KANE KESSLER, P.C.
1350 Avenue of the Americas
New York, N.Y. 10019
(212) 541-6222
Fax (212) 541-9799
Direct dial (212) 519-5154
drothfeld@kanekessler.com

CONFIDENTIAL ATTORNEY-CLIENT
PRIVILEGED MEMORANDUM

DATE: April 14, 2014

TO: HANYC Labor Relations Members and General Members Who Are Bound to the Industry-Wide Collective Bargaining Agreement ("IWA") General Managers, Human Resource Directors and Controllers

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: N.Y.S. Department of Labor: Reconsideration of 2009 Opinion letter: Overtime for Banquet Servers and Room Service Servers

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We are pleased to inform Hotels that, with the assistance of Association legislative counsel, Anthony Piscitelli of Wilson Elser, we have successfully persuaded the New York State Department of Labor to clarify a 2009 Opinion Letter which appeared to place Hotels in extreme jeopardy regarding overtime for banquet servers and room service servers.

BACKGROUND

Federal Law

Section 7(i) of the Fair Labor Standards Act provides an exemption from overtime for "commission employees" whose regular rate of pay is at least 1 ½ times minimum wage and who earn at least fifty (50%) percent of their total compensation from commission or mandatory gratuities. Under federal law, banquet servers and room service servers would be considered "commission employees". Federal courts have held that this exemption from overtime applies to banquet servers who earn more than 50% of their compensation from service charges or mandatory gratuities.

New York Law

New York State law does not adopt the FLSA 7(i) overtime exemption for "commissioned employees." A 2009 New York State Department of Labor Opinion Letter appeared to require employers to add service charges or mandatory gratuities to the hourly rate of pay when calculating an employee's regular and overtime wage rates.

The April 11, 2014 Memorandum from Carmine Ruberto, Director of Labor Standards at the New York State Department of Labor states:

> "The memorandum is intended to clarify the definition of "regular rate of pay" for purposes of calculating overtime rates for employees who receive mandatory gratuities or service charges. It is, and always has been, the Department's position that tips and gratuities, whether voluntary or mandatory, are not added into the regular rate of pay and do not increase the resulting overtime rates under New York Labor Law and implementing regulations and wage orders ("state law"). The Department of Labor's March 9, 2009 opinion (RO-08-0137) should not be read to imply a contrary conclusion, for the reasons set forth below."

A full copy of Mr. Ruberto's Memorandum is attached.

At a time when plaintiff's lawyers are very active in bringing wage and hour lawsuits, this Department of Labor Memorandum should serve to protect Hotels from claims that mandatory services charges should be factored into the regular rate of pay when calculating the rate of pay for overtime.

If you have any questions, do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Niki J. Franzitta, Lois M. Traub, Alexander Soric or Robert L. Sacks.

Enc.
cc: Joseph E. Spinnato, Esq.
Geoffrey A. Mills, Chairman

New York State Department of Labor
Andrew M. Cuomo, *Governor*
Peter M. Rivera, *Commissioner*

Memorandum

To: **All Staff**

From: **Carmine Ruberto** CR

Date: **April 11, 2014**

Subject: **Mandatory Gratuity/Calculation of Overtime**

This memorandum is intended to clarify the definition of "regular rate of pay" for purposes of calculating overtime rates for employees who receive mandatory gratuities or service charges. It is, and always has been, the Department's position that tips and gratuities, whether voluntary or mandatory, are not added into the regular rate of pay and do not increase the resulting overtime rates under New York Labor Law and implementing regulations and wage orders ("state law"). The Department of Labor's March 9, 2009, opinion (RO-08-0137) should not be read to imply a contrary conclusion, for the reasons set forth below.

While both state and federal minimum wage laws exclude tips from the calculation of the regular rates of wages for purposes of overtime, those laws do not share a common definition of tips: federal law limits tips to voluntary payments, while state law expands tips to also include mandatory payments purported to be tips or gratuities. This difference in the way that mandatory tips are treated at the state and federal level was neither identified nor addressed in the Department's opinion RO-08-0137 and, as a result, that opinion does not support a conclusion that mandatory tips should increase state overtime rates when those same tips are included in regular rate of pay calculations under the Fair Labor Standards Act ("FLSA").

Thus, the fact that an employer may be required to include mandatory payments purported to be a tip or gratuity as part of its calculation of an employee's regular rate of pay for purposes of FLSA overtime, or for the overtime exemption under section 7(i) of the FLSA, does not change the analysis under state law, where tips and gratuities, including mandatory payments purporting to be tips and gratuities, have always been excluded from the regular and overtime rates.

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Phone: (518) 457-2460 Fax: (518) 457-7997
W. Averell Harriman State Office Campus, Bldg. 12, Room 532, Albany, NY 12240
www.labor.ny.gov
LSASK@labor.ny.gov