do not have to be paid to the service employees is if:

- (1) the charge is called something other than a service charge,
- (2) in all references to the charge on all documents provided to the customer, the employer informs the customer that the charge is not a gratuity and is not paid to the service staff; and
- (3) in all references to the charge on all documents provided to the customer, the employer explains what the charge is for.

## Who must share in tips and who should not?

Under New York law, an employer cannot require non-food service employees to share or pool their tips. Nor can employers encourage such employees to share or pool their tips. Employers can require food service employees to pool or share their tips with other food service workers although there is no legal requirement to do so. If tips are pooled or shared, it is a best practice to have a Tip Agreement explaining how the tip pool/share operates and how an individual's portion of the pool/share is calculated.

A food service employee is any employee who is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers. The term food service worker shall not include delivery workers. An individual may not be classified as a food service worker on any day in which the employee has been assigned to work in an occupation in which tips are not customarily received for 2 hours or more or for more than 20 percent of her or his shift, whichever is less. Examples of typical food service workers include, but are not limited to: servers, bussers, runners, bartenders, and barbacks.

Food service workers cannot be required to share or pool tips with non-food service workers, such as coat check personnel and delivery workers. Further, no employee can share tips with managers or supervisors, even if the manager or supervisor is classified as non-exempt and is paid an hourly wage.



## What are the requirements for having a tip system?

Tip pools and tip shares organized by the employer are limited to food service employees. In order to establish a tip pool or tip share, it is strongly recommended that the employer have employees sign a Tip Agreement that details how the pool/share operates, its parameters, and how an individual's portion of the pool/share is calculated. Further, the tip pool/share must be reasonable and customary for the labor market where the employer is located.

## Can I charge certain parties an extra fee for large parties, corkage, etc.?

For additional service, such as large parties or corkage, New York employers may charge customers an extra fee. However, the fee must be properly disclaimed and explained, otherwise, the employer may be required to turn over the proceeds from the fee to the service employees. The definition of a "large party" is not clear under the law. Certainly, a party of ten or more is a "large party" and a party of less than seven is not a "large party."

## If I want to charge a mandatory fee or charge, what must I do and when can I use it?

In New York City, a restaurant may not charge a mandatory fee unless the fee is for a special service such as large parties, special events, or splitting dishes. Such prohibitions on mandatory fees include the assessment of automatic or mandatory gratuities. All other business in New York City and all business outside of New York City (including restaurants) may assess mandatory charges.

If a business wants to assess a mandatory charge and keep the proceeds, the business must:

- (1) Not call it a "service charge," "food service" charge, "mandatory gratuity," or "automatic gratuity". If the charge is called any of the aforementioned names, there is a strong presumption that the charge purports to be a gratuity and therefore must be paid to the service employees.
- (2) In all menus, contracts, POS slips, and any other documents that reference prices or mention the charge, the employer must state in 12 point font or greater, that the charge is not a gratuity or tip and is not paid or distributed to the employees.

- (3) The employer must explain in writing, in 12 point font or greater, the purpose of the charge (e.g., for administration of the event).
- (4) If a portion of the charge is given to the employees, the employer, in writing, must break down for the guest the amount (or percentage) given to the employees and the amount (or percentage) retained by the employer.
- (5) Include the proceeds from the charge in the employer's general revenues for sales tax purposes (unless the employer is exempt).

## Can I require employees to hand over all cash tips to be paid out on a paycheck?

Yes, a New York employer can require that all cash tips be paid out on a paycheck. However, it is recommended that the employer have the employee acknowledge the practice whether in a Tip Agreement, Employee Handbook, or otherwise.

## Is overtime impacted if I pay employees a portion of a mandatory charge?

Yes. As set forth above, a mandatory charge is not a gratuity and therefore the proceeds from the mandatory charge that are given to the employee are included in the calculation of overtime. For example:

**An employee works 45 hours at \$20.00 per hour and receives a \$700 from automatic gratuities for the week, the calculation of overtime is as follows:**

### Regular Rate of Pay

- Regular Rate of Pay = All compensation/ All hours worked
- Regular Rate of Pay =  $((45 \times \$20.00) + \$700)/45$
- Regular Rate of Pay = \$35.56

### Overtime

- Overtime =  $\$35.56 \times 0.5^1 \times 5$
- Overtime = \$88.90

### Total to Employee

- Total to Employee =  $\$900 + \$700 + \$88.90$
- Total to Employee = \$1,688.90

<sup>1</sup> The formula uses 0.5 instead of 1.5 because full time has already been paid and the only issue is the half time premium as overtime is time and one-half.



