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End of the Tip Credit in the Miscellaneous Industries

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During the height of the COVID-19 pandemic, Governor Andrew Cuomo seemingly issued new Executive Orders weekly placing restrictions on businesses. Between all of the Executive Orders, mandating which businesses were permitted to open and the maximum capacity at which they could operate, one of the significant changes affecting New York State businesses that has been overlooked is the phasing out of the tip credit for employers covered by the Minimum Wage Order for Miscellaneous Industries and Occupations (the “Miscellaneous Wage Order”).

As of December 31, 2020, in addition to the ever-changing conditions under which businesses must operate, businesses subject to the Miscellaneous Wage Order are no longer permitted to take a tip credit against their employees’ wages. This change will have implications for many employers, including but not limited to, those in the nail salon, hairdresser, car wash, and valet parking industries.¹ As discussed below, this change will not apply to restaurants, bars, hotels, or any businesses covered by the Hospitality Industry Wage Order (“Hospitality Wage Order”).²

Tip Credit for Miscellaneous Industries

New York is often considered one of the most progressive jurisdictions in the country when it comes to protections for workers. While the fight for a \$15 federal minimum wage rages across the country, New York has already implemented annual wage increases that will bring workers in every region of New York State to a \$15 per hour minimum wage.

While all employers must pay their workers at least the New York State minimum wage, until recently, employers governed by the Miscellaneous Wage Order were subject to complicated and

confusing regulations that permitted them to take a tip credit against the required State minimum wage, provided eligible employers met certain requirements.³ Pursuant to section 142-2.5(b) of the New York Codes, Rules and Regulations (“N.Y.C.R.R.”), tips or gratuities “may be considered a part of the minimum wage” so long as:

- (i) the occupation was one in which tips “have customarily and usually constituted a part of the employee’s remuneration”;
- (ii) there is substantial evidence that the employee’s tips at least equal or exceed the allowance claimed by the employer; and
- (iii) “the allowance claimed by the employer is recorded on a weekly basis as a separate item in the wage record.”⁴

If an employer satisfied each of the above-referenced conditions and the employee’s weekly average tips brought his total pay above minimum wage, the employer was permitted to take an allowance for tips.⁵ The amount of the allowance varied based on the employer’s number of employees and geographic location.⁶ For example, until June 29, 2020, an employer in New York City with ten or fewer employees was permitted to take a tip credit of \$2.25 “for an employee whose weekly average of tips received is between such Low tip amount [\$2.25] and the High tip amount [\$3.65]” and a tip credit of \$3.65 “for an employee whose weekly average of tips received equals or exceeds such High tip amount [\$3.65].”⁷ In contrast, if the employer was located in Nassau County or Suffolk County, the tip credits available ranged from \$1.95 on the low end to \$3.20 on the high end.⁸ In upstate counties, the tip credits ranged from \$1.75 to \$2.90.⁹

Elimination of Tip Credit in Miscellaneous Industries

At the end of 2017, Governor Cuomo directed the New York State Labor Commission to determine the impact of tip credits on employers and workers across the State and recommend a solution.¹⁰ After holding hearings and receiving testimony from business owners, business groups, and workers, the Labor Commission recommended the elimination of the tip credit in the industries covered by the Miscellaneous Wage Order.¹¹ In response to this recommendation, on December 31, 2019, the Commissioner of Labor, Roberta Reardon, adopted the



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recommendation and ordered, pursuant to New York Labor Law § 659(2), that section 142-2.21 of the N.Y.C.R.R. be amended as follows:

Notwithstanding any other provision contained in this part, tips or gratuities, shall not be considered a part of the minimum wage on or after December 31, 2020, provided, however, that no employer shall claim a tip allowance in excess of fifty percent of the applicable allowances listed in this part and rounded to the nearest five cents on or after June 30, 2020.¹²

In doing so, the Department of Labor phased in the elimination of the tip credit over the span of one year, purportedly to provide businesses adequate time to adjust.¹³ Employers were permitted to take the full tip credit from January 1, 2020 to June 29, 2020 and 50% tip credit from June 30, 2020 to December 30, 2020.¹⁴ As a result, Long Island employers in the miscellaneous industries were no longer permitted to take a tip credit of \$3.20, but rather 50% of that value, \$1.60.¹⁵

