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MEMORANDUM

DATE: April 15, 2014

TO: **Kane Kessler Clients**

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: N.Y.S. Department of Labor: Reconsideration of 2009 Opinion letter: Overtime for Banquet Servers and Room Service Servers

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We are pleased to inform you that with the assistance of legislative counsel, Anthony Piscitelli of Wilson Elser, with whom we work closely on such matters, we have successfully persuaded the New York State Department of Labor to clarify a 2009 Opinion Letter which appeared to place the Hospitality Industry in extreme jeopardy regarding overtime for banquet and a la carte servers who receive mandatory service charges or gratuities.

BACKGROUND

Federal Law

Section 7(i) of the Fair Labor Standards Act provides an exemption from overtime for "commission employees" whose regular rate of pay is at least 1 ½ times minimum wage and who earn at least fifty (50%) percent of their total compensation from commission or mandatory gratuities. Federal courts have held that this exemption from overtime applies to banquet servers who earn more than 50% of their compensation from service charges or mandatory gratuities.

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New York Law

New York State law does not adopt the FLSA 7(i) overtime exemption for "commissioned employees." Furthermore, a 2009 New York State Department of Labor Opinion Letter appeared to require employers to add service charges or mandatory gratuities to the hourly rate of pay when calculating an employee's regular and overtime wage rates.

The April 11, 2014 Memorandum from Carmine Ruberto, Director of Labor Standards at the New York State Department of Labor states:

> "The memorandum is intended to clarify the definition of "regular rate of pay" for purposes of calculating overtime rates for employees who receive mandatory gratuities or service charges. It is, and always has been, the Department's position that tips and gratuities, whether voluntary or mandatory, are not added into the regular rate of pay and do not increase the resulting overtime rates under New York Labor Law and implementing regulations and wage orders ("state law"). The Department of Labor's March 9, 2009 opinion (RO-08-0137) should not be read to imply a contrary conclusion, for the reasons set forth below."
>
> A full copy of Mr. Ruberto's Memorandum is attached.

Thus, while banquet servers and others who receive mandatory gratuities are still entitled to overtime under New York State law, it is now clear that the overtime rate is to be calculated at 1 ½ times an employee's hourly rate, not including service charges or mandatory gratuities.

At a time when plaintiff's lawyers are very active in bringing wage and hour lawsuits, this Department of Labor Memorandum should serve to protect the hospitality industry from claims that mandatory services charges or gratuities should be factored into the regular rate of pay when calculating the rate of pay for overtime.

If you have any questions, do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Robert L. Sacks, Lois M. Traub, Niki J. Franzitta or Alexander Soric of the Firm's Labor & Employment practice group.

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New York State Department of Labor
Andrew M. Cuomo, *Governor*
Peter M. Rivera, *Commissioner*

Memorandum

To: **All Staff**

From: **Carmine Ruberto** CR

Date: **April 11, 2014**

Subject: **Mandatory Gratuity/Calculation of Overtime**

This memorandum is intended to clarify the definition of "regular rate of pay" for purposes of calculating overtime rates for employees who receive mandatory gratuities or service charges. It is, and always has been, the Department's position that tips and gratuities, whether voluntary or mandatory, are not added into the regular rate of pay and do not increase the resulting overtime rates under New York Labor Law and implementing regulations and wage orders ("state law"). The Department of Labor's March 9, 2009, opinion (RO-08-0137) should not be read to imply a contrary conclusion, for the reasons set forth below.

While both state and federal minimum wage laws exclude tips from the calculation of the regular rates of wages for purposes of overtime, those laws do not share a common definition of tips: federal law limits tips to voluntary payments, while state law expands tips to also include mandatory payments purported to be tips or gratuities. This difference in the way that mandatory tips are treated at the state and federal level was neither identified nor addressed in the Department's opinion RO-08-0137 and, as a result, that opinion does not support a conclusion that mandatory tips should increase state overtime rates when those same tips are included in regular rate of pay calculations under the Fair Labor Standards Act ("FLSA").

