

December 2019

NYC | HOSPITALITY
ALLIANCE

Minimum Wage Increases and Other New Year Reminders for New York Employers

By Carolyn D. Richmond, Glenn S. Grindlinger and Jordan E. Pace

As we approach the end of the year, it is critical to remember and implement some of the new legal requirements that go into effect in New York on December 31, 2019. Failure to comply with these requirements could subject an uninformed employer to substantial financial liability.

Minimum Wage Increases

Effective December 31, 2019, the minimum wage, tip credit and minimum salary levels in New York will increase for many employers. The increases will vary depending upon an employer's size and location. The good news for large employers in New York City (11 or more employees) is that there will be no increases to the minimum wage or minimum salary levels. And for small employers in New York City (10 or fewer employees), there will be no increase to the fast food minimum wage.

On December 31, the regular, minimum wage rates in New York will be as follows:

Location	Minimum Hourly Wage	Fast Food Minimum Wage
New York City – Large Employers (11 or more)	\$15.00	\$15.00
New York City – Small Employers (10 or less)	\$15.00	\$15.00
Long Island & Westchester County	\$13.00	\$13.75
Remainder of New York State	\$11.80	\$13.75

As a reminder, a "fast food employee" is any individual working in a fast food establishment 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. In addition, "fast food establishment" is any establishment in New York serving food or drink items:

1. Where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out or delivered to the customer's location;

2. Which offers limited service;
3. Which is part of a chain; and
4. Which is one of 30 or more establishments **nationally**, including:
 - a. An integrated enterprise which owns or operates 30 or more such establishments in the aggregate nationally; or
 - b. An establishment operated pursuant to a franchise where the franchisor and the franchisee(s) of such franchisor own or operate 30 or more such establishments in the aggregate nationally.

The rate for spread of hours pay, call-in pay and similar non-working time payments that are based on the minimum wage will increase to match the minimum wages outlined above. The specific amount will depend on an employer's location, the number of employees and whether the business is designated as a fast food establishment.

Tip Credits and Other Allowances

In the hospitality industry, the tip credit, meal credit, and uniform maintenance allowances also change effective December 31, 2019, for certain employers, with the amount varying depending upon the employer's location, its size, and the designation of whether the employee is a "food service worker," "service employee," or non-service employee. Here too, large employers in New York City will not see an increase.

A "food service worker" is:

- Primarily engaged in the serving of food and beverages to guests, patrons and customers, other than a delivery employee;
- Customarily and regularly receives tips from such guests, patrons and customers; and
- Does not spend more than two (2) hours in any day or more than 20% of their time performing work in which tips are not customarily received.

A "service employee" regularly and customarily receives tips for the work they perform and is *not* a food service worker or a fast food employee. A non-service employee is any, non-exempt employee other than a food service worker, service employee or fast food employee.

Before New York employers can take a tip credit, they must inform the employee in writing in English and the employee's native language if not English that the employer is taking a tip credit and the amount of the tip credit. Specifically, the employer must provide to the employee the following information in writing in order to take the tip credit:

- The employee's regular rate of pay;
- The employee's overtime rate of pay;
- The employee's regular payday;

- Advise the employee that if the cash wages they receive, plus the employees tips, do not equal the regular minimum wage for all hours worked, the employer will pay the employee the difference; and
- 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.

With these parameters in mind, effective December 31, 2019, the tip credit and cash wage that must be paid to such employees is as follows:

Location	Food Service Workers	Service Workers
New York City – Large Employers (11 or more)	Minimum Wage: \$15.00 Cash Wage: \$10.00 Cash Overtime Wage: \$17.50 Tip Credit: \$5.00	Minimum Wage: \$15.00 Cash Wage: \$12.50 Cash Overtime Wage: \$20.00 Tip Credit: \$2.50 Tip Threshold: \$3.25
New York City – Small Employers (10 or less)	Minimum Wage: \$15.00 Cash Wage: \$10.00 Cash Overtime Wage: \$17.50 Tip Credit: \$5.00	Minimum Wage: \$15.00 Cash Wage: \$12.50 Cash Overtime Wage: \$20.00 Tip Credit: \$2.50 Tip Threshold: \$3.25
Long Island & Westchester County	Minimum Wage: \$13.00 Cash Wage: \$8.65 Cash Overtime Wage: \$15.15 Tip Credit: \$4.35	Minimum Wage: \$13.00 Cash Wage: \$10.85 Cash Overtime Wage: \$17.35 Tip Credit: \$2.15 Tip Threshold: \$2.80
Remainder of New York State	Minimum Wage: \$11.80 Cash Wage: \$7.85 Cash Overtime Wage: \$13.75 Tip Credit: \$3.95	Minimum Wage: \$11.80 Cash Wage: \$9.85 Cash Overtime Wage: \$15.75 Tip Credit: \$1.95 Tip Threshold: \$2.55