# EMPLOYEE BENEFITS AND PAY

## What methods of payment can I use to pay my employees?

- (1) Employees may be paid in **cash** or by **check, direct deposit or a payroll debit card**. If an employer pays wages by direct deposit or payroll debit card, certain restrictions and requirements apply.
- (2) **Direct Deposit** requires voluntary, advance written consent by the employee, which may be obtained electronically. Employees are allowed to revoke their consent to receive their wages via direct deposit at any time and employers must make the requested method of payment change within two (2) payroll periods. A copy of an employee's direct deposit consent form must be provided to the employee and retained by the employer during the employee's employment and for six (6) years after the last payment by direct deposit.
- (3) If an employer wishes to pay an employee's wages via a **Payroll Debit Card**, employees must provide voluntary, advance written consent, which may be obtained electronically. Employees cannot be charged any fees for services required to access their wages in full and the payroll card must include at least one method of withdrawing up to the employee's full wages or account balance *and* local access to one or more ATMs offering free withdrawal. The employer must provide a list of locations, or a link to a website that lists the locations, where the employee can access and withdraw his wages for free within a reasonable distance from his home or place of work. Further, the employer is not permitted to charge the employee, whether directly or indirectly, any of the following fees:

- an application, initiation, loading, or participation fee;
- a fee for point of sale transactions;
- a fee for overdraft, shortage, or low balance status;
- a fee for account activity;
- a maintenance fee;
- a fee for telephone or online customer service;
- a fee for retrieving balance and account information online;
- a fee for ordering a replacement card;
- a fee for providing the employee with written statements, transaction histories, or the issuer's policies;
- a fee for closing the account or issuing payment of the remaining balance;
- a fee for declined transactions; or
- any other fee not explicitly stated in the contract between the employer and the card issuer or in the conditions of the card provided to the employee.

*Employers must also notify employees of any change in the payroll debit card program terms and conditions at least 30 days in advance of any such change.*

## How frequently must I pay my employees?

- (1) Manual works—*i.e.*, individuals who spend more than 25% of their working time engaged in “physical labor”, which has been defined extremely broadly—must be paid weekly and not later than seven (7) calendar days after the end of the week in which the wages are earned. While the term “physical labor” may invoke an image of lifting heavy objects and other back-breaking work, because the term has been defined very broadly, it generally covers employees who perform any type of physical task using their body. If an employer has any doubt about whether their employees perform “physical labor,” it is best to pay employees weekly or speak with counsel.
- (2) All other workers must be paid at least semi-monthly, except for commissioned salespersons, who may be paid in accordance with the terms of their commission agreement, but in no case less frequent than monthly.

## What deductions can be taken from an employee's pay?

In New York, permissible deductions from an employee's pay are extremely limited and the deductions must be made in a very specific manner. When contemplating making a deduction from an employee's pay, employers should consult with counsel to ensure the deductions are permissible and made correctly. Generally, only the following types of deductions are allowed in New York:

- (1) Deductions made in accordance with the provisions of any law, rule, or regulation;
- (2) Deductions that are expressly authorized in writing by the employee and are for the benefit of the employee if the employee's authorization is voluntary and only given following receipt by the employee of written notice of all terms and conditions of the deduction and/or its benefits and the details of the manner in which deductions will be made. Convenience for an employee is not considered "for the benefit of the employee." Rather, deductions that are "for the benefit of the employee" are limited to the following:

- Insurance premiums and prepaid legal plans;
- Pension or health and welfare benefits;
- Contributions to a *bona fide* charitable organization;
- Purchases made at events sponsored by a *bona fide* charitable organization affiliated with the employer where at least 20% of the event's profits are being contributed to a *bona fide* charitable organization;
- United States bonds;
- Dues or assessments to a labor organization;
- Discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that entitle the employee to use mass transit;
- Fitness center, health club, and/or gym membership dues;
- Pharmacy purchases made at the employer's place of business;
- Cafeteria and vending machine purchases made at the employer's place of business and purchases made at gift shops operated by the employer, where the employer is a hospital, college, or university;
- Tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions;
- Daycare, before-school, and after-school care expenses;
- Payments for housing provided at no more than market rates by non-profit hospitals or affiliates thereof; and
- Similar payments for the benefit of the employee, such as deductions for other health and welfare benefits, pension and savings benefits, charitable benefits, union benefits, transportation benefits, or food and lodging benefits.

