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Wage & Hour Issues in the Hospitality Industry

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Agenda

- Overtime exemptions and misclassification
- Tip credit: definition, prerequisites and conditions
- Tip pooling and tip sharing
- Calculating overtime, including for tipped employees
- Joint employment
- Service charges
- Maine Earned Paid Leave

Non-Exempt Employees

- Everyone who is not exempt is “non-exempt”
- May be paid on hourly or salaried basis
- Must be paid at least minimum wage and overtime at 1.5 times the regular rate for hours worked over 40 in a workweek
- Must maintain records of hours worked

Exempt Employees

- Not entitled to overtime
- Must be paid minimum salary of \$684 per week (\$735.39 in Maine), regardless of hours worked
- Must perform certain duties.
- Employers do not have the discretion to classify an employee as exempt if they do not satisfy these criteria.

Overtime Exemptions

- **Executive**

- › Primary duty – managing the enterprise or a customarily recognized subdivision of the enterprise (*i.e.* Front of the House manager).
- › Must customarily direct the work of at least 2 or more other FTEs.
- › Must have authority to hire and fire, or recommendations must be given particular weight.
- › **Caution:** Each individual treated as exempt must oversee at least 80 hours of subordinate work.

Overtime Exemptions

- **Administrative**

- › Primary duty – performance of office or non-manual work directly related to the management or general business operations of the employer or customers (*i.e.* not food or customer service, but marketing, HR, accounting).
- › Employee's primary duty must include exercise of discretion and independent judgment with respect to matters of significance.
- › **Caution:** Office / non-manual work alone is not enough.

Overtime Exemptions

- **Learned Professional**
 - › Primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and includes work requiring consistent exercise of discretion and judgment.
 - › Advanced knowledge must be in a field of science or learning
 - › Must be customarily acquired by a prolonged course of specialized intellectual instruction.
 - › Can include executive chef or sous chef if they have 4-year culinary degree – cannot perform primarily routine or manual work

Overtime Exemptions

- **Creative Professional**
 - › Employee's primary work must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.
 - › May include executive chef if their primary duty is regularly creating or designing unique dishes and menu items – limited to "truly original" chefs working at "5-star or gourmet establishments"
 - Executive chefs performing routine cooking and food prep will not qualify.

Misclassification

- Risks of mistakenly classifying an employee as exempt are substantial:
 - › Regular rate will be determined by reference to the salary;
 - › If hours not tracked, hours worked will likely be determined by employee's testimony;
 - › Employer will be required to pay 1.5 times the regular rate for all hours over 40;
 - › Employer will be required to pay an equal amount in liquidated damages.

Tip Credit

- Employer may use tips to satisfy a portion of the minimum wage due to tipped employees (also known as service employees) when they are performing certain work – a “tip credit.”
- To be a “tipped employee” or “service employee,” employee must be engaged in an occupation in which they customarily and regularly receive at least \$30 a month in tips (currently \$100 in Maine).

Tip Credit – Amounts (2022)

- Federal law – MW is \$7.25; tip credit up to \$5.12; cash wage of at least \$2.13 required.
- Maine – MW is \$12.75; tip credit up to 50% (\$6.37); cash wage of at least \$6.38 required.
- Massachusetts – MW is \$14.25; tip credit up to \$8.10; cash wage of at least \$6.15 required.
- New Hampshire – MW is \$7.25; tip credit up to 55% (\$3.99); cash wage of at least \$3.27 required.

Prerequisites to Taking Tip Credit

- Employer must notify employees of intent to utilize tip credit.
- Notification should be **in writing** and signed by employee.
- Notice must include:
 - › Amount of cash wage and amount of tip credit claimed;
 - › Statement that tip credit can't exceed tips actually received;
 - › Statement that all tips will be retained by employee, except in case of valid tip pool;
- Tip credit won't apply to any employee who hasn't received the notice.

Limits on Tip Credit - FLSA

Tip-producing work

- Direct service – e.g. taking orders, serving food, making drinks, chatting with customers
- Tip credit is available

Work *not* part of tipped occupation

- Cleaning bathroom, sweeping parking lot
- Tip credit is not available

Work supporting tip-producing work

- Marrying condiments, rolling silverware, setting tables
- Tip credit is available if this work doesn't exceed 20% of time **and** if task isn't performed for more than 30 minutes.

Tip Pooling

- Maine employers may require service employees to contribute their tips to a tip pool, **but only if:**
 - › The tip pool is limited to customarily tipped employees (*e.g.* servers, bartenders).
 - › Under no circumstances may owners or managers receive tips from the pool.
 - › The tip pool cannot include the back of the house.

