

# Food Industry Targeted

By Peter A. Schneider, Esq., partner and co-head of the Employment and Labor Group  
at Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola, NY

The plaintiff's bar and the U.S. Department of Labor (DOL) are targeting the food industry for enforcement of the Fair Labor Standards Act (FLSA). It is important that businesses in the food service industry understand their requirements under the FLSA or risk facing litigation and the associated costs and penalties.

The FLSA and New York State Labor Law, for example, mandate payment of a minimum hourly wage (NYS - \$7.15, FLSA \$7.25 effective 7/24/09) and payment of overtime at 1½ times the regular hourly rate for hours worked in excess of 40 in a week. An employer who loses a wage/hour claim may pay double the unpaid wages due to a statutory penalty plus interest and the plaintiff's attorney's fees. Worse, many cases involve multiple plaintiffs or a class/ collective action. Following are key concepts food service businesses should understand:

## Hours of Work

Hours worked include all time an employee is "suffered or permitted to work." Employer policies prohibiting employees from starting work early or working overtime do not relieve an employer's payment obligation when the rule is violated and work is performed. Similarly, an employee whose unpaid meal period is interrupted or shortened must be paid for their time worked. Breaks of less than 20 minutes must be paid under NYS law.

## Exemptions

Payment of a salary does not alone exempt an employer from paying overtime. The most common

exemptions (Executive, Administrative and Professional) require a salary of not less than \$536.10 and the performance of specific duties.

To qualify as an Executive, the individual must customarily direct at least two full time employees, have a primary duty of managing the enterprise or department and have the authority to hire/fire or otherwise change an employee's status or to effectively make such recommendations.

A salaried individual primarily performing non-manual work unrelated to the production of company products or services, who exercises discretion and independent judgment regarding significant matters, will satisfy the Administrative exemption.

To qualify for the Professional exemption, the individual must primarily perform work requiring advanced knowledge in a field of science or learning where the knowledge is acquired by a prolonged course of specialized intellectual instruction.

Other exemptions from overtime include: certain commissioned salespersons; certain systems analysts, programmers and engineers with requisite salary or hourly rate; and employees earning \$100,000 annually who perform some but not all duties requisite for the executive, administrative or professional exemption.

A salaried employee who is not exempt is entitled to 1½ their regular hourly rate for hours over 40. A New York federal court has stated

that the regular hourly rate is the salary divided by 40 hours even if the salary was based on more hours; say 60. Thus, a \$600.00 salary becomes a \$15.00 hourly rate not \$10.00. With statutory damages and opposing attorney's fees, the employer would owe about \$46,000.00 for each year of non-compliance.

## Tipping Rules

A New York employer may pay a tipped food employee \$2.55 less than the minimum wage. When overtime is worked, the \$2.55 tip credit remains and the total of tip credit and base must equal 1½ times the minimum hourly wage. (Note: NYS DOL has not yet determined whether the tip credit will be adjusted with the increase in the federal minimum wage effective July 24, 2009). If tips are pooled, they may only be shared among employees who customarily and regularly receive tips. When improperly shared with others, the tip credit will be disallowed and the employer must pay the full minimum wage.

## Absence of Records

Failing to maintain records of hours permits the use of any evidence, including a plaintiff-employee's testimony, from which a reasonable inference may be drawn. As the period of recovery under NYS law is six years, records should be kept that long.

## Conclusion

A wage hour lawsuit can be enormously expensive. The dramatic rise in these suits mandates the auditing of payroll practices.