In order to take the tip credit for service employees, the employee must meet the tip threshold. This means that the employee's average weekly tips must meet the minimum amount listed in the chart above per hour worked.

Uniforms

Where employers covered by New York's Hospitality Industry Wage Order require employees to maintain their uniforms, unless they are "wash and wear" clothing that do not require any special treatment (i.e. dry cleaning, pressing, repairs), they must provide such employees with uniform maintenance pay. Effective December 31, 2019 under the Hospitality Industry Wage Order, the uniform maintenance pay shall increase for all but large employers in New York City and shall be:

Location	Work Week More Than 30 Hours	Work Week Between 20 and 30 Hours	Work Week of 20 Hours or Less
New York City – Large Employers (11 or more)	\$18.65	\$14.75	\$8.90
New York City – Small Employers (10 or less)	\$18.65	\$14.75	\$8.90
Long Island & Westchester County	\$16.20	\$12.80	\$7.75
Remainder of New York State	\$14.70	\$11.60	\$7.00

Meal Credit

Pursuant to the New York’s Hospitality Industry Wage Order, an employer who provides a qualifying meal to an employee may consider that meal to be part of the employee’s wages and take a credit against the employee’s wages for providing that meal. In order to qualify as a “meal,” it 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. Effective December 31, 2019, the meal credit under New York’s Hospitality Industry Wage Order shall increase for all but large employers in New York City and shall be:

Restaurants and All Year Hotels

Location	Food Service Workers	Service Employees	All Other Employees
New York City – Large Employers (11 or more)	\$3.60	\$4.15	\$5.15
New York City – Small Employers (10 or less)	\$3.60	\$4.15	\$5.15
Long Island & Westchester County	\$3.25	\$3.60	\$4.50
Remainder of New York State	\$3.00	\$3.30	\$4.05

New York Minimum Salary Levels

The United States Department of Labor issued a Final Rule on September 24, 2019, setting increases to minimum salary thresholds for employees to be exempt from overtime under federal law. Effective January 1, 2020, the minimum salary threshold will be \$684.00 per week (\$35,568 annualized based on 52 weeks) for exempt executive, administrative and professional employees (other than bona fide teachers and practitioners of law or medicine, for whom there is no minimum). For exempt highly compensated employees, the minimum annual salary will be \$107,432.00. For more information, please see our previous [Alert](#).

For New York employees, the federal minimum salary threshold is generally irrelevant, as in most cases New York requires employers to pay exempt employees a minimum weekly salary that is higher than the federal minimum. The major exception is professional employees (other than those in teaching, law or medicine), for whom federal law sets a minimum salary threshold but New York does not. Note that receiving at least the minimum salary is only one of several requirements for an employee to be exempt under both federal and New York law.

Effective December 31, 2019, the minimum salary threshold in New York for exempt executive and administrative employees shall increase for all but large employers in New York City and shall be:

Location	Weekly Minimum Salary
New York City – Large Employers (11 or more)	\$1,125.00 (\$58,500.00 annualized)
New York City – Small Employers (10 or less)	\$1,125.00 (\$58,500.00 annualized)
Long Island & Westchester County	\$975.00 (\$50,700.00 annualized)
Remainder of New York State	\$885.00 (\$46,020.00 annualized)

Notice of Rate of Pay

Pursuant to New York’s Wage Theft Prevention Act (WTPA), New York employers must provide a “Notice of Pay” form to all employees at the time of hire **and upon a change in their rate of pay**. For all employers outside of the hospitality industry, the New York State Department of Labor (NYDOL) has opined that, as long as the new rate of pay is referenced in the employee’s next pay stub, employers do not need to provide a new Notice of Pay as a result of the increase in the minimum wage.

