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MEMORANDUM

DATE: February 26, 2015

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

RE: New York State Labor Commissioner Adopts Recommendation to Increase Wages for Tipped Workers

Not surprisingly, particularly given Governor Cuomo's support for an increase in the minimum wage, on Tuesday February 24, 2015, Acting New York State Labor Commissioner Mario J. Musolino announced the adoption of numerous recommendations made by the New York State Wage and Hour Board on February 2, 2015.

The Acting Commissioner adopted a recommendation to establish a uniform minimum hourly rate of \$7.50 per hour starting December 31, 2015 for tipped workers in the hospitality industry, regardless of whether the tipped worker is a food service worker or other service employee. The New York State Hospitality Wage Order ("HWO") defines food service worker as "any employee who is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry" and service employee as "an employee, other than a food service worker, who customarily receives tips". Under the current HWO, the minimum hourly rate for food service workers is \$5.00 per hour while the minimum hourly rate for other service workers is \$5.65 per hour.

The Acting Commissioner adopted the Wage Board's

recommendation that if the legislature enacts a separate minimum wage rate for New York City, then the cash wage for tipped workers must be increased by \$1.00, effective on the date that such separate minimum wage rate for New York City takes effect.

Lastly, there shall continue to be a review of whether the system of cash wages and tip credits should be eliminated completely.

The lone recommendation rejected by Acting Commissioner Musolino would have allowed employers to reduce the minimum hourly rate for tipped workers to \$6.50 per hour if the employee's weekly average of cash wages and tips received equaled or exceeded the applicable minimum hourly rate by 150% in New York City and 120% in the rest of the state.

The new tipped minimum wage of \$7.50 may compel hospitality employers to consider whether these workers should be paid a non-tip minimum wage (now \$9.00 per hour) given the burden of compliance with associated HWO requirements (eg. separate tip notifications and postings, tip pooling restrictions and record keeping) and that the HWO seemingly invites litigation from plaintiff's lawyers, if the employer fails to comply with all of these complex rules.

For any questions, please contact David R. Rothfeld, Judith A. Stoll, Lois M. Traub, Alexander Soric, Michael C. Lydakis or Robert L. Sacks.