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Practice Update

The Ripple Effect of New York State's Minimum Wage Increase - Part II: The Hospitality Industry

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The hospitality industry in New York State, already facing potentially significant increases in labor costs due to upcoming increases in the minimum wage, will need to adjust policies and practices in anticipation of the ripple effects of those increases. The minimum wage will incrementally increase annually beginning on December 31, 2016 in New York State, up to as much as $15.00 per hour in some parts of the state, such as New York City, by as early as 2018.

In this second installment of Akerman's two-part series on the effect of the new minimum wage law, Akerman looks at how the new law will impact hospitality employers' other wage-related obligations under the new legislation and the N.Y.S Department of Labor's current regulations. As with the non-hospitality industry, the hospitality industry may have to brace itself and prepare for the side effects of the minimum wage increases, including how those increases are impacted or offset by (a) tip credits, (b) call-in pay, (c) spread of hours pay, (d) uniform maintenance allowances, and (e) meal breaks.

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Tip Credits

Generally, an employer may take a credit towards the basic minimum hourly rate if a service or food service worker receives enough tips and if the employee has been notified of the tip credit. Under the New York labor department's current regulations, a service employee in the hospitality industry is currently entitled to at least $7.50 per hour with a credit for tips not to exceed $1.50 per hour, provided that the total of tips received plus wages equals or exceeds the current minimum wage of $9.00 per hour.

While food service workers were treated the same as services workers under the New York labor department's regulations, the new legislation explicitly changed the formula for calculating the tip credit for food service workers. Effective immediately, food service workers must be paid at least two-thirds of the current minimum wage rate, rounded to the nearest five cents or $7.50, whichever is higher, provided that the tips of such an employee, when added to such cash wage, are equal to or exceed the minimum wage in effect at the time.

For example, with the current minimum wage rate at $9.00 per hour, two-thirds of that rate is $6.00 per hour, which does not meet the minimum threshold under the new formula. Therefore, food service employees today would have to be paid a minimum wage rate of $7.50 and the employer could take a tip credit of $1.50. This will not change when the minimum wage rate increases to $11.00 per hour for large employers in New York City on December 31, 2016, but it will change when the minimum wage rate increases to $13.00 per hour for such employers on December 31, 2017. At that time, food service employees will be due at least $8.65 per hour (two-thirds of $13.00 rounded to nearest $0.05), and an employer could then take a tip credit of $4.35. This formula may actually provide hospitality employers some relatively significant relief from the minimum wage hike, since one-third of the minimum wage may be credited by tips, which is not the case now.

However, the tip credit is only available if employees earn enough in tips to bridge the gap between the tip credit wage and the minimum wage, which could be a challenge at food service establishments where workers earn lower tips. For employees who fail to earn enough in tips, employers will not be able to take advantage of the tip credit and will bear the full load of the increased minimum wage.

Call-in Pay

Under the New York labor department's regulations, an employee who reports for duty at the request of the hospitality industry employer 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.

An employee's "applicable wage rate" for the purpose of call-in pay is a combination of (a) payment for time of actual attendance at the employee's regular or overtime rate of pay, whichever is applicable, minus any customary and usual tip credit, and (b) payment for the balance of the time at the minimum hourly rate with no tip credit subtracted.

As a result, employees' call-in pay rates will likely increase with each increase in the minimum wage. Therefore, employers with employees in New York will need to pay close attention to employees' schedules and implement policies and practices to help protect themselves from unnecessary or unintended call-in pay. One line of defense is to implement a written policy requiting employees to check the work schedule the day before reporting to work to see if the schedule has changed. A second line of defense is to train supervisors to immediately notify staff by phone, email, and/or text that they will not be needed on a particular day. If an employee is notified before the employee leaves for work, the employer will not be subject to call-in pay.

Spread of Hours Pay

Under the New York labor department's current hospitality regulation, an employee shall receive one additional hour of pay at the current basic minimum hour rate when the employee's "spread of hours" exceeds 10 hours in the workday. In the hospitality industry, spread of hour pay is defined as 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 and for intervals off duty. An example of a spread of hours greater than 10 hours: employee is scheduled to work from 7:00 a.m. to 10:00 a.m. and 7:00 p.m. to 10:00 p.m. – a total of 6 hours worked but a 15-hour spread.

The labor department does not provide split shift pay for employees in the hospitality industry as it does for employees outside of the hospitality industry. Such pay is essentially rolled into the labor department's more expansive definition of spread of hours pay in the hospitality industry.

However, similar to the non-hospitality industry, if an employee's hourly rate of pay exceeds the current minimum hourly rate, the excess earned above the minimum rate is credited against the extra hour of minimum wage that might otherwise be due because of a spread in hours. In other words, the value of spread of hours pay erodes each hour of the day that an employee is compensated above the minimum hourly wage rate. For instance, if an employee is paid at a regular rate of $10.00 an hour and works a 10-hour shift, the employee would not be entitled to an additional hour of pay at the current minimum wage rate of $9.00 an hour because the employee accumulated $1.00 extra above the minimum wage rate for each hour worked. The employee accumulated a total of $10.00 additional dollars earned, which more than offsets the additional $9.00 due as per the current minimum wage rate.

Therefore, this exception to the regulation allows employers to potentially avoid spread of hours pay by paying employees at an hourly rate sufficiently above the minimum wage rate so as to account for the spread of hours premium in the total compensation the employees receive for a particular day. However, the upcoming increases to the minimum wage may result in employers having to pay this premium to those employees whom are paid at or slightly above the new minimum wage ($11.00 per hour beginning on December 31, 2016 for large New York City employers), even though such employees were not eligible to receive spread of hours pay prior to the minimum wage hike. As a result, hospitality employers may find it increasingly difficult to avoid spread of hours pay going forward, as each minimum wage hike will result in an even higher floor for the hourly rate at which this benefit is extinguished.

Uniform Maintenance Pay

While the increases to the minimum wage do not have any direct impact on uniform maintenance pay, an employer's obligations related to such pay compounds the financial pressures on employers in the hospitality industry.

To begin with, when an employee purchases a required uniform, the employer must reimburse the employee for the total cost of the uniform. Next, where an employer does not maintain required uniforms for employees, the employer must pay the employee uniform maintenance pay of (a) $11.20 per week for work weeks over 30 hours, (b) $8.85 per week for work weeks of more than 20 but not more than 30 hours, and (c) $5.35 per week for work weeks of 20 hours or less.

However, an employer may avoid uniform maintenance pay, if the required uniforms (a) are made of “wash and wear” materials; (b) may be routinely washed and dried with other personal garments; (c) do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment; and (d) are furnished to the employee in sufficient number, or the employee is reimbursed by the employer for the purchase of a sufficient number of uniforms, consistent with the average number of days per week worked.

Furthermore, an employer is not be required to pay uniform maintenance pay to any employee who chooses not to use the employer’s free laundering service, where an employer: (a) launders with reasonable frequency; (b) ensures the availability of an adequate supply of clean, properly-fitting uniforms; and (c) informs employees individually in writing of such service.

Meal Credits

Another way hospitality employers may help offset the increases in the minimum wage is to take advantage of meal credits. Meals provided by an employer to an employee may be considered part of the wages paid to the employee and may be used by employers as a credit against the wage due. Meals furnished by an employer may be valued at no more than $2.50 per meal for service and food service employees, and $3.10 per meal for all other employees.
