

MEMORANDUM

DATE: December 12, 2018

TO: New York Clients

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

RE: New York State Minimum Wage Increase and Related Items

Introduction

In 2016, New York State Governor Andrew Cuomo enacted legislation that would incrementally increase the minimum wage for all New Yorkers to \$15 per hour. The increases are staggered and split into four (4) categories: 1) New York City businesses employing eleven (11) or more workers, 2) New York City businesses employing ten (10) or fewer workers, 3) businesses in Nassau, Westchester, and Suffolk Counties, and 4) businesses in the remainder of New York State. This Memorandum addresses changes to the New York State minimum wage, together with some of the more significant wage related items for the coming year.

Minimum Wage and Overtime

New York State laws and regulations set forth the minimum hourly wage to be paid to all non-exempt workers across the State. These regulations also establish the wages to be paid to tipped employees along with the related credits, deductions, and reimbursements to which employers are entitled or for which they are responsible. This Memorandum serves as a reminder of the upcoming wage-related increases effective December 31, 2018.

Effective December 31, 2018, the minimum hourly wage in New York State for all non-exempt employees shall increase as follows:

	NYC businesses employing 11 or more workers	NYC businesses employing 10 or fewer workers	Nassau, Westchester, and Suffolk Counties	Remainder of New York State
Current wages	\$13.00	\$12.00	\$11.00	\$10.40
Dec. 31, 2018	\$15.00	\$13.50	\$12.00	\$11.10

In addition, in order to be eligible for the executive or administrative exemptions from overtime, effective December 31, 2018, employees must be paid at least:

NYC businesses employing 11 or more workers	\$1,125.00 per week (\$58,500 annually)
NYC businesses employing 10 or fewer workers	\$1,102.50 per week (\$57,330 annually)
Nassau, Westchester, and Suffolk Counties	\$900.00 per week (\$46,800 annually)
Remainder of New York State	\$832.00 per week (\$43,264 annually)

New York does not set a salary threshold for the professional exemption to overtime, so employees must meet the current federal salary threshold of \$455.00 per week to qualify for the professional exemption.

Tip Credit

New York State Department of Labor (“DOL”) regulations allow employers to take a tip credit against the minimum wage if an individual is a tipped employee. Before a New York employer can take a tip credit, it must inform the employee in writing, in English (and in the employee’s native language if not English), that the employer is taking a tip credit and the amount of the tip credit. The employer must also provide the employee with notice of their regular rate of pay, overtime rate of pay and their regular payday. In addition, the employer must advise the employee that if the cash wages they receive, plus the employee's tips, do not equal the regular minimum wage for all hours worked, the employer will pay the employee the difference. Finally, in order to take the tip credit, the employer must notify the employee that the employer will not take any tips received by the employee except those that are contributed to a valid tip pooling or tip sharing arrangement. If an employer fails to provide this information, it cannot take the tip credit.

If an employee is a service employee¹, an employer may take a tip credit if the service employee’s wages and tips equals or exceeds the non-tipped minimum wage and further provided that the service employee’s weekly average of tips is at least the hourly rate of the applicable hourly tip threshold each year.

For food service workers², the minimum hourly wage must equal (2/3) of the applicable non-tipped minimum wage, rounded to the nearest five cents, or \$7.50, whichever is greater. A food service worker’s total tips received plus wages must be equal to or greater than the minimum hourly “total” rate,

¹ A “service employee” is an employee, other than a food service worker, who customarily receives tips.

² “Food Service Worker” is defined as is any employee who is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers. However, the term food service worker shall not include delivery workers.

i.e., the non-tipped minimum wage.

Below is a chart itemizing the applicable minimum wage rates, tip credits and overtime rates for tipped employees.

