

Don't Bite The Hand That Feeds You: Prevalent Wage And Hour Issues In The Hospitality And Restaurant Industries

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The Hospitality Industry is a major part of New York City's economy. However, wage and hour violations within this sector are widespread, with litigation against employers booming. In 2008 alone, the United States Department of Labor brought 3,827 lawsuits against restaurants and hotels nationwide and recovered over \$21,362,000 in back wages alone.

[A landmark survey](#) in 2008 of 1,432 low-wage workers in New York City by the National Employment Law Project, found that 54% of those sampled experienced at least one-pay related violation in the previous work week, while the average worker lost \$58 out of an average weekly earnings of \$397 which translates into wage theft of nearly 15% of earnings. From our extensive experience at Wigdor LLP with wage and hour violations, victims of such violations, as verified by the National Employment Law Project, are particularly prevalent among unauthorized workers, those who are foreign-born, uneducated workers and those who speak little English or none at all. Interestingly, the research also found women are between 30 and 60% more likely to be victims of wage and hour violations than men.

Prevalent Wage and Hour Violations

Some of the most prevalent wage and hour violations within all industries, including the hospitality industry, are:

Time Shaving

Deducting time from hourly employees' paychecks by tampering with punch cards and time sheets, and thus failing to pay employees for all time worked, including overtime hours.

Off-the-Clock Work

Often a tactic employers use when employees are close to becoming eligible for overtime (i.e. working over 40 hours for a work week), by pressuring an employee to punch in only after receiving their first customer, doing side work while not clocked in, staying after clocking out to clean or verify that registers contain the right amount of money, etc.

Circumventing Overtime Pay

Multiple locations of a business, such as restaurants, which are owned by the same owner or ownership group may rotate employees between various business locations, but fail to aggregate the hours the employees work, such as issuing separate paychecks through different corporate entities. However, by failing to aggregate the hours worked between all locations of a business jointly owned by an employer, employers may be circumventing their obligations to pay overtime wages, in addition to "spread of

hours” pay (discussed below).

Break Violations

Employers in New York must compensate employees for all breaks up to 20 minutes.

Termination- Related Violations

When a termination occurs, the employer must notify the discharged employee, in writing, of the exact date of termination and the exact date benefits will end. Earned wages must be paid no later than the first regularly scheduled payday following termination.

Spread of Hours Pay

Spread of hours is 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, plus intervals off-duty.

- Example: 7a.m. – 10a.m., and 7p.m.-10p.m. = 6 hours worked but a 15 hours spread

On each day in which spread of hours exceeds 10, an employee shall receive one additional hour of pay at the basic minimum hourly rate. Spread of hours pay is not included in the regular rate for the purpose of calculating overtime pay. This “spread of hours” hourly rate cannot be offset by any credit, such as a minimum wage tip credit.

Written Notice of Pay Rates, Tip Credits and Pay Day

Prior to the start of employment, or when an employee’s rate of pay changes, an employer must give each employee written notice of the employee’s regular hourly rate, overtime hourly pay rate, the amount of tip credit, if any, and the regular payday.

- Notice must state that extra pay is required if tips are insufficient to bring the employee up to basic minimum hourly rate.
- Notice must be provided in English and, if the employee has a different primary language of Chinese, Haitian-Creole, Italian, Korean, Polish, Russian or Spanish, than in that language as well.
- Notice is required prior to any change in the employee’s hourly rate of pay.
- Acknowledgement of receipt must be signed by the employee and kept on file for 6 years.
- Employer has the burden of proving compliance with notice requirements.

Employers that do not give notice are liable for damages of up to \$50 per week, per employee, unless they paid employees all wages required by law (up to \$2,500 per employee). Current employees must also be furnished with wage notices between January 1 and February 1 of each year.

Wage Statements to Employees

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Employers must provide employees with a statement/paystub with every payment of wages, listing the hours worked, rates paid, gross wages, credits claimed, if any, and net wages. An employer must also give an employee a written explanation of how they computed wages if asked. Employers that fail to give wage statements are liable for damages up to \$100 per week, per employee, unless they paid employees all wages required by law (up to \$2,500 per employee).

Deductions and Expenses

An employer may not make deductions for wages, other than for authorized credits and authorized and required deductions (such as for social security and income taxes).

Prohibited deductions include:

- Deductions for spoilage or breakage;
- Deductions for non-payment by a customer;
- Deductions for cash shortages or losses; and
- Fines or penalties for lateness, misconduct, or quitting by an employee without notice.

Uniform Maintenance Pay

Uniform Maintenance includes washing, ironing, dry cleaning, alterations, repair or any other maintenance necessary. Uniform maintenance pay cannot be offset by any credits. If an employer does not maintain required uniforms for any employee, an employer shall pay the employee uniform maintenance pay of:

- After December 31, 2013,: \$9.95 per week for work weeks over 30 hours, \$7.85 per week for work weeks of more than 20 but not more than 30 hours, and \$4.75 per week for work weeks of 20 hours or less.

Wash and wear exception to uniform maintenance pay: an employer will not be required to pay the uniform maintenance pay where required uniforms meet all of the following criteria:

- Are made of “wash and wear” materials;
- May be routinely washed and dried with other personal garments;
- Do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment;
and
- 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 by the employee.