As of December 31, 2020, the tip credit was completely eliminated and all employers subject to the Miscellaneous Wage Order were no longer permitted to consider tips and gratuities as part of their employee’s minimum wage. Instead, employers are required to pay their employees a cash wage of the full New York State minimum wage, regardless of how much their employees receive in tips.¹⁶

In reaching the decision to recommend the elimination of the tip credit, the New York State Department of Labor cited various concerns including “widespread confusion about whether or not [workers] are entitled to earn minimum wage,” “rampant wage theft in particular industries,” and a concern that tip credits are inappropriate in certain industries.¹⁷ The Department of Labor’s recommendation will likely resolve some of these concerns. The elimination of a sliding scale for allowances depending on the amount of tips received and the employer’s number of employees will alleviate confusion

among workers as to their wages and may reduce inadvertent wage theft resulting from the complex calculation of allowances.

Hospitality Industry

It is important to note the Miscellaneous Wage Order and its elimination of the tip credit in miscellaneous industries will not affect employees and employers in the hospitality industry. Restaurants and hotels can still take the tip credit from their employees’ wages, provided they meet the requirements set forth in the Hospitality Wage Order.¹⁸

While amendments to the tip credit in the Hospitality Wage Order may be forthcoming, restaurants and hotels need not eliminate tip credits in calculating employees’ cash wage for the time being. However, with the start of the new year, employers must nevertheless be aware of the new minimum wage on Long Island and the new cash wage, tip credit and tip threshold beginning December 31, 2020.¹⁹

1. See Governor Cuomo Announces End of Subminimum Wage Across Miscellaneous Industries Statewide, Governor.NY.gov (Dec. 31, 2019), <https://on.ny.gov/3qH6423>. The miscellaneous industries include all industries other than hospitality, farmworkers, and building service. See *Minimum Wages for Tipped Workers*, New York State Department of Labor, <https://on.ny.gov/372K3mn>.

2. N.Y. Comp. Codes R. & Regs. tit. 12, § 146-3.1.

3. *Id.* § 142-2.5(b).

4. *Id.*

5. See *id.*

6. See *id.* § 142-2.5(b)(2)(i).

7. *Id.*

8. See *id.* § 142-2.5(b)(2)(i)(b).

9. See *id.* § 142-2.5(b)(2)(i)(c).

10. See *New York State Subminimum Wage Hearings, Report and Recommendations to Governor Andrew M. Cuomo*, New York State Department of Labor, pg. 4, <https://on.ny.gov/3oDCg4C>.

11. See *id.* at pg. 9.

12. *Order of Commissioner of Labor Roberta Reardon Pursuant to Labor Law Section 659(2)*, New York State Department of Labor (Dec. 31, 2019), <https://on.ny.gov/373IXH4>; see N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.21.

13. See *Governor Cuomo Announces End of Subminimum Wage Across Miscellaneous Industries Statewide*, supra n.1.

14. See *Order of Commissioner of Labor Roberta Reardon Pursuant to Labor Law Section 659(2)*, supra n. 12; see also N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.21.

15. See *Minimum Wages for Tipped Workers*, supra n.1; see also *Minimum Wage Poster – Attention Miscellaneous Industry Employees*, New York State Department of Labor, <https://on.ny.gov/373ZtGU>. As of June 30, 2020, on Long Island, employers were entitled to pay their employees a cash wage of \$11.40 per hour when tips were at least \$1.60 per hour and \$12 per hour when tips were at least \$1 per hour, but less than \$1.60 per hour.

16. N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.21; see *Minimum Wages for Tipped Workers*, supra n.1.

17. See *New York State Subminimum Wage Hearings, Report and Recommendations to Governor Andrew M. Cuomo*, supra n.10, at pg. 3.

18. N.Y. Comp. Codes R. & Regs. tit. 12, § 146-1.3.

19. See *id.* §§ 146-1.2, 146-1.3.