

New York Department of Labor Issues Draft Wage Orders Implementing Minimum Wage Increase

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New York's minimum wage will increase from \$7.25 per hour to \$8.00 per hour on December 31, 2013. Additional increases will occur annually after that — to \$8.75 on December 31, 2014, and \$9.00 on December 31, 2015.

The increased minimum wage affects other compensation requirements under the **New York Department of Labor's Minimum Wage Orders**, including allowances for tips, meals and lodging credits, uniform pay requirements and the minimum salary basis for exempt status under New York law. The DOL has published proposed amended Wage Orders for all industries. While the amended Wage Orders are preliminary, they identify changes that almost certainly will go into effect on December 31, 2013. Employers should plan now for any changes to their compensation practices that may be needed on account of the new minimum wage.

Major takeaways are detailed below.

Overtime Rate for Non-Tipped Employees

The overtime rate for hourly employees making the minimum wage is calculated at one-and-a-half times the minimum wage for all hours worked over 40 in a week. Because the minimum wage will increase, the overtime rate for employees earning the minimum wage will also increase, as follows: \$12.00 effective December 31, 2013, \$13.13 effective December 31, 2014, and \$13.50 effective December 31, 2015.

Maximum Tip Credit, Overtime Rate for Tipped Employees in Hospitality Industry

The cash wage payable to tipped employees in the hospitality industry remains the same — \$5.00 per hour for “food service” workers (e.g., servers, bussers, runners) and \$5.65 for “service” employees (e.g., delivery persons and coat check). However, the tip credit (the difference between the cash wage and the minimum wage) increases due to the increase in the minimum wage. The tip credit for food service workers will be \$3.00 per hour; the tip credit for service employees \$2.35. Each food service worker will need to receive at least \$3.00 per hour in tips for the tip credit to apply under state law, and each service employee must receive at least \$2.35 per hour in tips.

Due to the increase in the minimum wage, beginning December 31, 2013, the new overtime rate for food service workers is \$9.00 per hour, calculated by multiplying the minimum wage (\$8.00) by 1.5, then subtracting the tip credit (\$3.00). A service employee’s overtime rate will be \$9.65, calculated by multiplying the minimum wage (\$8.00) by 1.5, then subtracting the tip credit (\$2.35).

Tip Credit Rate for Tipped Employees Outside Hospitality Industry

Outside the hospitality industry, the minimum cash wage for employers utilizing tipped workers (e.g., in car washes and in salons) is increasing. For employees earning more than \$1.95 on average per hour in tips, the minimum cash wage will be \$6.05 per hour; for employees earning between \$1.20 and \$1.95 in tips on average per hour, the cash wage is \$6.80. This is an increase from the current level, at which employers were permitted to pay tipped employees a cash wage of \$5.50.

Spread of Hours

New York employers required to pay for “spread of hours” also must be sure to compensate employees, including tipped employees, at the increased basic minimum wage rate. Note that outside the hospitality industry, a setoff still applies to the extent aggregate pay for the day in which a “spread” occurred equals at least minimum wage for all hours worked plus one additional hour.

Uniform Maintenance Pay

Uniform maintenance pay also is increasing. Beginning December 31, 2013, employers must pay covered uniformed employees \$9.95 per week if the employees work more than 30 hours, \$7.85 per week if the employees work between 20 and 30 hours, and \$4.75 per week if the employees work 20 hours or less. These amounts will increase in future years. Beginning December 31, 2014, employers will be required to pay covered uniformed employees \$10.90 per week for employees who work more than 30 hours, \$8.60 per week for employees who work between 20 and 30 hours, and \$5.20 per week for employees who work 20 hours or less. Beginning December 31, 2015, the maintenance pay increases to \$11.20 per week for employees who work more than 30 hours, \$8.85 per week for employees who work between 20 and 30 hours and \$5.35 per week for employees who work 20 hours or less. The previously enacted “wash and wear” exception to uniform maintenance pay within Hospitality continues to apply.

Meal Credits

The DOL has proposed new meal credit rates for employers that provide employees meals. Beginning December 31, 2013, for employers outside the hospitality industry, the meal credit

increases to \$2.75 per meal. Within the hospitality industry, the maximum meal credit for food service and service employees remains at \$2.50, but increases to \$2.75 for other workers in the hospitality industry (e.g., cooks and other non-service employees). The DOL also proposes revisions to lodging credits for restaurants and all-year hotels, and meal and lodging credits in resort hotels.

Minimum Salary for Exempt Employees

All New York employers should pay particular attention to the increased salary thresholds needed to qualify for the executive or administrative exemption under state law. Beginning December 31, 2013, New York employers must pay exempt executive and administrative employees at least \$600.00 per week inclusive of board, lodging and other allowances (\$31,200 on an annualized basis). The minimum salary increases to \$656.26 per week (\$34,125.52 annually) on December 31, 2014, and \$675.00 per week (\$35,100 annually) on December 31, 2015.

Given the continued volume of class action wage litigation, employers must take action to ensure compliance with New York's minimum requirements and avoid claims.

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