Charge Purported to be a Gratuity or Tip

[Section 196-d of the New York Labor Law](#) prohibits employers from demanding, accepting, or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity. A charge purported to be a gratuity must be distributed in full as gratuities to the service employees or food service employees who provided the service. There shall be a rebuttable presumption that any charge in addition to charges for food, beverage, lodging and other specific materials or services, including, but not limited to, any charge for "service" or "food service," is a charge purported to be a gratuity. Employers who make charges purported to be gratuities must establish, maintain and preserve for at least six years records of such charges and their dispositions. Such records must be regularly made available for participants in the tip sharing or tip pooling systems to review.

Tip Credit

An employer may take a credit towards the basic minimum hourly rate if a service employee or food service worker received enough tips to compensate them at or above the minimum wage, and if the employee has been notified of the tip credit.

Food service workers, as of December 31, 2013, shall receive a wage of at least \$5.00 per hour, and credit for tips shall not exceed \$3.00 per hour, provided that the total of tips received plus the wages equals or exceeds \$8.00 an hour

- Minimum wage goes up to \$8.75 an hour in 2015, and to \$9.00 an hour in 2016, but minimum wage for tipped employees will remain at \$5.00

Service employees, as of December 31, 2013, shall receive a wage of at least \$5.65 per hour, and credit for tips shall not exceed \$2.35 per hour, provided that the total of tips received plus the wages equals or exceeds \$8.00 an hour

- Minimum wage goes up to \$8.75 an hour in 2015, and to \$9.00 an hour in 2016, but minimum wage for tipped employees will remain at \$5.65

Overtime rate for tipped employee is the employee's regular rate of pay before subtracting any tip credit, multiplied by 1.5, minus the tip credit.

- For example, for a food service employee, the overtime rate is calculated by multiplying the regular hourly rate of pay (\$8.00) by 1.5 (gives us \$12.00), minus the tip credit (\$3.00), giving us \$9.00 as the overtime rate

Tip Sharing and Tip Pooling

Tip sharing is the practice by which a directly tipped employee gives a portion of his or her tips to another service employee or food service employee who participates in providing service to customers, and will keep the balance for his or herself. An employer may require directly tipped food service workers to share tips with other food service workers who participated in providing service to customers and may set the percentage to be given to each occupation. However, employees must handle the transactions themselves. Employers are not required to compensate participants in tip sharing for tips wrongfully withheld from the tip sharing by any participant.

Tip pooling, on the other hand, is the practice by which the tip earnings of directly tipped employees are intermingled in a common pool and then redistributed among directly and indirectly tipped employees. An employer may require food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool.

Directly tipped employees are those employees who receive tips from patrons or customers without any intermediary between the patron or customer and the employee, while indirectly tipped employees are those employees who, without receiving direct tips, are eligible to receive shared tips or to receive distributions from a tip pool.

The eligibility of employees to receive shared tips, or to receive distributions from a tip pool, shall be based upon duties and not titles. In order to be eligible, employees must perform or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties, and is not merely occasional or incidental. Examples of such occupations include:

- Wait staff;
- Counter personnel who serve food or beverages to customers;
- Bus persons
- Bartenders;
- Service bartenders
- Food runners
- Captains who provide direct food service to customers; and
- Hosts who greet and seat guests.

However, it may not include sushi chefs, expeditors, stockers and others ([see *Schear v. Food Scope America, Inc.*, 297 F.R.D. 114 \(S.D.N.Y. 2014\)](#)) who did not have more than a *de minimis* interaction with customers as part of their employment and/or whether they were ordinarily engaged in personal customer service. It also does not include employees who qualify as managers, such as maître d's who have the authority to hire, fire, supervise, discipline and schedule employees (see *Fonseca v. Dircksen & Talleyrand Inc.*, 2014 WL 1487279 (S.D.N.Y. Apr. 11, 2014)). But employees who regularly provide direct service to patrons may participate in a tip pool, even if that employee possesses limited supervisory responsibilities. [Barenboim v. Starbucks Corp.](#), 21 N.Y.3d 460, 472, 995 N.E.2d 153, 159 (2013) (shift supervisors who performed the same duties as baristas could share in tip pool).

- “Meaningful authority might include the ability to discipline subordinates, assist in performance evaluations or participate in the process of hiring or terminating employees, as well as having input in the creation of employee work schedules, thereby directly influencing the number and timing of hours worked by staff as well as their compensation... the power to hire and fire is not the exclusive test. *Barenboim v. Starbucks Corp.*, 21 N.Y.3d 460, 473, 995 N.E.2d 153, 160 (2013)

Practice Pointer

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Be mindful of any potential unauthorized deductions from the tip pool that an employer may make, such as a deduction of the tip pool that corresponds to a percentage of the restaurant's wine sales ([see *Capsolas v. Pasta Resources, Inc.*, 2011 WL 177-927 \(S.D.N.Y. May 9, 2011\)](#)), or a deduction that corresponds to a purported credit card usage fee percentage that the restaurant allegedly is charged (which is higher than the actual percentage the credit card company charges).

Wigdor LLP has extensive experience representing both employees and employers with respect to allegations of wage and hour violations. If you are a hospitality industry employee who feels you are being compensated unlawfully, please contact us to learn about your rights. Conversely, if you are an employer in the hospitality industry and are facing potential wage and hour claims from your employees, or may just wish to have expert attorneys in this area of law perform an audit of your business and wage and hour practices, please also contact us.

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