December 31, 2018	Minimum Wage	Overtime Rate	Tipped Minimum Wage for Service Employees, Non-resort Hotels	Tip Credit/Tip Threshold	Tipped OT Rate	Tipped Minimum Wage – Food Service Workers	Tip Credit	Tipped OT Rate for Food Service Workers
NYC businesses employing 11 or more workers	\$15.00	\$22.50	\$12.50	\$2.50/\$3.25	\$20.00	\$10.00	\$5.00	\$17.50
NYC businesses employing 10 or fewer	\$13.50	\$20.25	\$11.25	\$2.25/\$2.95	\$18.00	\$9.00	\$4.50	\$15.75
Nassau, Westchester, and Suffolk Counties	\$12.00	\$18.00	\$10.00	\$2.00/\$2.60	\$16.00	\$8.00	\$4.00	\$14.00
Remainder of New York State	\$11.10	\$16.50	\$9.25	\$1.85/\$2.40	\$14.65	\$7.50	\$3.60	\$12.90

Fast Food Workers

On December 31, 2015, New York State began implementing a schedule of minimum wage increases for all fast food workers within the state³. This increase shall continue both in New York City and outside of New York City as follows:

- For New York City, the minimum wage for fast food workers shall be increased to:
 - \$15.00 on December 31, 2018

³ A “fast food employee” is one who works in a chain establishment of limited service which is one (1) of thirty (30) or more such establishments nationally and whose job duties include at least one of the following: customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance.

- For the rest of the state, the minimum wage for fast food workers shall be increased to:
 - \$12.75 on December 31, 2018
 - \$13.75 on December 31, 2019
 - \$14.50 on December 31, 2020; and
 - \$15.00 on December 31, 2021

Uniforms and Meal Credits

The New York State Hospitality Wage Order (“HWO”) requires hospitality employers to provide maintenance pay for employee uniforms where such maintenance requires washing, ironing, dry cleaning, alterations, repair, or any other necessary upkeep, unless the uniform is made of “wash and wear” materials. Under the HWO, the weekly flat uniform maintenance pay will increase on December 31, 2018 to:

Location	Workweek over 30 hours	Workweek between 20 and 30 hours	Workweek of 20 hours or less
NYC businesses employing 11 or more workers	\$18.65	\$14.75	\$8.90
NYC businesses employing 10 or fewer	\$16.80	\$13.30	\$8.05
Nassau, Westchester, and Suffolk Counties	\$14.95	\$11.80	\$7.15
Remainder of New York State	\$13.80	\$10.90	\$6.60

The HWO also allows employers who provide employee meals to take a credit against employee wages for each meal provided. To be eligible for this credit, the employee meals must include each of the following: (1) fruits or vegetables; (2) grains or potatoes; (3) eggs, meat, fish, poultry, dairy or legumes; and (4) tea, coffee, milk or juice. The meal credit under the HWO shall change on December 31, 2018 to:

Location	Food Service Workers	Service Employees, Non-Resort Hotels	All Other Employees
NYC businesses employing 11 or more workers	\$3.60	\$4.15	\$5.15
NYC businesses employing 10 or fewer	\$3.35	\$3.75	\$4.65

Nassau, Westchester, and Suffolk Counties	\$3.05	\$3.35	\$4.15
Remainder of New York State	\$2.90	\$3.10	\$3.80

Wage Theft Prevention Act Notices Reminder

Finally, please be mindful of the notice requirements still in effect pursuant to the New York State Wage Theft Prevention Act. All employers must continue to provide wage rate notices to employees in English and their primary language within ten (10) days of hire, or face penalties for failure to do so. Sample pay notices in a variety of languages can be found on the NYS DOL website: <https://labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm>.

Employers must also continue to collect signed acknowledgements of receipt and provide a copy to the employees. The requirements regarding earnings statements, wage changes or changes in status remain the same. Employees must be notified seven (7) days before any changes to such information, such as the wage increases discussed in this memorandum.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Lois M. Traub, Alexander Soric, Jennifer Schmalz, Jaclyn Ruocco, Michael C. Lydakis, Joseph Tangredi, or Robert L. Sacks.

*This memo is provided for informational purposes only.
It is not intended as legal advice and readers should consult counsel to discuss how these matters relate to their individual circumstances.*