- (3) Deductions that are related to recovery of an overpayment of wages where the overpayment is due to a mathematical or other clerical error by the employer;
- (4) Repayment of advances of salary or wages made by the employer to the employee (if the payment is contingent on interest accruing, fees, or a repayment amount higher than the money advanced by the employer, then it does not qualify as an advance—employers cannot recover such "loans" through payroll deductions); and
- (5) Deductions made in conjunction with an employer sponsored pre-tax contribution plan approved by the IRS or other local taxing authority.

## Can I charge the employee for a uniform?

While *deductions* from an employee's wages for the cost of a uniform are not permitted (under New York law, deductions from wages are only permitted in very limited circumstances and the cost of a uniform is not one of them), an employer may charge an employee if that employee wishes to purchase additional uniforms in excess of the number of uniforms provided by the employer to the employee (note, however, that when an employer provides employees with uniforms, it must provide enough uniforms for an average workweek).

## Can I charge employees for guest/customer walk-outs?

It is illegal under New York law for an employer to fine an employee or otherwise deduct money from their wages due to guest walk outs.

## Can I charge employees for cash register shortages?

No, an employer may not charge an employee or deduct from an employee's pay the amount of any cash register shortages. Nor can an employer charge an employee or deduct an employee's pay due to other employer losses, spoilage, or breakage. The employer is limited to employee discipline for these types of issues.

## Can I require employees to buy their own wine corks, bicycles, knives and other "necessary" tools?

No, an employer is prohibited from requiring employees to buy—whether through a required payment to the employer or deductions from an employee's wages—any "tools of the trade" such as corks, bicycles, knives, and other necessary tools.





## Can I deduct an employee's pay for an accidental overpayment of wages?

If an employer inadvertently overpays an employee, the employer may deduct the overpayment if it is due to a mathematical or other clerical error. However, very specific steps must be followed in order to lawfully deduct an overpayment:

- (1) The deductions can only cover overpayments that occurred eight (8) weeks prior to notifying the employee of the overpayment;
- (2) The deduction can only be made once per paycheck;
  - If the amount of the overpayment is less than or equal to the net wages earned in the next paycheck, the employer can recover the entire overpayment in the next wage payment.
  - If, however, the amount of the overpayment exceeds the net wages in the next paycheck, recovery may not exceed 12.5% of gross wages in the next wage payment and cannot reduce the employee's effective hourly wage below the minimum wage.
- (3) The employer must provide notice to the employee of its intent to make deductions to recover an overpayment;
  - If the amount to be reclaimed is less than or equal to the net wages in the next payment, notice must be given three (3) days before the deduction.

If the amount to be reclaimed is more than the net wages in the next payment, notice must be given three (3) weeks before the deductions start.

The notice must contain:

- (1) The amount overpaid in total and per pay period;
- (2) The total amount to be deducted, the date each deduction shall occur, and the amount of each deduction; and
- (3) Notice that the employee may contest the overpayment, including the date by which the employee must contest the overpayment and the procedure for contesting the overpayment/method of deductions.
- (4) The procedure for contesting the overpayment/method of deductions must conform to the following rules:
  - The employee may respond to/contest the notice within one (1) week;
  - That the employer will respond to the employee within one (1) week and the response will contain the employer's position regarding the overpayment and whether the employer agrees/disagrees with the employee's position and why or why not;
  - The employer must give employee written notice of the opportunity to meet within one (1) week of the employer's reply to discuss any disagreements; and
  - In all cases, the employer must provide a written notice of its final determination regarding the deductions within one (1) week of the meeting referenced above. In making a final determination regarding the overpayment, the employer must consider the agreed-upon wage rate paid to the employee and whether the alleged overpayment may have appeared to the employee to be a new agreed-upon rate of pay.
- (5) Finally, if an employee initiates this dispute procedure, the employer may not commence the deductions until at least three (3) weeks after it issues its final determination.

## Can I offer my employees a discount on food & beverages at our business? Are there tax consequences?

Yes, employers may offer employees a discount on food and beverages at their business or a discount on dining at their establishment. However, any such employee discount should be capped at (1) for services (such as dining at an employer's restaurant on the employee's night off), 20% of the price of any services offered to customers, or (2) for goods/property (such as purchasing an item sold to the public), the gross profit percentage of the price at which the goods/property is being offered by the employer to customers. Any discount exceeding these thresholds must be included in the employee's taxable income and must be reported on the employee's IRS Form W-2. The amount that is taxable income is the entire amount of the discount, not just the amount in excess of 20 percent.

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