Labor & Employment Law Corner

Additional Pay Due to Employees in the Hospitality Industry in New York State

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Opening Note: Welcome to the first column of this new monthly series (smartly entitled "Labor & Employment Law Corner") looking at the requirements and impact of labor and employment law on the restaurant and hospitality industry. My goal is to educate readers on the legal requirements imposed on restaurants and other employers in the hospitality industry, and to offer useful guidance on compliance. If you have any suggestions for topics to be addressed in a future column or any questions about the topic addressed, please contact me at scott.deluca@ogletree.com. And now, on with the show…

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Restaurateurs and other employers in the hospitality industry must, under certain circumstances, pay employees additional compensation under the Hospitality Industry Wage Order issued by the New York State Department of Labor (NYSDOL). The two primary categories of additional pay are call-in pay and spread of hours pay. This article will address both forms of additional pay.

1. Call-In Pay

Employees who report to work are entitled to a minimum number of hours of pay for each shift, even if the employee works for a shorter period of time. In New York State, this requirement is referred to by the serious misnomer "call-in pay."

Call-in pay must be paid to an employee if they report to work. Despite its name, call-in pay is not owed simply because an employee is "called-in" and reports to work. If an employee reports to work for a scheduled or previously unscheduled shift, the employee is entitled to call-in pay.

The only exception to this requirement is if the employee reports to work for a regularly scheduled shift. The NYSDOL defines a regularly scheduled shift as "a fixed, repeating shift that an employee normally works on the same day of each week." The NYSDOL is stringent about whether a shift is regularly scheduled—if an employee's hours worked on a given day vary from week to week, the shift does not qualify as a regularly scheduled shift. I would urge caution before relying on this exception to the call-in pay requirement.

If an employee reports for work and it is not a regularly scheduled shift, the employee must be paid the following (regardless of whether the employee is assigned work duties):

- For one shift, at least three (3) hours;
- For two shifts, at least six (6) hours; and
- For three shifts, at least eight (8) hours.

Of course, if an employee reports for a single work shift and works for any number of hours greater than three (3), the employee should be paid for the hours worked at their regular rate of pay; in that situation, there is no additional compensation due to the employee. It is when the employee works for fewer than the minimum number of hours mentioned above that call-in pay is due to the employee. Call-in pay must be paid at the state mandated minimum wage rate (currently: $17.00/hour in New York City and Westchester, Nassau and Suffolk Counties; $15.50 in the remainder of the state).

The sum due to the employee for call-in pay is the difference between the amount of time actually worked and the call-in pay entitlement. For example, if an employee works for 2 hours and 15 minutes, they are entitled to 45 minutes of call-in pay. The 2 hours and 15 minutes would be paid at the employee's regular rate of pay, and the 45 minutes must be paid at the applicable minimum wage ($17.00 or $15.50).

Call-in pay need not be paid to an employee who voluntarily leaves work early. However, I would urge caution before relying on that exception. If an employee decides to leave work early, employers should retain documentation reflecting why the employee voluntarily left work early. Indeed, prudence recommends that the employee should sign that documentation to reflect it was a voluntary decision.

2. Spread of Hours Pay

Employees who have a "spread of hours" in excess of ten (10) hours are entitled to an additional hour of pay at the state mandated minimum wage rate.

An employee's spread of hours is the length of time between the start and end of an employee's entire workday, regardless of whether the employee works all the time during the spread of hours. When examining spread of hours pay, an employer must look to when an employee first starts working and finally stops working on a given workday. An employee's spread of hours must be assessed each workday.

Spread of hours pay is most easily understood by way of example.

- An employee who works from 9am to 5pm has a spread of hours of eight (8) hours and is not entitled to spread of hours pay for that workday.

- An employee who works from 9am to 8pm has a spread of hours of eleven (11) hours and is entitled to eleven (11) hours of pay at their regular rate of pay for all hours worked ***plus*** one (1) additional hour at the state mandated minimum wage rate.

- An employee who works 9am to 1pm and then from 5pm to 11pm has a spread of hours of fifteen (15) hours and is entitled to ten (10) hours of pay at their regular rate of pay for all hours worked ***plus*** one (1) additional hour at the state mandated minimum wage rate.

Closing Thoughts

Neither call-in pay nor spread of hours pay is compensation for time worked. Therefore, any amounts paid need not be included in the number of hours worked for purposes of calculating overtime compensation. Moreover, sums paid for call-in pay and spread of hours pay should not be included when calculating the employee’s regular rate of pay. Importantly, call-in pay and spread of hours pay may not be reduced by any tip, meal, or any other credit. (Unlike other industries, the Hospitality Industry Wage Order does not require additional pay for split shifts.)

I will be back next month with some more insights on the impact of labor and employment law on restaurateurs and the hospitality industry.