Thus, the fact that an employer may be required to include mandatory payments purported to be a tip or gratuity as part of its calculation of an employee's regular rate of pay for purposes of FLSA overtime, or for the overtime exemption under section 7(i) of the FLSA, does not change the analysis under state law, where tips and gratuities, including mandatory payments purporting to be tips and gratuities, have always been excluded from the regular and overtime rates.

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New York State Department of Labor
David A. Paterson, *Governor*
M. Patricia Smith, *Commissioner*

March 9, 2009

[redacted]

Re: Request for Opinion
Minimum Wage/Overtime
Hotel Industry
R0-08-0137

Dear [redacted]:

I have been asked to respond to your letter of November 4, 2008 in which you state that you are counsel to a labor union representing workers in the hotel industry. Your letter states that, recently, a hotel employer notified your client of its intentions to classify banquet staff as exempt from overtime pursuant to Section 7(i) of the Fair Labor Standards Act (FLSA [29 USC §201 *et seq.]).* The questions posed in your letter regarding such an exemption are addressed individually below.

1. Would the rate of pay prescribed by Section 7(i) of the FLSA be used to determine the employee's "regular rate" under 12 NYCRR §138-4.16, and would that "regular rate" be used for calculating overtime hourly rates pursuant to 12 NYCRR §138-2.2?

Yes. Subpart 4.16 of the Minimum Wage Order for the Hotel Industry defines "regular rate," for purposes of that part, as "the amount that the employee is regularly paid for each hour of work." The determination of an employee's regular rate of pay is made under Subpart 4.16 regardless of whether such rate is used to satisfy provisions contained in the FLSA. An employee's overtime hourly rate would therefore be calculated at one and one half times such regular rate pursuant to Subpart 2.2.

2. Would the wait staff continue to be subject to the Minimum Wage Order for the Hotel Industry without regard to whether they were treated as exempt under Section 7(i) of the FLSA?

Yes. While an employee may be exempted from the minimum wage and overtime protections of the FLSA, the FLSA expressly allows state laws to provide employees with greater protections that those provided by Federal Law. *(see,* 29 USC §218(a).) "FLSA does

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not, however, pre-empt state regulation of wages and overtime if the state's standards are more beneficial to workers," *(Manliguez v. Joseph,* 226 F. Supp.2d 377,388-389 (EDNY 2002)). Therefore, insofar as the Minimum Wage Order for the Hotel Industry guarantees employees minimum wage and overtime protections exceeding the FLSA, such protections control. Under the New York State Labor Law, an employee's exempt status under the FLSA does not diminish their rights or protections provided by the New York State Labor Law, unless otherwise provided therein. The Minimum Wage Order for the Hotel Industry makes no reference to the FLSA, and that Act's exemptions, are, therefore, not applicable to employees covered by it.

3. Assuming an employer, in order to satisfy the exemption under Section 7(i) of the FLSA, calculates the employee's regular rate as including the full tip amount received (i.e. basic hourly rate of $5.30 plus an average service charge of $18.00 equaling a regular rate of $23.30), would the employer be obligated to pay one and one halftimes such a regular rate for all hours worked in excess of 40?

As set forth above, 12 NYCRR §138-4.16 defines "regular rate" as "the amount that the employee is regularly paid for each hour of work. Furthermore, Labor Law §190(1) defines the term "wages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." As such, it is this Department's opinion that if an employer uses an amount paid to an employee as part of the calculation of the employee's regular rate for federal purposes then that amount paid must be deemed part of the employee's regular rate for New York State purposes. Accordingly, if an employer deems an employee's regular rate of pay to be $23.30 per hour for purposes of Section 7(i) of the FLSA, then that shall be deemed to be the employee's regular rate for all New York State purposes, including but not limited to the calculation of overtime due to that employee pursuant to 12 NYCRR §138-2.2.

This opinion is based on the information provided in your letter dated November 4, 2008. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By: Jeffrey G. Shapiro
Associate Attorney

JGS:da
cc: Carmine Ruberto

* Please be advised that this issue is further explained at:
http://www.labor.ny.gov/legal/counsel/pdf/overtime/LS-14-OP-4-mandatory-gratuity-calculation-of-overtime-04-10-14.pdf