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CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

DATE: February 24, 2016

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
Labor and Employment Practice Group

RE: Union RFI re: Night Shift Differential

We have reviewed the Union's RFI which we believe was distributed to Hotels yesterday, February 23rd. The following are our comments:

1. The Union's first question asks: "Does the Hotel include Night Shift Differential in the calculation of any overtime calculations?"
If your answer is NO, ***do not*** respond to the Union by saying, "no." You should, however, send the documents requested by Question no. 3.
2. The Union's one-week timeline for response is not self-enforcing. If you need more time, notify the Union accordingly.
3. Retain copies of the information and documents that you send to the Union.
4. We understand that some Hotels include night shift differential in calculating overtime for non-tipped employees between the hours of 35 to 40 in a work week, even though the IWA, Division A CBA and FLSA do not so require. Therefore, those Hotels should make such distinction clear to the Union in connection with the information sent to the Union.

Another copy of our initial memo on this subject is attached.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Robert L. Sacks, Lois M. Traub, Alexander Soric, Michael C. Lydakakis, Jaelyn Ruocco or Jennifer Schmalz.

cc: Joseph E. Spinnato, Esq.
Vijay Dandapani, Chairman

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CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

DATE: February 22, 2016

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
Labor and Employment Practice Group

RE: HANYC and NYHTC Meeting with U.S. DOL Re: Night Shift Differential and Overtime Pay under the Fair Labor Standards Act and IWA

Last week, we were notified that the United States Department of Labor (“DOL”) requested a meeting with representatives of the Hotel Association of New York City, Inc. and the New York Hotel & Motel Trades Council (the “Union”) regarding the overtime provisions of the Fair Labor Standards Act (“FLSA”) and the impact of such provisions on Article 51 of the IWA, Night Shift Differential.

IWA Article 51(C)(1) (and Article IX(e) of the Division A contract) states that night shift differential is not included in overtime calculations. Accordingly, under the IWA and Division A contract, and consistent with the FLSA, employees who work less than forty (40) hours in a week do not have night shift differential included in their overtime calculation for such hours worked under forty (40).

The FLSA governs, among other things, non-exempt employees’ entitlement to minimum wage and to overtime pay for hours worked over forty (40) in a work week. Shift differentials, including night shift differentials, are to be included in calculating an employee’s regular rate of pay for FLSA overtime purposes. An example of the calculation is as follows:

A bellman works three eight-hour day shifts and three eight-hour night shifts at \$20.00 per hour. The bellman is paid \$1 shift differential for each hour worked on the night shift. The eight hours of overtime are paid based on the bellman’s regular rate of pay.

Regular Rate of Pay Calculation

3 days x 8 hours x \$20/hour	\$480
3 evenings x 8 hours x \$21/hour	\$504
Total Earnings	\$984

<u>Total Hours Worked</u>	<u>48 hours</u>
Regular Rate of Pay (or Straight Time) Divided by Total Hours)	\$20.5 (Total Earnings)

Overtime Pay Calculation

\$20.5 (regular rate) x 1.5 (time and a half)	\$30.75
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Total Compensation Calculation

40 hours x \$20.5 (regular rate) earnings)	\$820 (straight time
8 hours x \$30.75 (overtime rate)	\$246 (overtime earnings)
Total Earnings	\$1,066

We think that most Hotels comply with the FLSA in this regard but the DOL has asked for information regarding the same. To that end, and at this time in lieu of an audit or a request by the DOL of a self-audit, the Union intends to distribute Requests for Information (“RFI’s”) to each Hotel seeking the following information, at a minimum:

- (i) Whether the Hotel includes night shift differentials within its overtime calculation and if so, a sampling of payroll documents demonstrating the same, and/or
- (ii) If the Hotel does not include night shift differential within its overtime calculation, payroll information regarding every employee that is paid a night shift differential and that has worked overtime in the last two years.

We will provide further advice after the receipt of the Union’s RFI.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Robert L. Sacks, Lois M. Traub, Alexander Soric, Michael C. Lydakakis, Jaclyn Ruocco or Jennifer Schmalz.

cc: Joseph E. Spinnato, Esq.
Vijay Dandapani, Chairman