Identifying “Management”

- US Department of Labor applies duties test of executive exemption:
 - › Individual’s primary duty is overseeing enterprise or a department;
 - › Supervises at least 2 FTEs;
 - › Authority to hire and fire, or recommendations given special weight.
- Management may retain tips they earn individually, but may not contribute them to or take tips from a pool.
- **Caution:** Lead servers

Tip Sharing

- Under state law, employers cannot require service employees to share their tips with non-tipped employees (e.g. dishwasher, kitchen).
 - › **Note:** Federal law permits mandatory tip sharing with back of the house, as long as employer doesn't take tip credit.
- Any "tip out" must be entirely voluntary and employees must handle the transactions themselves.
 - › **Caution:** Beware of "suggested" tip-out amounts and excessive peer pressure which could render tip sharing involuntary.

Calculating Overtime

- Overtime is 1.5 x the “regular rate,” which is the full MW (not the tipped cash wage).
 - › Example: Maine server is paid a cash wage of \$6.38, and employer takes a \$6.37 tip credit.
 - › OT rate determined by multiplying the full MW (\$12.75) by 1.5 and then subtracting the tip credit.
 - $\$12.75 \text{ (MW)} * 1.5 = \19.13 (OT rate) .
 - $\$19.13 \text{ (OT rate)} - \$6.37 \text{ (tip credit)} = \mathbf{\$12.75}$
 - › If employer instead multiplies the cash wage by 1.5 they will arrive at \$9.56.
- OT rate is based on actual hourly wage you pay and tip credit you take
 - › E.g. Pay cash wage of \$9.00 and tip credit of \$3.75
 - › OT rate still \$19.13 but only subtract \$3.75 and pay \$15.38

Service Charges – Federal Law

- Under federal, a compulsory charge for service (e.g. 15% of the bill) is not a tip, but rather part of employer's gross receipts.
- Accordingly, not required to be paid to service employees; but if paid **must be included in regular rate for purposes of calculating overtime.**

Service Charges – ME Law

- “Tips” that are automatically included in a customer’s bill must be treated as tips and distributed to the service employees.
- Banquets and private clubs may impose service charges and, as long as they notify the customer the charge is not a tip, they may retain or distribute the service charge as they like.
- Maine law is not clear about whether restaurants, hotels, and establishments other than banquets and private clubs may impose service charges without them being deemed a “tip” under Maine law.

Service Charge Takeaways

- Any amount automatically charged to a customer and distributed to an employee must be added to the regular rate for purposes of calculating OT.
- In Maine, any automatic gratuity / tip / amount for service must be distributed to the service employees.
 - › *Caveat:* In Maine, banquets and private clubs need not distribute service charges as long as clear with customer that charge isn't a tip.

Calculating OT w/ Automatic Gratuity (ME)

- Maine server is paid a cash wage of \$6.38, and employer takes a \$6.37 tip credit under ME law. Assume employee worked 45 hours and received \$450 in auto gratuity.
- Regular rate under federal law is \$17.25 (\$7.25 MW + \$10/hour auto gratuity).
- $1.5 \times \$17.25 = \25.88
- Back out \$.95 tip credit under federal law ($\$7.25 - \$6.38 = \$.95$)
- $\$25.88 - \$.95 =$ OT rate of \$24.93 (not \$12.75 as under ME law)

Other Common Overtime Issues

- “Regular rate” includes *all* compensation paid by the employer, not just MW or base rate.
 - › Service charges
 - › Commissions
 - › Non-discretionary bonuses, which must be allocated to the weeks in which they were earned
 - › Shift differentials
- Overtime is required when employee works over 40 hours in one workweek. Cannot average hours over a two-week pay period, or offer comp time next week in lieu of paying OT this week.

Joint Employment

- When multiple locations are commonly owned and operated, DOL will treat them as joint employers (even if they are separate corporations and even if they have different names).
- When an employee works at two or more locations, DOL will aggregate their hours worked for purposes of triggering overtime.
 - › Example: Employee works 25 hours at ice cream shop and 25 hours at commonly owned but separately incorporated seafood restaurant. Employee will be deemed to have worked 50 hours for a joint employer, and is entitled to OT for hours after 40.

ME – Earned Paid Leave

- Employers with more than 10 employees are required to provide EPL.
- Employees earn 1 hour for every 40 hours worked, up to 40 hours in a year.
- Can be used for any purpose whatsoever, planned or emergency.
- Employees must be free to carry up to 40 hours over from one year to the next.
 - › Alternatively, employer can “front load” the hours, making them all available for use on January 1.

ME – Earned Paid Leave cont.

- Can prohibit employees from using EPL for the first 120 days of employment, but employees must still accrue EPL during that time.
- EPL must be paid at the “regular rate” in effect the week immediately prior to the week in which leave is taken.
- Employer may pay out upon termination or not, as dictated by its policy.
- If employer does not pay out EPL upon termination, and if employee returns to employment within 1 year, their EPL balance upon termination must be restored to them.

Presenters

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