Unfortunately, hospitality employers are not so lucky. The language of the Hospitality Industry Wage Order specifically states that employers must provide a new Notice of Pay form to those employees who are affected by the increase to the minimum wage (including all tipped employees) on or prior to December 31, 2019. The notice must contain the following information:

- The employee’s normal rate(s) of pay and the basis thereof (e.g., hourly, shift, weekly, salary);

- If an employer is taking a tip credit for an employee, the employer should note the full minimum wage as the employee's hourly rate of pay, rather than the cash wage, i.e. \$15.00, \$13.00 or \$11.80, depending on employer size and location, beginning on December 31, 2019.
- If applicable, the employee's overtime rate of pay;
 - If an employer is taking a tip credit for an employee, the employer should note the full overtime wage, rather than the cash overtime wage, i.e. \$22.50, \$19.50 or \$17.70, depending on employer size and location, beginning on December 31, 2019.
- The employee's regular pay day;
- Any allowances claimed against the minimum wage (e.g., tip credit, meal credit, lodging allowance, etc.);
- The name of the employer (including any "doing business as" name);
- The address of the employer's main office and a mailing address (if different); and
- The employer's telephone number.

The written notice must be signed by both the employer and the employee and must be retained by the employer for at least six years. As noted above, employers must provide employees with written notice containing specific information before they may lawfully take a tip credit.

NYDOL has issued sample Notice of Pay forms that employers may use. In addition, the notice must be provided in both English and the employee's native language (if not English), provided NYDOL has created a Notice of Pay form in the employee's native language. Currently, NYDOL has issued forms in English, Spanish, Chinese, Haitian Creole, Italian, Korean, Polish and Russian. The NYDOL sample forms can be obtained from [NYDOL's website](#). However, the Notice of Pay forms provided by NYDOL do not contain all of the required notices necessary for an employer to take a tip credit. It is advisable to consult with counsel on how to best revise the Notice of Pay form to include the required language.

Paystubs

In addition to providing employees with the Notice of Pay, New York employers are required to provide their employees with detailed paystubs that contain the following information:

- Dates of work covered by the paycheck;
- Name of the employee;
- Name, address and phone number of the employer;
- Rates of pay (regular and overtime) and basis of pay i.e. whether the employee is paid by the hour, shift, day, week, salary, piece, commission or other method;
- Gross wages;
- Detailed listing of deductions;

- Listing of any allowances claims as part of the minimum wage; and
- Net wages.

Employers in New York City who are required to comply with the New York City Earned Safe and Sick Time Act and all employers offering vacation, paid time off, sick time or any other similar benefit should also provide detailed information regarding these benefits on employee paystubs to avoid any discrepancies and confusion. Such information should include the amount of time accrued during that pay period, the total amount of time accrued, the amount of time used during that pay period, the amount of time used that year to date and the amount of time available to the employee for use.

Remember, it is the responsibility of the employer to ensure that their paystubs are accurate. Do not blindly trust your payroll service to ensure that the paystubs are compliant. Rather, you should consult with counsel to ensure that your paystubs are compliant with New York law.

Beyond New York

New York is not the only jurisdiction in which the minimum wage will be increasing in 2020. The minimum wage will increase effective January 1, 2020 (or on another date in 2020) in more than half of the states and in countless municipalities throughout the United States, including but not limited to the following:

State/Territory	General Minimum Wage	Tipped Minimum Wage
Connecticut	\$12.00 (Sept. 1)	No change enacted (currently \$6.38 for hotel/restaurant employees and \$8.23 for bartenders)
District of Columbia	\$15.00 (July 1)	\$5.00 (July 1)
New Jersey	\$11.00 (Jan. 1)	\$2.63 (Jan. 1)

Based upon the influx of increases in the minimum wage in 2020, it is prudent for employers to consult with counsel to determine if the minimum wage is increasing in the city, county and/or state in which the business operates.

For more information about this alert, please contact Carolyn D. Richmond at 212.878.7983 or crichmond@foxrothschild.com, Glenn S. Grindlinger at 212.905.2305 or ggrindlinger@foxrothschild.com, or Jordan E. Pace at 212.878.7993 or jpace@foxrothschild.com or any other member of the firm's Labor & Employment Department.

Attorney Advertisement

© 2019 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.
www.foxrothschild.com